SUMMER 2013 NEWSLETTER

INSURANCE LAW UPDATE

By Jennifer Kelley

THE FIFTH CIRCUIT

***Starr Indem. & Lia. Co. v. SGS Petroluem Servs. Corp.*, 719 F.3d 700 (5th Cir. 2013).**

In *Star Indem. & Liability Co.*, one of the issues before the court was whether or not an insurer must show prejudice before denying coverage based on late notice on an occurrence based policy. The insured did not report the triggering incident until 59 days after it learned of the incident. The insurer sought a declaratory judgment that it was not required to show prejudice before denying coverage to the insured for liability arising out of a pollution occurrence, which the insured did not report within thirty days as required by the policy. Plaintiff, on the other hand, argued that the insurer did not suffer any prejudice from Plaintiff's failure to provide notice to the insurer within the required 30 days. Drawing parallels from an earlier decision, the Fifth Circuit explained that to extend the 30 day notice period would have exposed the insurer "to a risk broader than the risk expressly insured against the policy." The court noted that both the insured and the insurer were sophisticated commercial parties with comparable bargaining power, that the language in the policy was plain, and that timely reporting of the claim was one of the events necessary to trigger coverage. The Fifth Circuit concluded that the notice provision of the policy was an essential part of the bargained-for exchange under the occurrence-based policy and was specifically negotiated, and therefore held that the insurer was not required to show prejudice before denying coverage.

FEDERAL DISTRICT COURTS

***Mario Santacrus v. Allstate Tex. Lloyds, Inc.*, No. 3:12-CV-02553-BK, 2013 U.S. Dist. LEXIS 88799, (N.D. Tex. June 25, 2013).**

In *Santacruz*, the Northern District held that an insurer can deny coverage where the insured did not provide the insurer with reasonable time to investigate the loss before the insured made the repairs. In that case, the insured reportedly lost shingles due to a wind storm and had a tarp placed on the roof. The insured then reported a claim for wind and water damage. When the adjuster called to begin the investigation, the insured reported that she had a roofing contractor on site ready to replace the roof that day. The adjuster stated that they could not make it out that day but could in a couple of days. Two days later at the time of the inspection, the roof had already been replaced. Allstate denied coverage and a lawsuit followed.

Allstate filed a motion for summary judgment asserting in part that the insured failed to comply with her duties after loss and that by replacing the roof before the inspection, the insured violated the terms and conditions of the policy and deprived Allstate of the opportunity to investigate the loss. The Northern District agreed, finding insufficient evidence that wind blew shingles off the roof, that plaintiff's actions in replacing the roof made it impossible to

investigate the claim and concluding that Allstate had a reasonable basis to deny the claim. Thus, because the insured failed to prove her right to recover and the amount of her covered damages, summary judgment was granted in favor of Allstate.

SUPREME COURT OF TEXAS

***City of Bellaire v. Johnson*, 400 S.W.3d 922 (Tex. 2013).**

In *City of Bellaire*, the Supreme Court of Texas held that coverage disputes between the carrier and employer do not affect the workers' compensation exclusive remedy bar which prevents injured employees from suing their employers. In that case, a city employee who was paid by a staffing service was injured on the job. The employee attempted to circumvent the exclusive remedy by arguing that he was not actually covered by the policy because he was paid by the staffing service, not the city, and therefore he did not qualify as a "paid employee" for whom the workers' compensation policy provided coverage. Relying on a prior decision, *Port Elevator-Brownsville, L.L.C. v. Casados*, 358 S.W.3d 328 (Tex. 2012), the Supreme Court of Texas rebuffed the employee's hyper-technical attempt to escape the exclusive remedy bar. The supreme court observed that the undisputed evidence showed that he was legally the city's employee in that the city controlled the details of his work, and he was paid by the city via the staffing service, and he therefore fell into the category of employees "legally required to be covered."

