SUMMER 2014 NEWSLETTER

INSURANCE LAW UPDATE

By Jennifer Kelley

SUPREME COURT OF TEXAS

***Gotham Ins. Co. v. Warren E&P, Inc.*, No. 12-0452, 2014 Tex. LEXIS 209 (Tex. Mar. 21, 2014).**

In *Gotham*, the Supreme Court of Texas rejected claims by an insurer based on equity because the insurer had contractual remedies under the policy. In that case, the insurance policy provided coverage for costs incurred to regain control of an oil well in the event of a blowout. The insured represented that it owned a 100% interest in the well. A blowout occurred and the insurer paid under the policy but later learned that the insured had only a partial interest in the well and others shared in the loss. The insurer sued the insured seeking return of its payments under both breach of contract and equity theories.

The Supreme Court of Texas, reemphasizing its holding in *Fortis Benefits v. Cantu*, 234 S.W.3d 647 (Tex. 2007), noted that "an insurer is limited to contractual claims when the policy addresses the matter at issue. Here the policy contains several clauses addressing misrepresentations, reporting, salvage and recoveries, subrogation and due diligence." The supreme court discussed issues related to the contractual remedies and, after finding some evidence in support of the insurer's contract claims, held that the insurer could not rely on its equitable claims for recovery. Accordingly, the judgment of the court of appeals was reversed and the case was remanded to that court to address the contract claims.

FIFTH CIRCUIT COURT OF APPEALS

***McGinnes Indus. Maint. Corp. v. Phoenix Ins. Co.*, No. 13-20360, 2014 U.S. App. LEXIS 11090 (5th Cir. Jun. 11, 2014).**

In *McGinnes*, the United States Fifth Circuit Court of Appeals certified the following question of Texas law to the Texas Supreme Court;

> Whether the EPA's PRP letters and unilateral administrative order, issued pursuant to CERCLA, constitute a "suit" within the meaning of the Plaintiff's CGL policies, triggering a duty to defend.

***Blanton v. Cont'l Ins. Co.*, No. 12-20344, 2014 U.S. App. LEXIS 80920 (5th Cir. Apr. 29, 2014) (unpublished).**

In Blanton, the Fifth Circuit found occasion to apply the Supreme Court of Texas's recent holding in *Ewing Const. Co., Inc. v. Amerisure Ins. Co.*, 420 S.W.3d 30 (Tex. 2014), in which the supreme court held that an insured's express agreement to perform construction in a good

and workmanlike manner did not enlarge its obligations and was not an "'assumption of liability' within the meaning of the policy's contractual liability exclusion." However, the Fifth Circuit still found several reasons why the CGL insurer did not owe a duty to defend its insured in a suit alleging breach of contract and negligent work.

The insured in *Blanton*, faced allegations that it negligently repaired a boat engine resulting in extra repair costs and resulting loss of use of the boat. Following *Ewing*, the Fifth Circuit noted that the alleged breach of the contract to repair the boat engine did not trigger the Contractual Liability exclusion because it was not an "assumption of liability." Nevertheless, the Fifth Circuit held the boat, which was not itself damaged, constituted "impaired property" and any damage to the engine was damage to the insured's own "work" or "product."

TEXAS COURTS OF APPEALS

***Oleksy v. Farmers Ins. Exch.*, 410 S.W.3d 378 (Tex. App.—Houston [1st Dist.] Jul. 30, 2014, pet. denied).**

In *Oleksy*, Houston's First Court of Appeals examined the applicability of the motor-vehicle exclusion and recreation vehicle exception in a homeowner's policy. In that case, the insured, a Texas resident, went snowmobiling in New York with his friend. The friend was seriously injured when his snowmobile collided with the insured's snowmobile. The friend and his wife later sued the insured in Texas. The insured filed a declaratory judgment action against his homeowner's insurance carrier, seeking a declaration that insurer had a duty to defend and to indemnify him in the lawsuit. Although his homeowner's policy included an exclusion for personal injuries arising from the use of motor vehicles, the insured based his claim for coverage on an exception to the exclusion that it did not apply to:

(1) motor vehicles which are not subject to motor vehicle registration and are:

....

(d) designed and used for recreational purposes; and are:

(i) not owned by an insured; or

(ii) owned by an insured while on the residence premises.

The insurer filed an answer, counterclaim, and third-party petition for declaratory relief naming the friend as a third-party defendant and seeking a declaratory judgment that the insured was not entitled to coverage because the motor-vehicle exclusion applied. Both parties asserted there was a conflict of law issue on whether or not snowmobiles were subject to motor-vehicle registration.

The parties both filed motions for summary judgment. The trial court granted summary judgment for the insurer, denied the insured's motion, and issued a final declaratory judgment holding the insurance policy provided no coverage for the snowmobile accident and the insurer had no duty to defend or indemnify the insured. On appeal, the Houston appellate court found the

trial court erred in granting the insurer's summary judgment motion because there was no conflict of law issue and in both Texas and New York snowmobiles were *not* subject to "motor-vehicle registration." Thus, because the insurer did not conclusively disprove the applicability of the recreational-vehicle exception, the appellate court reversed and remanded to the trial court.

