

United States District Court Southern District of Texas

Case Number: 06-1508

ATTACHMENT

Description:

- State Court Record State Court Record Continued
- Administrative Record
- Document continued - Part _____ of _____

Exhibit to: _____
number(s) / letter(s) A-D

Other: _____



JACK F. ABERCIA, CONSTABLE
 PRECINCT NUMBER ONE
 HARRIS COUNTY, TEXAS

MAIN OFFICE
 P.O. BOX 52578
 HOUSTON, TEXAS 77052-2578
 (713) 755-5200 FAX (713) 755-8951

ANNEX OFFICE
 7300 NORTH SHEPHERD
 HOUSTON, TEXAS 77091
 (713) 697-3600 FAX (713) 697-3649

OFFICER'S RETURN FOR CERTIFIED MAIL

Received this CITATION, case # 200623740 on the 19TH day of APR 2006 at 7:58 A.M. Executed at 350 N ST PAUL STREET DALLAS, TX 75201 by mailing to the within name CONNECTICUT GENERAL LIFE INSURANCE COMPANY BY SERV ITS REG AGENT CT CORPORATION SYSTEM AND by delivering to CT CORPORATION on the 21ST day of APR 2006 BY REGISTERED/**CERTIFIED MAIL** WITH DELIVERY RESTRICTED TO ADDRESSEE ONLY, a true copy of this citation together with a copy of PLAINTIFF'S ORIGINAL PETITION

FEE : \$50.00

JACK F. ABERCIA, CONSTABLE
 PCT #1, HARRIS COUNTY TX

DEPUTY: J. Lee #1832

CONSTABLE JACK F. ABERCIA PCT #1
 P O BOX 52578
 HOUSTON, TEXAS 77052-2578

| | |
|--|----------------------------------|
| Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes | Service Type CERTIFIED |
| Article Number 7100 0000 0000 0068 5038 | |



7100 0000 0000 0068 5038

COMPLETE THIS SECTION ON DELIVERY

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|--|--|---|
| A. Signature: (<input type="checkbox"/> Addressee or <input checked="" type="checkbox"/> Agent) | B. Received By: (Please Print Clearly) | C. Date of Delivery |
| D. Addressee's Address (From Address Used by Sender) | | Article Addressed To: |
| Secondary Address (Please Print Clearly) | | 200623740 |
| Delivery Address | | CONNECTICUT GENERAL LIFE INSURANCE BY SERVING ITS REG AGENT CT CORPORATION SYSTEM 350 NORTH ST PAUL STREET DALLAS, TX 75201 |
| City | State | ZIP + 4 Code |

CERTIFIED MAIL BY CONSTABLE

CAUSE NO. 709823740

7300 0000 0000 0066 5036

ENTERED

RECEIPT NO. 262399

50.00

CO1

04-17-2006

TR # 72034862

PLAINTIFF: HOUSTON MCLANE COMPANY INC (DBA HOUSTON ASTROS BAS vs. DEFENDANT: CONNECTICUT GENERAL LIFE INSURANCE COMPANY

In The 129th Judicial District Court of Harris County, Texas 129TH DISTRICT COURT Houston, TX

CITATION (CERTIFIED)

THE STATE OF TEXAS County of Harris

TO: CONNECTICUT GENERAL LIFE INSURANCE COMPANY BY SERVING ITS REGISTERED AGENT CT CORPORATION SYSTEM 350 NORTH ST PAUL STREET DALLAS TX 75201

HARRIS COUNTY, TEXAS

06 APR 19 AM 7:58

Attached is a copy of PLAINTIFF'S ORIGINAL PETITION

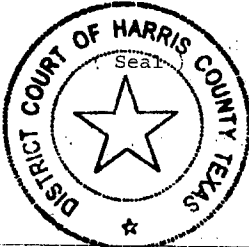
This instrument was filed on the 17th day of April, 2006, in the above cited cause number and court. The instrument attached describes the claim against you.

YOU HAVE BEEN SUED, You may employ an attorney. If you or your attorney do not file a written answer with the District Clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of 20 days after you were served this citation and petition, a default judgment may be taken against you.

TO OFFICER SERVING:

This citation was issued on 18th day of April, 2006, under my hand and seal of said Court.

