The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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PURCHASE OF SECOND HOME NOT "REPLACEMENT" ENTITLING INSURED'S TO REPLACEMENT COST BENEFIT

Last Tuesday, the Fifth Circuit held that an insured who had purchased a second home, but acknowledged an intent and had committed to return to their Louisiana home, was not entitled to replacement costs benefits under their homeowners policy. In *Nunez v. Allstate Ins. Co.*, 2010 WL 1579410 (5th Cir. (La.) April 20, 2010), the Nunez residence was destroyed by flood and wind caused by Hurricane Katrina. After receiving payment for damage under their flood and all-risk homeowner policies, they used the money to purchase a second home in Houston, Texas. But they also committed to rebuilding and returning to the Louisiana home and received grant money under the Road Home program. They then filed suit against Allstate under their homeowners' policy asserting that the purchase of the Houston residence entitled them to replacement cost benefits under the terms of the policy. The trial court disagreed and granted summary judgment in favor of Allstate.

On appeal, the Fifth Circuit found that neither the policy nor Louisiana law defined the term "replace." But applying its generally accepted meaning, and noting the fact that that the Nunezes attested to the fact that they intended to repair and someday return to the house in Louisiana, the purchase of the Houston home did not constitute a substitute or replacement under the policy. The court also concluded that the Nunezes had waived their right to argue burden of proof and segregation of wind and flood damage issues on appeal. And lastly, the court held that the district court had properly excluded testimony from plaintiff's expert, Steve Hitchcock, and affirmed summary judgment in favor of Allstate. *Editor's note:* Although this case did not involve an application of Texas law, this case was determined to be of significance to our readers and warranted coverage in this edition.

CONTRACTUAL INDEMNITY PROVISION APPLIES TO ACTUAL AND CONSEQUENTIAL DAMAGE CLAIMS BETWEEN CONTRACTING PARTIES

Last Wednesday, the U.S. District Court for the Southern District of Texas granted summary judgment to a contracting party and its insurer seeking indemnity from a negligent contractor whose actions resulted in damage to the insured's refinery. In *BP Products North America Inc. v. J.V. Industrial Companies' LTD.*, 2010 WL 1610114 (S.D. Tex. April 21, 2010), BP and their insurer, American Home Assurance Company, sought indemnity from J.V. Industrial for actual and consequential damages caused by a fire that resulted negligent work performed by J.V. at the BP Texas City facility. Plaintiffs sought summary judgment that an indemnity provision was valid, applied to BP, and not just third-party claims and encompassed consequential damages.

The court observed that indemnity provisions generally do not apply to claims between contracting parties, but serve "to protect the indemnitee against claims brought by third parties." But the court also noted that indemnity agreements can be written to require the parties to indemnify each other for claims later asserted between them. The court found that the agreement at issue in this case specifically did so here. And after rejecting arguments that it only applied before BP accepted the work, the court granted summary judgment in favor of BP on both actual and consequential damage claims.

ARBITRATION RIGHT WAIVED

Confronted with a magistrate's findings, conclusions of law and recommendations that plaintiff's claims be dismissed, the plaintiff sought to compel arbitration under a related agreement. In *Wang v. Prudential Ins. Co. of America*, 2010 WL 1558619 (N.D. Texas, April 19, 2010), the court observed that "waiver of a party's right to arbitrate will be found when the party substantially invokes the judicial process to the detriment or prejudice of the other party." Noting that plaintiff only sought to invoke appraisal after filing three lawsuits and when confronted with the magistrate's recommendation that the case be dismissed, the court found that the plaintiff "clearly and unequivocally waived any right she had to arbitrate her claims."

BUSINESS RISK EXCLUSION FACT ISSUE PRECLUDES SUMMARY JUDGMENT

Last Monday, the U.S. District Court for the Southern District of Texas determined that a fact issue involving apportionment of damages between covered and excluded causes of loss precluded summary judgment. In *Lexington Insurance Company v. North American Pipe, Inc.*, 2010 WL 1558609 (S.D. Tex. April 19, 2010), a piece of pipe / casing ruptured in a natural gas well and the insured, North American settled with the well owner after Lexington denied coverage. The denial was based on an endorsement precluding coverage for defective pipe that was recalled prior to the policy's inception. The court determined, however, that the casing at issue was not from the recalled lot and the endorsement did not apply. Accordingly, summary judgment in favor of the insured was granted on that issue. A fact issue remained, however, over apportionment of the cost of repairs related to replacement of the defective product as excluded under the business risk exclusion, and damage to other property caused by the defective product. Summary judgment was denied and trial on apportionment is to proceed.