The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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FIFTH CIRCUITCONCLUDES ABSOLUTE POLLUTION EXCLUSION PRECLUDES COVERAGE FOR CARBON MONOXIDE CLAIM

The Fifth Circuit recently held that the absolute pollution exclusion applied to exclude coverage for a claim that involved accidental carbon monoxide discharge within an apartment. In *Nautilus Ins. Co. v. Country Oaks Apartments Ltd*, 2009 WL 1067587 (5th Cir. April 22, 2009), workers accidentally blocked a vent to the furnace in several apartments causing carbon monoxide to be dispersed into the apartments. One of the residents sued the complex for damages claimed on behalf of a minor who allegedly suffered in utero carbon monoxide exposure. After suit was filed, the apartment complex tendered the defense to Nautilus. Nautilus, in turn, refused to defend contending it owed no duty to defend or indemnify due to the absolute pollution exclusion. The policy defines the term "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

The district court granted summary judgment in favor of Nautilus. On appeal, the Fifth Circuit addressed two issues: (1) is carbon monoxide a "pollutant" within the meaning of the policy; and (2) if so, did it "discharge," "disperse," "release," or "seep" into the apartment. Here, the underlying petition alleged the carbon dioxide caused severe and permanent injuries to the infant in utero. The court held the allegations clearly involved a pollutant as defined by the policy. Next, the court analyzed whether the damages alleged in the underlying suit resulted from the "discharge, dispersal, seepage, migration, release, or escape" of carbon monoxide. After examining several arguments to the contrary, the court concluded the emission of carbon monoxide from a furnace into an apartment unambiguously satisfied the pollution exclusion requirement. The court affirmed summary judgment finding no duty to defend or indemnify the insured for the underlying claims.

FIFTH CIRCUIT FINDS DUTY TO DEFEND ADDITIONAL INSURED - STATUS NOT LIMITED BY GENERAL INDEMNITY PROVISION

The Fifth Circuit recently applied the *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 206 S.W. 3d (Tex. 2008) decision to vacate summary judgment for St. Paul Fire and Marine and to render judgment for United Oil and Minerals on its request for defense in the underlying suit. In *Aubris Resources LP v. St. Paul Fire and Marine Ins. Co.*, 2009 WL 1089434 (5th Cir. April 23, 2009), United hired J&R Valley to service its oilfield properties under a service agreement which required J&R to carry a CGL policy and name United as an additional insured. The agreement also contained a general indemnity provision whereby United agreed to indemnify J&R for causes of action arising from United's own negligence.

An explosion at one of United's oilfields severely injured two J&R employees and both J&R and United were sued for negligence. United requested J&R's carrier, St. Paul, provide a defense for the underlying suit. St. Paul denied the request arguing the general indemnity provision limited the additional insured

provision to preclude coverage for United's own negligence. The additional insured provision stated United was an additional insured except with respect "to any obligations for which UNITED has specifically agreed to indemnify" J&R; the general indemnity provision stated United would indemnify J&R for causes of action arising from United's own negligence. The district court agreed with St. Paul and granted summary judgment on the basis that the general indemnity provision limited additional insured coverage.

In vacating the district court's decision and rendering judgment for United, the Fifth Circuit applied the *Evanston* decision to restrict its coverage analysis to the additional insured provision. And the court held the scope of additional insured coverage was not limited by the separate general indemnity provision.

SUMMARY JUDGMENT REVERSED ON WATER DAMAGE CLAIMS UPHELD ON MOLD CLAIMS

Last Thursday, the Corpus Christi Court of Appeals examined a summary judgment ruling in favor of State Farm and while upholding summary judgment on the contractual and extra-contractual claims for the claims involving mold damage based on *Feiss*, the court reversed summary judgment on the water damage claims and remanded them to the trial court. In *Garcia v. State Farm Lloyds*, 2009 WL 1153506 (Tex. App. – Corpus Christi, April 30, 2009), in 2002 the insureds filed claims under their homeowners policy for water and mold damage claims. State Farm paid the claim with a letter stating that the payment was for "water damage." The inured sued in 2004 asserting contractual and extra-contractual claims for allegedly failing to pay for mold damage and insufficient payment for water damage. After the Texas Supreme Court's ruling in *Feiss v. State Farm Lloyds*, 202 S.W.3d 744, 753 (Tex.2006), finding no coverage for mold, the trial court granted summary judgment in favor of State Farm.