Issued at request of: FISHER, WAYNE 2777 ALLEN PKWY 14FL HOUSTON, TX 77019 Tel: (713) 400-4000 Bar No.: 56



CHARLES BACARISSE, District Clerk Harris County, Texas 301 Fannin Houston, Texas 77002 (P.O. Box 4651, Houston, Texas 77210)

BY Wanda Rene Chambers Deputy CHAMBERS, WANDA RENE ULW/SRY/7518719

CLERK'S RETURN BY MAILING

Came to hand the ___ day of ___, and executed by mailing to Defendant certified mail, return receipt requested, restricted delivery, a true copy of this citation together with with an attached copy of PLAINTIFF'S VERIFIED ORIGINAL PETITION & APPLICATION FOR INJUNCTIVE RELIEF to the following addressee at address:

ADDRESS

ADDRESSEE

Service was executed in accordance with Rule 106(a) (2) TRCP, upon the Defendant as evidenced by the return receipt incorporated herein and attached hereto at

on ___ day of ___ by U.S. Postal delivery to

This citation was not executed for the following reason:

CHARLES BACARISSE, District Clerk HARRIS-COUNTY, T E X A S

By _____, Deputy

CAUSE NO. 2006-23740

| | | |
|-------------------------------|---|-------------------------|
| HOUSTON McLANE COMPANY, INC., | § | IN THE DISTRICT COURT |
| D/B/A HOUSTON ASTROS BASEBALL | § | |
| CLUB | § | |
| | § | |
| VS. | § | HARRIS COUNTY, TEXAS |
| | § | |
| CONNECTICUT GENERAL | § | |
| LIFE INSURANCE COMPANY | § | 129TH JUDICIAL DISTRICT |

**ORIGINAL ANSWER
OF DEFENDANT CONNECTICUT GENERAL
LIFE INSURANCE COMPANY**

Defendant Connecticut General Life Insurance Company (“Defendant”) answers
-
Plaintiff’s Original Petition as follows:

I.

Pursuant to Texas Rule of Civil Procedure 92, Defendant generally denies the material allegations set forth in Plaintiff’s Original Petition. Defendant reserves the right to file amended pleadings in this case in accordance with the Texas Rules of Civil Procedure.

II.

Defendant requests that the Court, after final trial or hearing, enter a take-nothing judgment in Defendant’s favor, prays for his court costs, and for other relief to which Defendant is justly entitled.

III.

Defendant hereby requests a trial by jury.

Respectfully submitted,

BAKER BOTTS L.L.P.

By: 

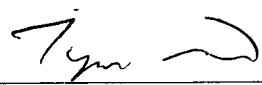
Tynan Buthod
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ATTORNEYS FOR DEFENDANT
CONNECTICUT GENERAL LIFE
INSURANCE COMPANY

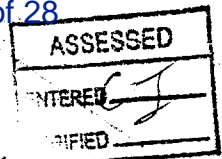
CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was sent to all known counsel of record by certified mail, return receipt requested, on the 28th day of April 2006.

Wayne Fisher
Olan J. Boudreaux
James A. Huguenard
Fisher, Boyd, Brown, Boudreaux & Huguenard, L.L.P.
14th Floor, Riviana Building
2777 Allen Parkway
Houston, Texas 77019



Tynan Buthod



NO. 2006-23740

HOUSTON McLANE COMPANY, INC.,
D/B/A HOUSTON ASTROS BASEBALL
CLUB

vs.

CONNECTICUT GENERAL
LIFE INSURANCE COMPANY

§
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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW Houston McLane Company, Inc., d/b/a Houston Astros Baseball Club (hereinafter referred to as "Plaintiff" or the "Astros"), complaining of Connecticut General Life Insurance Company (hereinafter referred to as "Defendant" or "CIGNA"), and would respectfully show the Court and Jury the following:

**I.
Discovery Plan**

Plaintiff asserts that discovery in this action should proceed under Level 3 of Rule 190.4 of the Texas Rules of Civil Procedure.

**II.
Jurisdiction and Venue**

This Court has jurisdiction in this case because the amount in controversy exceeds the minimum jurisdictional limits of this Court. Venue is proper in Harris County because the causes of action, or a part thereof, giving rise to this lawsuit arose in Harris County, Texas.

