The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TEXAS SUPREME COURT RULES A FACT-FINDER SHOULD RESOLVE AMBIGUITY ISSUES

Last week, the Texas Supreme Court in *Progressive County Mutual Ins. Co. v. Kelley*, 2009 WL 795528, addressed the question of whether two documents issued by an insurance company constitute two separate insurance policies or a single policy. After being involved in a car accident, Kelley made a claim with Progressive for underinsured benefits under a policy issued to her parents, which also covered Kelley. Progressive paid the limit of $500,025 but that was not sufficient to cover all her medical expenses. Kelley then made a claim under an alleged second policy with Progressive with a limit of $500,025. At the time of the accident, Progressive insured five of the Kelleys' vehicles. Four vehicles were listed on a two-page document, and the fifth was listed on a separate two-page document. However, the documents had two separate policy numbers. Progressive denied there was a second policy and refused to make any additional payments. Kelley sued Progressive and both parties filed motions for summary judgment, presenting two issues: (1) whether Progressive issued one or two policies, and (2) if two policies, whether Progressive's "Two or More Auto Policies" anti-stacking provision found within each policy, limited recovery to one policy's maximum limits.

The court held that the documents are ambiguous as to whether one or two policies were issued. Although in an insurance contract, where a provision is subject to two reasonable interpretations, a court will adopt the interpretation that favors the insured, the court stated it is not interpreting a particular exclusion or provision within an insurance policy in this situation. Rather, it was determining whether two documents amount to a single or separate policies. Because the documents are ambiguous a fact finder should resolve the meaning. The court did not address the second issue because it stated the validity of the anti-stacking provision is contingent on a finding that Progressive issued two policies. The court remanded the case to the trial court for further proceedings.

TEXAS SUPREME COURT HOLDS PREJUDICE RULE APPLIES TO CLAIMS-MADE POLICY

Last week, in *Prodigy Communications Corp. v. Agricultural Excess & Surplus Ins. Co.*, 2009 WL 795530, the Texas Supreme Court determined that the *PAJ* "notice-prejudice" rule that an insured's failure to timely notify its insurer of a claim or suit does not defeat coverage if the insurer was not prejudiced by the delay applied to a claims-made policy. The claims-made policy notice provision at issue required the insured to give notice of a claim "as soon as practicable …, but in not event later than ninety (90) days after the expiration of the Policy Period or Discovery Period." The court decided whether, under this policy, an insurer can deny coverage based on its insured's alleged failure to comply with a policy provision requiring that notice of a claim be given "as soon as practicable," when (1) notice of the

claim was provided before the reporting deadline – the ninety-day cutoff period; and (2) the insurer was not prejudiced by the delay.

The court's analysis first addressed the argument that the policy language stated that the insured's duty to give "notice, in writing as soon as practicable" is a "condition precedent" to coverage, and noted that the *PAJ* holding did not rest on the distinction between conditions and covenants and it must go further to determine whether prejudice is required. The court then addressed the distinction between the *PAJ* occurrence-based policy and this claims-made policy. It emphasized that the inherent benefit of a claims-made policy is the insurer's ability to "close its books" on a policy at its expiration and to attain a level of predictability unattainable under standard occurrence polices. In this case, even assuming that the insured did not give notice "as soon as practicable," the insurer was not denied the benefit of the claims-made nature of its policy as it could not "close its books" on the policy until ninety days after the discovery period expired. Accordingly, the court concluded that the insured's obligation to provide the insurer with notice of a claim "as soon as practicable" was not a material part of the bargained-for exchange under this claims-made policy. As the insurer admitted that it was not prejudiced by the delay in receiving notice, it could not deny coverage based on the insured's alleged failure to provide notice "as soon as practicable." It was concluded that in a claims-made policy, when an insured notifies its insurer of a claim within the policy term or other reporting period that the policy specifies, the insured's failure to provide notice "as soon as practicable" will not defeat coverage in the absence of prejudice to the insurer.

Note: (We reported on the *PAJ* decision in our January 14, 2008 Newsbrief.)

TEXAS SUPREME COURT APPLIES *PRODIGY* REQUIRING PREJUDICE TO DENY LATE NOTICE CLAIM IN A CLAIMS-MADE POLICY

On the same day that the *Prodigy* case above was issued, the Texas Supreme Court also answered a related certified question from the Fifth Circuit in *Financial Industries Corporation v. XL Specialty Ins. Co.*, 2009 WL 795529. The following question was submitted:

> Must an insurer show prejudice to deny payment on a claims-made policy, when the denial is based upon the insured's breach of the policy's prompt-notice provision, but the notice is nevertheless given within the policy's coverage period?

The court concisely answered "yes" citing to the *Prodigy* case explanation of the inherent benefit of a claims-made policy. The difference between the policy language in this case and the *Prodigy* case is that XL's policy required only that notice of the claim be given "as soon as practicable" and does not contain as clear-cut reporting deadline such as the 90-day deadline in the *Prodigy* case. However, the same reasons for requiring the insurer to demonstrate prejudice apply: the insured gave notice of the claim within the policy's scope of coverage, i.e., before the insurer could "close its books" on the policy. The court answered the certified question and held that an insurer must show prejudice to deny payment on a claims-made policy, when the denial is based upon the insured's breach of the policy's prompt-notice provision, but the notice is given within the policy's coverage period.

LEGISLATIVE UPDATE: HB 911 PROPOSES OPERATIONAL CHANGES TO THE TEXAS WINDSTORM INSURANCE ASSOCIATION

Texas House Bill 911 was filed on March 12, 2009 by Representative Smithee which proposed changes to the TWIA that could have a major effect on the insurability of coastal residences. As it relates to residential property, the bill allows the TWIA only to insure residential homestead property or property

that is used as the primary residence of a tenant of the policyholder. Residential property that is not used as a primary residence is not insurable property for purposes of the proposed legislation and is not eligible for coverage through the TWIA, resulting in coverage being lost for second residences in coastal communities. Additionally, under the proposed legislation, the maximum liability limits for a dwelling would be $250,000. The coverage also does not include coverage for loss of use, which currently is provided. The language of the bill can be found at: http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=81R&Bill=HB911. This bill, if passed, will cause thousands of property owners in coastal areas to lose coverage and will also have a major effect on the marketability of coastal property that can no longer be insured or will be considered underinsured. The bill is currently in committee and has not yet been submitted for a vote in the Texas House of Representatives.

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