***ACGS Marine Ins. Co. v. Spring Ctr., Inc.*, No. 14-13-00417-CV, 2014 Tex. App. LEXIS 4581 (Tex. App.—Houston [14th Dist.] Apr. 29, 2014, no pet.) (memo. op.).**

In *ACGS*, Houston's Fourteenth Court of Appeals examined a commercial property policy's vacancy clause and construed it in favor of coverage. In that case, the insurer insured a business park consisting of eleven buildings inside a single fenced property. One of the buildings was broken into and stripped of wiring and suffered other damage associated with the break-in and the removal of the wiring. The insurer denied the claim after it learned the building had been vacant for four months. The insured sued, and the chief issue was whether the policy's vacancy clause applied to each of the eleven buildings individually, or only to the entire property collectively.

The vacancy clause used both the phrase "the building or structure" and the phrase "covered location." The term "covered location" was defined by the policy's Location Schedule as the single street address encompassing all eleven buildings. The appellate court noted that at least one other portion of the policy used the phrase "*each* building or structure," while the vacancy clause did not. Thus, the appellate court found the insured's construction was not unreasonable and, because the property as a whole was not vacant, the insurer had incorrectly denied the claim.

***Patterson v. Home State County Mut. Ins. Co.*, No. 01-12-00365-CV, 2014 Tex. App. LEXIS 4460 (Tex. App.—Houston [1st Dist.] Apr. 24, 2014, no pet.).**

In *Patterson*, Houston's First Court of Appeals affirmed summary judgment in favor of an insurer on claims seeking recovery from the insurer in excess of the policy limits based on an alleged violation of Texas' *Stowers* doctrine, finding the claimant failed to present settlement demands which triggered the insurer's duty to settle the liability claims against its insured. In that case, the claimant's wife was killed when the insured eighteen-wheel truck collided with her vehicle. The claimant brought a wrongful death claim against the driver, the trucking company, and the leasing company. After receiving two demands for policy limits on behalf of the claimant and his children, the insurer filed an interpleader action to allow them to deposit the $1,000,004 policy limits into the registry of the court and then sought to be dismissed from any liability. The trial court granted the interpleader and dismissed the insurer from all but the potential *Stowers* causes of action.

After the interpleader was granted, the insurer withdrew its defense because its policy limits were exhausted by payment. After a bench trial, the claimants were awarded over $5,000,000 in damages, took an assignment of claims from the insured and pursued the insurer for the excess judgment based on *Stowers.* The trial court granted summary judgment in favor of the insurer on the *Stowers* action.

On appeal, the court reviewed the elements of a demand necessary to trigger an insurer's *Stowers* duty to settle under Texas law and held, at a minimum, that it requires: 1) a claim within the scope of coverage; 2) a demand within policy limits; and 3) the terms are such that an ordinary prudent insurer would accept it. The appellate court noted: "As a threshold matter, a settlement demand must propose to release the insured fully in exchange for a stated sum of money." Because the three demand letters did not offer to release all parties or all of the claims and because none of the demands were unconditional, the appellate court affirmed summary judgment in favor of the insurer finding the demands failed to trigger the insurer's *Stowers* duty to settle.

FEDERAL DISTRICT COURTS

***Bell v. State Farm Lloyds*, No. 3:13-cv-1165-M, 2014 U.S. Dist. LEXIS 53828 (N.D. Tex. Apr. 18, 2014).**

In *Bell*, the Dallas Division of the Northern District of Texas granted summary judgment in favor of an insurer recognizing the insurer had timely investigated the insured's wind and hail damage claim and promptly paid all that was owed on the claim. In that case, the insured presented a claim for damage to the insured property resulting from a June 22, 2012 hail storm. The insurer promptly acknowledged the claim and inspected the property finding some hail and wind damage. After receiving the insured's contractor's estimate, the insurer requested additional information. One month later, the insurer received a damage estimate from the insured's public adjuster that was surprisingly lower than the insurer's initial estimate as well as the insured's contractor's estimate. In October 2012, the insured requested a re-inspection and the insurer promptly obliged. The second adjuster wrote an estimate higher than the first adjuster's estimate, and sent the estimate to the insured. The insurer subsequently received a "final invoice" for $32,879 from the contractor who did the repairs and in December 2012, the insurer issued payment based on its slightly higher damage estimate, less the insured's deductible. The insured, unhappy despite the payment of his claim, filed suit against the insurer.

The insurer moved for summary judgment on all contractual and extra-contractual claims. The district court found there was no evidence that anything more was owed to the insured under the policy and granted summary judgment in favor of the insurer on the breach of contract claims. Moreover, because there was no breach of contract, nor evidence of an act by the insurer that was so extreme it caused an independent injury, the district court granted summary judgment in favor of the insurer on the common law and statutory bad faith claims. Lastly, the district court found the insurer complied with its statutory time limits under the Texas Prompt Payment of Claims Act and there was no evidence to support the insured's fraud claims. Accordingly, summary judgment was granted in favor of the insurer on all claims.