III.
Parties

Plaintiff, Houston McLane Company, Inc. d/b/a Houston Astros Baseball Club is a Texas Corporation with its principal place of business in Houston, Harris County, Texas.

Defendant, Connecticut General Life Insurance Company is a Connecticut corporation. This defendant may be served via United States certified mail/return receipt requested, through its registered agent CT Corporation System at 350 North St. Paul Street, Dallas, Texas 75201.

IV.
Background Facts

Plaintiff is in the business of owning and operating a major league baseball team, commonly known as the Houston Astros. In its efforts to make the Astros a winning team, Plaintiff has pursued a strategy of recruiting and retaining highly skilled players for its roster. As part of that effort Jeff Bagwell has, for many years, played first base for the ball club.

Mr. Bagwell's most recent contract to play baseball for the Astros was signed on December 19, 2000. The contract term was for five years, extending through the 2006 Major League Baseball season. Jeff Bagwell's compensation during the term of the contract, including a signing bonus, will be approximately \$85,000,000.00, not including incentive bonuses and other incidental benefits. As is typical of players of his stature he requested, and the Astros agreed, that the contract would be "guaranteed." That is, except in very limited circumstances, Jeff Bagwell has a contractual right to receive all of the

compensation provided in the contract, regardless of his ability to play professional baseball.

The Astros purchased a policy of disability insurance that went into effect on January 31, 2001 in order to protect the ball club from the financial burden that would ensue if Jeff Bagwell became disabled during the term of his guaranteed contract. The policy was issued by CIGNA as an "Employer Purchased Athlete's Individual Total Disability Insurance Policy" and bears Policy Number PFS/CGTX/01/01806 (the "Policy"). The Astros Club owns the Policy and is designated in the policy as the "Owner" and "Beneficiary" entitled to the benefits provided therein. Jeff Bagwell is the insured. To acquire this disability coverage, the Astros paid \$2,409,343.00 in premiums to CIGNA.

The terms of the Policy are relatively straightforward. The Policy provides a schedule of benefits payable to the Astros in the event (a) Mr. Bagwell becomes totally disabled and (b) the terms and conditions of the Policy are met. In section 2 on page 6 of the Policy, the benefits scheduled for the 2006 regular season that CIGNA, by contract, agreed to pay are \$85,748.00 for each regular season day that Mr. Bagwell misses due to a total disability. Plaintiff has timely presented a claim for these benefits to Defendant. Defendant has denied the claim. Hence, this lawsuit.

The Astros' claim under the Policy is predicated on the unfortunate fact that Jeff Bagwell is disabled from playing professional baseball. Mr. Bagwell is right-handed. He throws right-handed. He also bats right-handed. Mr. Bagwell suffers from a degenerative arthritic condition in his right shoulder which is subsequently described in detail. Near the beginning of the 2005 regular season, the pain in his right shoulder reached the point that

he could no longer perform at the major league level, and he decided to undergo surgery in the hope that it would relieve his symptoms and enable him to regain his playing abilities. The Astros placed Mr. Bagwell on the disabled list in May, 2005, and on June 7, 2005 he underwent capsular release surgery by Dr. Richard Hawkins in Spartanburg, South Carolina. Following the surgery, he returned to Houston and began a regimen of physical therapy and rehabilitation under the direction of the Astros' team physician, Dr. David Lintner. The rehabilitation program lasted throughout the summer, and included a brief assignment to the Astros' farm club in Corpus Christi.

After league rules permitted the Astros to utilize a "40-Man Roster," the Astros placed Mr. Bagwell on the active roster on September 9, 2005. However, Mr. Bagwell requested that he not be assigned to a field position, where he would have to throw the baseball. Instead, his duties were limited to occasional pinch hitting and, where appropriate, serving as a designated hitter. Mr. Bagwell remained on the active roster in this limited role throughout the remainder of the regular season, throughout the National League playoffs, and in the World Series. At no time during this period was Mr. Bagwell ever assigned to any defensive position.