TEXAS COURTS OF APPEALS

***Stadium Auto, Inc. v. Loya Ins. Co.*, No. 08-11-00301-CV, 2013 Tex. App. LEXIS 7795 (Tex. App.—El Paso, June 26, 2013, no pet.).**

In *Stadium Auto, Inc.*, the El Paso Court of Appeals concluded that a named driver exclusion applied to preclude coverage for a loss payee. In that case, the named insured purchased a vehicle from Stadium Auto and also financed the vehicle with Stadium. The insured purchased an auto policy from Loya Insurance covering damage to the vehicle and added Stadium as a loss payee. The policy was endorsed with a named driver exclusion, precluding any coverage for the vehicle while the named insured's children were driving. One of the named insured's son's took the vehicle without permission and was involved in an auto accident. Loya denied coverage and the trial court granted summary judgment in Loya's favor.

On appeal, Stadium asserted that the loss payable clause provided coverage to the loss payee, despite the named driver exclusion. Stadium also contended that it should be afforded coverage based on the alleged "theft" of the vehicle. The court of appeals, however, determined that this argument was not asserted at the trial court level and was therefore waived. Addressing whether the driver exclusion precluded coverage for the loss payee, the appellate court found that under the unambiguous language of the driver exclusion endorsement, when an excluded driver drives there is no coverage under the policy for the driver or the loss payee. Accordingly, summary judgment in favor or Loya Insurance was affirmed.

***Concierge Nursing Centers, Inc. v. Antex Roofing, Inc.*, NO. 01-11-00882-CV, 2013 Tex. App. LEXIS 5732, (Tex. App.—Houston [1st Dist.] May 9, 2013, pet. filed).**

In *Concierge Nursing Centers, Inc.*, the First Court of Appeals in Houston overturned a summary judgment based in part on the conclusion that the general contractor's insurers' subrogation rights did not prevent a suit against the subs. In that case, the trial court concluded that the general contractor's assignment of its claims against the subs to the property owner as part of a settlement was ineffective because the general contractor's insurers were subrogated to those claims.

On appeal, the subcontractors contended that because of the subrogation, the insurers, not the general contractor, owned the claims, and therefore the general contractor's attempt to convey the claims as part of the settlement was void. The Houston [1st Dist.] Court of Appeals disagreed, explaining that the policies' subrogation provisions transferred only the general contractor's right to recover against a third-party. The policies did not create a complete transfer of all claims, and the general contractor retained the right to bring a lawsuit, which it could convey to the property owner. The court of appeals analyzed the express language of the subrogation provisions, and concluded that while the policies transferred *some rights*, they did not transfer *all* rights. The court also reviewed the business activity served by the policies, and noted that subrogation provisions are intended to reduce risk, not enable insurers to potentially profit from a loss. The insurer only has a right to recover an amount equal to its payment, and does not fully obtain the entire claim as though it were wholly transferred by an assignment. The appellate court ultimately concluded that the general contractor's claims against its subcontractors were assignable even given the subrogation rights held by the insurers.

***Theavy Sederberg, as Representative of the Estate of Monyka v. IDS Prop. Cas. Ins. Co.*, No. 05-11-01275-CV, 2013 Tex. App. LEXIS 4850 (Tex. App.—Dallas Apr. 17, 2013, no pet.).**

In *Sederberg*, the Dallas Court of Appeals reviewed a summary judgment in favor of an insurer based on the "reasonable-belief-of-entitlement-exclusion" and found no evidence to support that the driver had a reasonable belief that he had permission to drive the insured vehicle at the time of a single car accident. In that case, the insured's daughter, using the insured vehicle, attended a party with a male co-worker. On the way home, with the co-worker driving, the vehicle left the roadway, rolled and ejected the daughter who died as a result of the accident. The mother brought suit to recover against the driver under her own insurance policy covering the vehicle. The insurer moved for summary judgment based in part on the argument that the driver did not have permission to drive the vehicle and was therefore not a "covered person." Summary judgment was granted in the insurer's favor.

On appeal, the Dallas Court of Appeals reviewed whether the insurer had met its burden of proof under a traditional motion for summary judgment to establish that the "reasonable-belief-of-entitlement-exclusion" applied. The court found that it did so by first proving that the exclusion existed. The appellate court also found the insurer proved that the mother did not know the driver, had never met him, did not give him permission to drive the car, and did not know that he was driving the car at the time of the accident. The burden then shifted to the insured to offer controverting evidence, she was unable to do so. Thus, based in part on testimony from the insured that she had told her daughter after a similar incident had occurred that the daughter

needed to get her permission before she let anyone else drive the car, summary judgment in favor of the insurer was upheld.