On appeal, the court found that State Farm had presented no evidence that the water damage repairs were completed for the amounts paid and reversed summary judgment on the contractual and extra-contractual claims as related to the water damage, but not the mold claims. The court also upheld summary judgment for State Farm on mental anguish and treble and exemplary damages. To clarify its ruling, the court summarized: "on remand, the claims still available to the Garcias are (1) breach of contract and breach of the duty of good faith and fair dealing, and (2) violations of the insurance code and DTPA, to the extent those are based on State Farm's failure to pay for all the water damage to the Garcias' home. The damages available for these claims will not include: (1) mental anguish damages; (2) treble damages under the Insurance Code for conduct committed "knowingly," (3) exemplary damages based on malicious conduct, and (4) additional living expenses under the policy."

APPELLATE COURT HOLDS SINGLE-VEHICLE ACCIDENT OCCURRED AFTER PERSONAL AUTO POLICY EXPIRED BUT BEFORE RENEWAL

The Houston First Court of Appeals recently held as a matter of law that a personal auto policy expired for failure to timely pay the premium and as a result, no coverage was afforded for a property damage claim that occurred before the renewal. In *Hartland v. Progressive Co. Mut. Ins. Co.*, 2009 WL 1086068 (Tex. App.—Houston [1st Dist.] April 23, 2009), the insured's wife was involved in a single-vehicle accident. A claim was made, but denied because the policy was not in effect at the time of the loss. The insured sued the insurer asserting contractual and extra-contractual claims. The insurer sought a declaratory judgment claiming it owed no duty or obligation to the insured because the policy had expired before the date of loss.

The trial court denied the insurer's summary judgment and the case proceeded to trial. The jury returned a defense verdict indicating the insured did not timely renew his policy. The insured then filed a motion for judgment notwithstanding the verdict arguing that even though he mailed the payment after the policy period ended, the insurer formed a contract based on the original terms of the renewal by accepting payment. The court, however, rejected claims that the insurer had violated various provisions of the Texas Administrative Code and then cited policy language to the contrary. The court held that when the initial policy expired, the relationship between the carrier and insured ended. And the renewal formed a new contract which was not in force on the date of loss.

MDJW WINS ARSON TRIAL FOR THE HARTFORD

MDJW Partners Chris Martin and Marty Sadler recently won a two week arson trial in Ft Bend County, Texas. The owner of a bar in Richmond, Texas submitted a claim for a total fire loss in March 2003 under a commercial property policy. The Hartford determined the fire was the result of arson and denied it. The insured sued and the case was tried over the second and third weeks of April.

As with most arson trials, forensic accounting issues regarding financial motive were central to the establishment of the arson claims. Shannon Rusnak of the Houston office of Matson, Driscoll & Damico served as the forensic accountant at both the claim stage and at trial. The presence of accelerants as the cause of the fire was not disputed. The insured alleged unidentified disgruntled customers were the cause of the fire. Former employees testified the alarm system was activated at closing time the night of the fire and the cause and origin expert, John Ragone of Houston, testified the alarm was not activated at anytime before the fire occurred, implying that the fire was an inside job.

Following 6 hours of deliberations, the jury found 10-2 that the insured, it's employees or authorized representatives committed arson and also made misrepresentations in the submission of the claim. The other jury questions were predicated on the liability questions so the jury's "yes" answers prevented the need to answer the other questions. Our firm thanks The Hartford for its willingness to take this case to verdict and for the opportunity to win it for them.