Following the World Series, Mr. Bagwell continued his rehabilitation program. In an effort to evaluate his playing ability, the Astros requested that Mr. Bagwell be examined by a preeminent sports medicine physician, Dr. James R. Andrews, in Birmingham, Alabama. This examination was conducted on January 12, 2006, and included both a physical examination by Dr. Andrews as well as separate testing in a laboratory setting. The laboratory testing involved both throwing and batting in a controlled environment, which

was recorded by a series of sophisticated video and computerized instruments which enabled Dr. Andrews to evaluate Jeff Bagwell's ability to perform at a major league level.

Following his examination of Mr. Bagwell, Dr. Andrews issued a report to the Astros which indicated, among other things, his conclusion that Mr. Bagwell is totally disabled from playing professional baseball for at least the duration of the 2006 regular season.

Specifically, Dr. Andrews' report included the following findings:

1. Mr. Bagwell's range of motion was markedly limited on his right side.
2. He suffers from a rather marked loss of complete rotation in all parameters of his right shoulder compared to the normal range of motion of his left shoulder.
 - a. The normal range in the lab is 160 to 184 degrees. Jeff Bagwell's result was 91 degrees "which is far less than the normal range."
 - b. His maximum speed of rotating his arm at the shoulder or his maximum internal rotation velocity was 1475 degrees per second and the normality range in the lab is anywhere from 5585 degrees per second to 7376 degrees per second.
3. He has degenerative arthritis throughout the right shoulder.
4. He has mild to moderate loss of joint space in the glenohumeral joint.
5. He has a large "goat beard" deformity with an inferior spur which is rather large in size off the inferior humeral neck angle.

6. He also has spurring involving the inferior glenoid ream with a kissing arthritic spur formation from both the humerus and glenoid side, which creates a mechanical block to forward flexion, external and internal rotation.
7. He has a narrowed joint space in his right shoulder.
8. He averaged only 35 mph on his throws, which was well below the 71-76 mph range of the healthy reference data.
9. The ASMI Biomechanics Evaluation pointed out to Jeff Bagwell that the critical aspects of his mechanics in throwing are:
 - a. Deficits in rotating his arm back.
 - b. Generating velocity forward at his right shoulder.
 - c. Improper position of the right shoulder at the time of the front foot contact.
 - d. An excessive amount of horizontal adduction, further explaining that, "in other words, [he] sticks [his] right elbow in front of [his] chest to some extent and then relies on pushing the ball (extending the elbow) to try to make up for lack of shoulder rotation."
 - e. Other deficiencies in his body mechanics were listed as stride length, trunk tilt and pelvis velocity which "... are almost certainly a result of [his] shoulder limitations and are therefore not worth addressing until shoulder mechanics are resolved."

Dr. Andrews summarized his conclusions regarding Jeff Bagwell's ability to play during the 2006 season as follows:

For the record, though, it appears to me he is disabled completely from playing professional baseball at this time unless some type of miracle occurs that is not predictable.

Similarly, Dr. David Lintner, the Astros' Team Physician, concluded that Jeff Bagwell was totally disabled from playing first base. Jeff Bagwell has acknowledged that he cannot play any other defensive position on a professional baseball club.

The Astros timely filed a Proof of Disability Form with CIGNA on January 24, 2006, and also provided as additional information:

- The report of James R. Andrews, M.D., dated January 12, 2006;
- Copies of x-rays of the Insured's right shoulder dated January 12, 2006;
- A Bio-Mechanical Analysis performed by the American Sports Medicine Institute ("ASMI"); and
- Operative and surgical notes from surgeries performed in October, 2001 and June, 2005.

Based on the conclusions of Dr. Andrews and Dr. Lintner, the Astros placed Mr. Bagwell on a rehabilitation assignment under the care and direction of Dr. Lintner. Under the provisions of Article XIII of Section H of the "Basic Agreement Between the Thirty Major League Clubs and Major League Baseball Players Association," a club may direct a

disabled player to perform prescribed rehabilitation work for an injury at a rehabilitation facility at one of three sites. On February 10, 2006 the Astros informed Jeff Bagwell and his agent, Mr. Barry Axelrod, that Mr. Bagwell had the option of continuing his rehabilitation at the Club's home city of Houston, Texas, or at the Astros' Spring Training Facility at Kissimmee, Florida, with the consent and under the supervision of Dr. Lintner, the team physician. Mr. Bagwell was specifically advised that his attendance at the Astros' Spring Training facility would be for the purpose of rehabilitation only, and that Dr. Lintner might prescribe that his rehabilitation include retraining on batting and progressive throwing.

