



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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COURT FINDS CGL INSURER HAS DUTY TO DEFEND AND INDEMNIFY CLAIMS RELATED TO DEFECTIVE FOUNDATION DESIGN

Last Monday, the U.S. District Court for the Northern District of Texas granted summary judgment in favor of a homebuilder after concluding that a homebuyer's allegations of; defective design, that the foundation was poured and the buyer closed on the property during the policy period, were sufficient to trigger the commercial general liability insurer's duty to defend. And, the insurer also had a duty to indemnify for an arbitration award granting the homeowner diminution in value and other damages. In *Landstar Homes Dallas, Ltd. v. Mid-Continent Casualty Company*, 2010 WL 5071688 (N.D.Tex., December 13, 2010), within months after closing on the home a home buyer filed a service request claiming damage to the home which included trim separation, cracking and similar damage. Dissatisfied with the builder / insured's efforts to address the concerns, suit was filed alleging in part defective foundation design and damages as a result. And the buyer ultimately received an arbitration award for damages claimed which included diminution in value.

The builder's insurer initially denied coverage but later agreed to defend based on an amended petition in the underlying lawsuit which included dates previously omitted. After an arbitration award to the homebuyer, the builder / insured and insurer filed competing motions for summary judgment in the coverage lawsuit. Addressing the duty to defend, the court observed that a reference to foundation design letter that was dated within the policy period, combined with other allegations in the petition was sufficient to trigger the duty to defend. An amended petition with added dates further supported the courts court's conclusions. The court then examined Texas case law and rejected the insurer's arguments that: 1) a shifting foundation is not an "occurrence," 2) that claims for diminution in value are not covered, and 3) that the "your work" exclusion precluded coverage. Addressing diminution in value damages, the court found in part that they were covered because the insured was "legally obligated" to pay them as a result of "property damage" related damages awarded in arbitration. The court granted summary judgment as to liability under the policy in favor of the insured.

NON-SUIT DOES NOT RESTART 120-DAY TIME PERIOD TO FILE EXPERT REPORTS

As a matter of first impression for Texas courts, last Friday the Fort Worth Court of Appeals determined that the 2005 changes to the healthcare liability claims law did not enable a plaintiff to non-suit and re-file a claim in order to avoid the statutory 120-day period to file an expert report in support of the claim. In *Town Hall Estates – Arlington, Inc. v. Cannon*, 2010 WL 5118128 (Tex.App. – Fort Worth, December 16, 2010), the plaintiff non-suited her healthcare liability suit against Town Hall, three days before her expert report was required to be served. She then re-filed the lawsuit a few months later and then served the required report within days of re-filing a new, but identical lawsuit.

On appeal, the court considered the 2005 legislative changes requiring plaintiff's to file an expert within 120 days after the date "the claim was filed." And, whether the change in the word requiring the report within 120 days after "the original petition was filed" provided an opportunity for plaintiff's to restart the 120 day period by non-suiting and filing a new original petition in a second lawsuit. After reviewing the plain language of the statute and its legislative history, the court held that the non-suit and re-filing would not restart the 120 day deadline to file an expert report in support of the claim.

COURT GRANTS INSURER'S SUMMARY JUDGMENT MOTION AFTER FINDING SIRP IS NOT A "SUIT," LATE NOTICE AND VOLUNTARY PAYMENT PRECLUDED COVERAGE

The U.S. District Court, Southern District of Texas, Corpus Christi Division recently granted summary judgment in favor of the insurer in a lawsuit seeking coverage for damage arising from construction defects. In *Hardesty Builders, Inc. v. Mid-Continent Casualty Co.*, No. C-10-142 (S.D.Tex., December 13, 2010), a claim was presented against the insured alleging construction defects and the insurer was notified. The homeowner then initiated a Texas Residential Construction Commission's State Sponsored Inspection Process ("SIRP") which found construction defects in the work. The insurer advised that they intended to deny coverage. The homeowner filed suit and the builder settled with the homeowner before notifying the insurer that suit was filed. The builder then sued their insurer alleging breach of contract and bad faith causes of action.

The court first examined whether a SIRP was a "suit" within the meaning of the policy so as to trigger the insurer's duty to defend and determined that it was not. The court then noted that once an actual "suit" was filed, the matter was settled before the suit was tendered to the insurer. And as a result, the policies voluntary payment clause precluded any duty to indemnify for the settlement. Lastly, and following the analysis above, the court determined that liability was not reasonably clear as a matter of law and granted summary judgment in favor of the insurer on all contractual and extra-contractual claims.

NEWSBRIEF TO RESUME JANUARY 10, 2011

MDJ&W WISHES ALL OF OUR READERS A VERY MERRY CHRISTMAS AND A HAPPY AND PROSPEROUS NEW YEAR!

Our offices will be closed this Wednesday, Thursday and Friday, December 22nd through 24th, for the Christmas Holiday, as well as Friday, December 31st, for the New Year's Holiday. Our Texas Insurance Law Newsbrief research and writing staff will also be taking those days off to spend time with family and friends. The Newsbrief will resume publication January 10, 2011 and will continue weekly in 2011 as we have for the past 10 years. As we have done before, if the courts of Texas (particularly the Texas Supreme Court) issue any *significant* decisions before January 10th, we will issue a special report to keep our readers updated on any ground-breaking developments. Until then, we want to offer our special thanks to our clients and friends in the insurance industry who contributed in many different ways in making 2010 successful on many different judicial, appellate, legislative, regulatory and business fronts. We want to wish all of our readers a very Merry Christmas and a Happy and Prosperous New Year!

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