The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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COURT FINDS "EXTENT" OF HAIL DAMAGE TO ROOF IS SUBJECT TO APPRAISAL

In a surprising and troubling decision, last Tuesday the Dallas Court of Appeals determined that an appraisal provision allowing the parties to submit a dispute over the "amount of loss" to appraisal included a dispute over the "extent" of loss in a claim for hail damage to the insured's roof. In *Johnson v. State Farm Lloyds*, 2006 WL 2053472 (Tex. App. – Dallas July 25, 2006), the insured's roof sustained hail damage but State Farm's investigation determined that the extent of damage was limited to the ridge vent and estimated the cost of repair to be $499.50. The insured disagreed with State Farm's estimate and obtained their own for the cost of replacing the entire roof in the amount of $6,400. A declaratory judgment action was filed and the trial court granted summary judgment for State Farm finding that the parties' dispute over the *extent* of damage was a coverage dispute not subject to appraisal. The insured's appealed.

The Dallas Court of Appeals examined the appraisal provision in the policy, case law addressing the issue and citing an 1888 Supreme Court of Texas decision addressing different policy language, and then concluded: "that if the parties agree there is coverage but disagree on the extent of damage, the dispute concerns the "amount of loss" and that issue is determined in accordance with the appraisal clause. Because the parties here agree that covered property sustained damage from a covered peril but fail to agree on the amount of loss, the appraisal clause applies." Note: We will continue to monitor this decision for further developments. Until such time that the Supreme Court of Texas resolves the issue, decision letters to insureds should clearly reference the wear and tear and any other applicable exclusions or policy language precluding coverage for any portion of damage for which payment is not being issued.

SETTLEMENT WITHOUT CONSENT PREJUDICED LIABILITY INSURER AS A MATTER OF LAW

Following one rehearing, and last week denying another, the Fifth Circuit found that settlement without consent of an insurer, who tendered a defense under a reservation of rights, prejudiced the insurer as a matter of law and precluded coverage for the settlement under the policy. In *Motiva Enterprises, L.L.C. v. St. Paul Fire & Marine Ins. Co.* 445 F.3d 381 (5th Cir. (Tex.) March 28, 2006), *reh'g and reh'g en banc denied*, 2006 WL 2037328 (July 21, 2006), the court reconsidered an earlier decision to remand the case to the trial court to examine the prejudice issue (See *Texas Insurance Law Newsbrief*, February 13, 2006) and found based on Texas law that: "An insurer's right to participate in the settlement process is an essential prerequisite to its obligation to pay a settlement. When, as in this case, an insurer is not consulted about the settlement, the settlement is not tendered to it and the insurer has no opportunity to participate in or consent to the ultimate settlement decision, we conclude that the insurer is prejudiced as a matter of law." In denying another rehearing last week, the court added that the policy provision requiring liability to be established with the insurer's "'consent or by actual trial and final judgment,' is a condition precedent to coverage. Because the insured seeks recovery of an amount paid in settlement without consent of the insurer" the condition precedent failed and coverage was precluded.