Mr. Bagwell chose to continue his rehabilitation effort at the Astros' Spring Training Facility in Kissimmee, Florida. However, despite intense efforts, he could not demonstrate the physical ability required of a professional baseball player. On March 25, 2006, Mr. Bagwell confirmed his disability by announcing publicly that he was and is unable to play professional baseball and that he intends to explore the possibility of additional surgery on his right shoulder. In accordance with the rules of Major League Baseball, the Astros placed Mr. Bagwell on the disabled list, where he remains at this time. CIGNA was advised of these facts.

V.

Breach of Contract

CIGNA has breached its contract by repudiating the performance of its contractual obligations under the Policy. This breach is and will be a proximate cause of damages to the Astros.

As discussed previously, the Policy requires CIGNA to pay the scheduled benefits to the Astros if Mr. Bagwell is totally disabled from performing his occupation, which is defined in the Policy as “Professional Baseball Player – Non-Pitcher.” The operative language in the Policy is found in Section 1:

The Company [i.e., CIGNA] will pay the Total Disability benefit as shown in the SCHEDULE for each Regular Season day missed by the Insured [i.e., Mr. Bagwell] during the maximum benefit period as shown in the SCHEDULE if:

- (1) The Insured becomes Totally Disabled, as defined in the DEFINITIONS section, and as a direct result of:
 - (a) An Accidental Bodily Injury which occurs while this Policy is in force; or
 - (b) A Sickness or Disease which first Manifests itself while this Policy is in force; and
- (2) The insured satisfies the Elimination Period as shown in the SCHEDULE; and
- (3) The Insured is under the regular care of a Physician other than him/herself or a member of his or her Immediate Family for the disability; and
- (4) The Owner [i.e., the Astros] and Insured satisfy all the terms and conditions of this Policy.

The term “sickness or disease” is defined in Section 7.17 of the Policy as follows:

7.17 **“Sickness or Disease”** means any physical illness or **condition** or Complication of Pregnancy which:

- (1) (a) first manifests itself while this Policy is in force; and

- (b) is not a Preexisting Condition as defined in this Policy.
- (2) is a Preexisting Condition but:
 - (a) is declared on the application for this Policy; and
 - (b) is not excluded from coverage by name or specific description.

The "Schedule" contained in section 2 of the policy provides that the benefits payable during the 2006 season are \$85,748.00 per regular season day missed due to disability. The "maximum benefit period" for the 2006 season is defined in the "Schedule" as 182 regular season days. Defendant's breach has and will proximately cause damages to the Astros in the amount of \$85,748.00 per day for 182 days, or \$15,606,136.00.

Upon a trial of this case, Plaintiff will show the Court and Jury that each of the requirements of section 1 of the Policy has been met. In this connection, Plaintiff will show that Jeff Bagwell became disabled as a result of a "Sickness or Disease" as those terms are defined in the Policy, and that the disability first "Manifested" itself while the Policy was in force.

Likewise, Plaintiff has satisfied the "Elimination Period" as that term is defined in the Policy. If CIGNA should assert that the "Elimination Period" has not been satisfied, an examination of the language of the Policy shows that such a position would be unfounded.

Simply put, the "Elimination Period" is the period during which no disability benefits are due or payable. In the context of this Policy, the "Elimination Period" commences on the date total disability begins, and ends on the first day of the subsequent season. However, section 2 of the Policy provides that the Elimination Period will be considered

satisfied “. . . if the Insured **suffers** Total Disablement during the off-season prior to the commencement of subsequent Spring Training.” In other words, if Jeff Bagwell is disabled at any time prior to the start of the 2006 spring training, the “Elimination Period” is satisfied, and benefits are due and payable during the 2006 regular season.

