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SOUTHERN DISTRICT JUDGE REJECTS FORM ANTI-APPRAISAL ARGUMENTS

Federal District Judge Ewing Werlein (of the Houston Division of the Southern District) last week granted a motion to compel appraisal urged by Hartford and, in doing so, he rejected a number of arguments from Plaintiffs' counsel with the Mostyn firm which the Judge criticized as "repetitious and erroneous." In *James v. Property and Casualty Ins. Co. of Hartford*, Civ. No. H-10-1998, 2011 WL 4067880 (S.D. Tex. Sept. 12, 2011), Judge Werlien first concluded that the insurer had not waived its right to appraisal, either by delay or anticipatory breach of contract. Relying on the Texas Supreme Court's May 2011 decision in *In re Universal Underwriters*, the judge stated that the Plaintiff had not shown prejudice from any delay, and quoted the *Universal* court's statement that "it is difficult to see how prejudice could ever be shown when the policy, like the one here, gives both sides the same opportunity to demand appraisal." Judge Werlein then noted that the Plaintiff's anticipatory breach argument would effectively negate any appraisal clause, which would contravene public policy in favor of such clauses.

Next, Judge Werlein addressed Plaintiff's argument that only the contract portion of the suit should be abated during the appraisal process, and she should be able to maintain her extracontractual claims. Relying on an opinion from the Amarillo Court of Appeals and language from the Texas Supreme Court endorsing the Amarillo opinion, Judge Werlein concluded that the entire case should be abated, and added a detailed footnote articulating a second alternative rationale in support of a total abatement. In closing, the court held the appraisal clause was not unconscionable and noted that the Plaintiff had shown nothing to the contrary.

Notably, Judge Werlein explicitly criticized the Plaintiff's attorneys with the Mostyn firm in a footnote addressing the Plaintiff's motion for leave to file a motion in excess of the court's page limits. Judge Werlein noted that he would normally deny such a motion. However, noting the "repetitious and erroneous" arguments asserted by the Plaintiff's law firm, the court granted the motion "to obviate any need for [the Plaintiff's] Law Firm to incur additional hours of attorney time to downsize its erroneous arguments to a memorandum of appropriate size."

IN APPROVING CLASS SETTLEMENT, DALLAS FEDERAL JUDGE DETERMINES POLICY PROCEEDS FROM POLICY ARE PROPERLY ALLOCATED

As part of an extensive and detailed order last week approving a $1,520,000 "limited fund" class action settlement, Senior District Judge Royal Furgeson of the Northern District of Texas was required to determine whether the defendant's liability coverage was properly allocated. In *Stott v. Capital Financial Services, Inc.*, No. 3:11-cv-2073-F, 2011 WL 4047666 (N.D. Tex. Sept. 12, 2011), a proposed class settlement included $120,000 from the defendant and $1.4 million from the defendant's liability carrier, which constituted the remainder after defense costs of a $2 million sublimit of the defendant's $5 million policy. Judge Furgeson was not convinced by the insurer's contention that all of the class members' claims were "related" so as to be

subject to the sublimit. However, the judge noted that other litigation involving the same defendant and policy were pending before his court. He stated that he was "well aware of the need for other portions of the policy to be devoted to claims" asserted in the other cases.

While the Judge did not base his ruling on the carrier's argument that the claims were "related," he stated that the carrier would have a substantial chance of success, and would delay the plaintiffs receiving at least some compensation for their losses. The court also noted that because the policy was a wasting policy, additional litigation would likely reduce the amount class plaintiffs' recovery. Thus, the judge concluded that the $1.4 million remaining from the subpolicy was a proper amount for the "limited fund" settlement.

EL PASO APPELLATE COURT AFFIRMS SUMMARY JUDGMENT IN INSURER'S FAVOR BASED ON "INTERRELATED ACTS" CLAUSE OF CLAIMS-MADE POLICY

El Paso Court of Appeals held last Thursday that even though a 2005 suit for which an insured demanded defense and indemnity was brought during the relevant coverage period, the insured was not entitled to coverage because the dispute arose four years earlier, an earlier lawsuit was filed, and the two cases were based on "interrelated acts." In *Reeves County v. Houston Casualty Company*, No. 08-09-00256-CV, 2011 WL 4062479 (Tex. App.—El Paso Sept. 14, 2011), Plaintiffs Reeves County and Sheriff Arnulfo Gomez were insured by Houston Casualty under a non-profit organization liability policy with coverage dates between December 2004 and December 2005. In 2005, Reeves County and Gomez were sued by a bail bondsman for alleged civil rights violations, and presented the case to Houston Casualty for defense and indemnity. Houston Casualty refused on the basis that the suit arose out of a 2001 dispute and was a continuation of litigation that pre-dated the policy and fell under the policy of another carrier.

The relevant policy provision stated that multiple claims arising out of the same act or interrelated acts would be deemed to have been asserted when the first such claim was made. The claim against Reeves County and Gomez was brought by a set of plaintiffs who had also sued Reeves County and Gomez in 2001, a suit that the parties settled in 2002. In the 2005 suit, the plaintiffs alleged that despite the 2002 settlement Gomez had continued a campaign of harassment of the plaintiffs and favoritism towards one of the plaintiffs' competitors. The court of appeals held the 2005 case bore more than a "slight or attenuated connection" with the previous suit and, as such, the acts alleged in each were interrelated. This rendered the 2005 suit subject to the above policy exclusion, and the court affirmed the trial court judgment in Houston Casualty's favor. The Court did not reach Houston Casualty's argument that the policy did not cover jail or detention facility operations or activities.