Clearly, Mr. Bagwell’s disability arises from a “Sickness or Disease” as defined in the Policy. His physical illness or **condition** was “manifested” in January of 2006, when Dr. Andrews and Dr. Lintner informed the Astros that, despite the surgery and the extensive efforts at rehabilitation, Mr. Bagwell was unable to perform as a professional baseball player. This disabling condition persisted until the start of the 2006 spring training program, and will continue throughout the 2006 season. Thus, pursuant to Section 2 of the Policy, the elimination period has been satisfied, and the Astros are entitled to the benefits under the Policy.

The remaining requirements of section 1 of the Policy are that Jeff Bagwell must be under the care of a physician, and it is undisputed that he remains under the care of Dr. David Lintner for his disabling condition. Additionally, the Policy requires that all terms and conditions of the Policy must be satisfied. Pursuant to Rule 54 of the Texas Rules of Civil Procedure, the Astros aver that all conditions precedent to recovery have been performed or have occurred.

Therefore, pursuant to the express terms of the Policy, because of CIGNA’s repudiation of its contractual obligations, the Astros are entitled to the benefits set forth in the Schedule and seek recovery of those benefits in this lawsuit.

VI.

Breach of the Duty of Good Faith and Fair Dealing

Texas law recognizes a common law duty of good faith and fair dealing owed by an insurer to its insured. This duty includes a duty to reasonably investigate the insured's claim, exercising the degree of care and diligence on behalf of the insured that a person of ordinary prudence would exercise in the management of his or her own affairs. Accordingly, CIGNA owed the Astros an obligation to conduct a thorough, systematic, objective, fair and honest evaluation of the claim, turning every leaf, considering both the positive and the negative, and indulging the Astros with the benefit of every doubt. Furthermore, under Texas law CIGNA must seek to establish coverage and eliminate any exclusions from coverage if possible.

An insurer breaches its duty of good faith and fair dealing if it denies a claim when its liability has become reasonably clear. Similarly, the duty is breached when the insurance company denies the claim based upon an unreasonable, outcome-oriented investigation.

The Astros submitted their claim under the Policy to CIGNA on or about January 24, 2006. CIGNA responded by letter dated March 13, 2006 denying the Astros' claim (the "Denial Letter"). In support of the claim, the Astros produced the reports of Dr. Andrews and Dr. Lintner and other information previously described. Additionally, counsel for the Astros and counsel for CIGNA traveled to Kissimmee, Florida, where a statement was taken from Jeff Bagwell on February 27, 2006 which, when transcribed, was 53 pages in length.

The Policy defines “sickness or disease” as meaning “any physical illness or **condition** ... which first manifests itself while this Policy is in force that renders him totally disabled from performing as a professional baseball player.” Despite the objectively-verifiable medical evidence showing that Jeff Bagwell suffers from such a disabling physical condition, CIGNA denied the claim. The evidence considered by CIGNA, as enumerated in its Denial Letter, establishes that liability was reasonably clear at the time the claim was denied. CIGNA’S denial of the claim was a breach of its duty of good faith and fair dealing, which proximately caused damages to the Astros.

As further evidence of defendant’s bad faith, the Denial Letter is remarkably devoid of any reference to any controverting medical evidence or opinion to suggest that Mr. Bagwell is physically able to play baseball at the major league level. The only medical opinions considered by CIGNA, as verified in its own Denial Letter, were those of Dr. Andrews and Dr. Lintner. Despite the fact that both of these highly-qualified, eminent physicians unequivocally stated that Mr. Bagwell was totally disabled from playing professional baseball, CIGNA nonetheless denied the Astros’ claim. CIGNA’s conduct in denying the claim under these circumstances evidences an investigation that was result-oriented, biased and outcome-driven. The evidence shows that CIGNA’s investigation was not undertaken with an eye toward indulging the Astros with the benefit of the doubt, seeking to establish coverage, or eliminating exclusions from coverage. Instead, it grounded its conclusions on unsupported and strained constructions of the Policy’s provisions.

The Astros adopt by reference the factual allegations described in Section VII of this pleading as if set forth verbatim herein.

The Astros have been and will continue to be harmed by CIGNA's bad faith denial of the claim, and seek recovery of the damages proximately caused thereby.

VII.

Violations of the Texas Insurance Code

The Texas Insurance Code prohibits "Unfair Claims Settlement Practices." The Astros contend that CIGNA's behavior violated the applicable provision of the Texas Insurance Code, and caused damages to the Astros, for which the Astros seek recovery in this case.

Section 541.060(a)(2)(A) of the Texas Insurance Code **defines** "Unfair Settlement Practices" as including "failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear."

Section 542.003 prohibits "Unfair Claim Settlement Practices," including the practice of "not attempting in good faith to effect a prompt, fair, and equitable settlement of a claim submitted in which liability has become reasonably clear." TEX. INS. CODE § 542.003(b)(4).

Section 541.151 provides a private cause of action to a person who sustains actual damages caused by an unfair practice in the business of insurance.

Section 541.152(a)(1) allows a prevailing plaintiff to recover actual damages, court costs, and attorneys' fees.

Section 541.152(b) provides that upon a finding that the defendant knowingly committed an unfair practice in the business of insurance, plaintiff may recover up to three times the amount of its actual damages.

As defined by the Texas Insurance Code, CIGNA's conduct in denying the claim under the circumstances of this case was an unfair settlement practice which caused actual damages to the Astros. Therefore, the Astros assert claims under the above-referenced sections of the Texas Insurance Code and seek recovery of the damages occasioned by CIGNA's conduct. The Astros further assert that CIGNA's conduct was committed **knowingly**, so as to justify an award of additional damages in an amount not to exceed three times the actual damages suffered, pursuant to section 541.152(b) of the Texas Insurance Code.

As further evidence that CIGNA's denial of the Astros' claim was committed knowingly, the Astros will show that, on about March 30, 2006, counsel for the Astros forwarded a letter to CIGNA urging that CIGNA reconsider its denial of the claim. In this correspondence, CIGNA was apprised of the discrepancies between the positions asserted in the Denial Letter and the undisputed evidence in support of the Astros' claim.

The correspondence to CIGNA on March 30, 2006 also described Jeff Bagwell's public announcement on March 25, 2006 regarding his disability to play professional baseball. CIGNA was specifically notified of the following:

As CIGNA knows, on Saturday, March 25, 2006, Jeff Bagwell announced publicly that he is unable to play professional baseball. He explained that he is going to see if he can get the bone spurs that he has in his shoulder taken out.

Mr. Bagwell was then asked:

“What led you to this decision?”

His reply was as follows:

“What led me to this decision was the tremendous amount of pain that I couldn’t deal with anymore. I played a couple days in a row, I came out that first game and then I played a couple of days and I got through it and I said ‘alright, let’s see what’s happening here.’ I had to come out in the game in Detroit this week – and I said I wasn’t going to embarrass myself, **and I felt like this was a joke.** I could not get the ball to the infielders, and they were on the grass. God bless my teammates, even from the pitchers who come get the ball from me, it’s amazing how great they’ve been through this. I just could not get it to them and I said this is not what I want. I’m not going to continue to do this. We are defending our National League Championship this year and I’m not going to be this kind of distraction of a broken-down first baseman who can’t throw to the infielders. I said I’ve got to go in a different direction.”

He was then asked:

In baseball terms, will this be a miracle if you can come back?

He replied:

“Yeah, it might be a miracle. I don’t know. I don’t have a problem with work ethic and determination, but I can’t control what’s going on in my shoulder. I really, really want to get these bone spurs taken out if it’s possible to do. I’ve always felt like I wanted to do that. It’s just my feeling, whether or not I’m right or wrong, that will ease me. I had a good conversation with Dr. Andrews while I was there and he said, you’ve got to do everything you can to see if you can play because if you don’t, you’re going to be kicking yourself. And, that’s basically what I’m trying to do. I just want to see if this

is it, then that's it. That is the option I have to do, and I have to do that for myself. I'm OK with that."

He was also asked:

Why haven't you had this done yet?

He replied:

"It is a very difficult procedure. The bone spurs are so big. There is a nerve inside there and it may be wrapped around it and its very difficult to do and there is some damage that can be done. That's why, the fact of him going in there, he could say, no, I can't do this. I guess it was a risky operation and not one that they didn't want to do at that particular time. It's more of a last-ditch effort."

As further compelling evidence of bad faith on the part of CIGNA, and that its conduct was committed **knowingly**, on March 28, 2006, only a few days after Jeff Bagwell clearly confirmed he has been totally disabled to play professional baseball, a published report in the Houston Chronicle stated:

'On March 13, 2006, Connecticut General Life Insurance Co. notified the Houston Astros that it had denied a total disability claim submitted by the Astros relating to Jeff Bagwell,' said attorney Ty Buthod, a partner at the Houston law firm of Baker Botts, which is representing Connecticut General. 'The company determined, that there had been no adverse change in Mr. Bagwell's condition or ability to play baseball between the end of last season, when he was an active member of the roster, and Jan. 31, 2006, the date the policy expired.'

'The company carefully reviewed the claim as submitted by the Astros and determined that the claim did not support a finding of total disability.'

CIGNA was informed of the Astros' belief that CIGNA was acting in bad faith and causing damages beyond the benefits available under the Policy. Despite the Astros' urging, CIGNA has failed to reverse its earlier denial of the claim.

Section 541.060(3) of the Texas Insurance Code provides as follows:

- (a) It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to engage in the following unfair settlement practices with respect to a claim by an insured or beneficiary:

* * *

- (3) failing to promptly provide to a policy holder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim;

As further evidence of bad faith and violations of the Texas Insurance Code, the March 13, 2006 "Denial Letter" from CIGNA denying the Astros' claim also made the following statement:

Finally, while we do not believe that any total disability threshold is met, we note that even if it were then the limitations in Section 9 of the Policy may prevent the Astros from recovery under the Policy.

On January 30, 2006 CIGNA was asked to provide to the Astros CIGNA's interpretation of Section 9.2(1) of the policy. CIGNA's response, through its Houston attorneys, was as follows:

To the extent that you are asking Connecticut General to comment on or interpret portions of

the insurance contract, Connecticut General respectfully declines to do so. The policy speaks for itself. It contains specific terms and conditions which the parties agreed to back in 2001. Connecticut General is hesitant to offer any comments or interpretations of those terms or conditions because it believes they are clear. Any other response runs the risk of being treated as some sort of amendment or change to the policy, which neither side can do at this time.

CIGNA's response to the Astros' request for CIGNA's interpretation of Section 9.2(1) constitutes a violation of Section 541.060(3) of the Texas Insurance Code, which, as pointed out above, provides that failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim constitutes an unfair or deceptive act or practice in the business of insurance.

In addition to the actual damages, treble damages, attorneys' fees, and costs recoverable under the relevant provisions of the Texas Insurance Code, the Astros also seek recovery of interest on the amount of the claim at the rate of 18 percent per annum as damages, as provided in section 542.060 of the Texas Insurance Code.

VIII.

Attorneys' Fees

Because CIGNA has failed and refused to honor its obligations under the Policy, the Astros have been required to seek and retain the services of the undersigned to represent their interests in this lawsuit. Pursuant to section 38.001 of the Texas Civil Practice & Remedies Code and/or section 541.152 of the Texas Insurance Code, plaintiff seeks

recovery of the reasonable and necessary attorneys' fees required to prosecute the claims asserted in this lawsuit.

IX.

Jury Request

Plaintiff has requested a trial by jury and has paid the appropriate fee.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that upon final trial it recover its damages from the Defendant, plus costs of court, prejudgment and post-judgment interest at the maximum legal rate, additional statutory interest as provided by the Texas Insurance Code and any other further relief, both general and special, at law or in equity, to which Plaintiff may show itself justly entitled.

Respectfully submitted,

**FISHER, BOYD, BROWN,
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By:  _____

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ATTORNEYS FOR PLAINTIFF

EXHIBIT C

INDEX OF DOCUMENTS FILED IN STATE COURT

- (a) All executed process in the case (Exhibit A);
- (b) Pleadings asserting causes of action, e.g., petitions, counterclaims, cross-actions, third-party actions, interventions and all answers to such pleadings (Exhibit B);
- (c) All orders signed by the state Judge (None);
- (d) The docket sheet (None);
- (e) An index of matters being filed (Exhibit C); and
- (f) A list of all counsel of record, including addresses, telephone numbers and parties represented (Exhibit D).

EXHIBIT D

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