The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
www.mdjwlaw.com
A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.
Principal Office 808 Travis, Suite 1800 Houston, Texas 77002 713.632.1700 FAX 713.222.0101
111 Congress Avenue, Suite 1070 Austin, Texas 78701 512.610.4400 FAX 512.610.4401
900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

April 19, 2010

COURT ALLUDES TO NO COVERAGE FOR UNDERLYING BREACH OF CONTRACT CLAIMS

Recently, on April 1, 2010, in *David Lewis Builders, Inc. v. Mid-Continent Casualty Company*, 2010 WL 1286544, the United States District Court for the Northern District of Texas granted summary judgment in favor of Mid-Continent based on exclusionary language in the insurance policy contract. In this case, underlying plaintiffs Gary and Melissa Blake filed a lawsuit against David Lewis Builders for breach of contract stemming from a construction contract entered into between the Blakes and Lewis. Lewis tendered the underlying lawsuit to Mid-Continent who denied coverage based on several policy exclusions, including an exclusion for property damage to "property on which you . . . are performing operations, if the 'property damage' arise[s] out of those operations" . . . or "property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The court granted summary judgment based on these exclusions, noting that Mid-Continent was only entitled to summary judgment if one of the exclusions it relied upon was applicable. But the court strongly alluded that, because the underlying plaintiffs' causes of action sounded in contract, there was no coverage under the policy. Specifically, the court stated "by contending that the insurance policy . . . provides liability insurance coverage for [these claims], Lewis is, in effect, seeking reimbursement under its liability insurance policy for cost required to complete the proper performance of its construction contract. . . ."

FIFTH CIRCUIT HOLDS THAT "OTHER INSURANCE" PROVISIONS CONFLICT AND COVERAGE SHOULD BE DIVIDED PROPORTIONATELY

Recently, on Tuesday April 6, 2010, the United Stated Court of Appeals for the Fifth Circuit in *Travelers Lloyds Insurance Company v. Pacific Employers Insurance Company*, 2010 WL 1290722, held that two applicable insurance polices with conflicting "other insurance" clauses were liable for coverage proportionate to the coverage each policy provided. The Centre at Bunker Hill, Ltd., as landlord, and Best Buy Stores, Inc., as tenant, executed a lease for property. The lease included a provision by which Best Buy was required to obtain and maintain a commercial general liability insurance policy under which The Centre was to be an additional insured. Best Buy purchased an excess commercial general liability policy from Pacific, which included an "additional insured" clause that extended coverage to entities when required by written contract before the date of loss.

In the underlying cause of action, a patron of Best Buy was allegedly injured while exiting the store and filed a lawsuit against Best Buy and The Centre for negligence and premises defects. Travelers insured The Centre through a comprehensive general liability (CGL) policy, and demanded that Best Buy and Pacific assume The Centre's defense and indemnify it from further exposure, arguing that The Centre was

an additional insured under the Pacific policy. Pacific refused and Travelers launched this lawsuit. Pacific contended that because the indemnity provision was determined by the court—and agreed to by the parties—to be void due to the express negligence doctrine, the "additional insured" provision should be void as well because, Pacific argued, "the requirement that Best Buy name The Centre as an additional insured solely supports the lease's indemnity provision." The court disagreed with Pacific's analysis, stating that "[t]his circuit has upheld additional insured provisions despite void indemnity provisions present in the same contract . . . ," and held that the trial court properly concluded that the additional insured provision was enforceable. And the court determined that, because both polices contained "other insurance" clauses which provided that if other insurance was available, that insurance policy would be considered excess over the other policy, these clauses could reasonably be construed to conflict, and therefore, "each insurer must share in the costs of underlying litigation against The Centre." The court further determined that coverage should be pro-rated between the two insurers proportionate to the amount of coverage each policy provided.

EMPLOYEE AND THIRD-PARTY TORTFEASOR ARE JOINTLY AND SEVERALLY LIABLE FOR SETTLEMENT AMOUNT WRONGFULLY WITHHELD FROM CARRIER WITH SUBROGATION INTEREST

Last Thursday, in *Garriga v. Ace American Insurance Company*, 2010 WL 1490022, the Eastland Court of Appeals held that an employee and a third-party tortfeasor were jointly and severally liable for settlement proceeds wrongfully withheld from a workers' compensation carrier, limited to the amount of the settlement. This case arises out of an automobile accident between Ramon Barragan and Troy Hickman in which Hickman was injured. The accident occurred within the scope of Barragan's employment. Ace, the workers' compensation carrier, initially denied Barragan's workers' compensation claim. State Farm provided insurance coverage for Hickman. Barragan retained the services of Jose Garriga to pursue a third-party claim against Hickman, and Garriga negotiated a settlement from Hickman for $12,600, of which Garriga paid $6,364.81 for medical expenses and a health subrogation claim, and Garriga received $2,706.83 in attorneys' fees.

After administrative hearings, Ace accepted Barragan's workers' compensation claim and paid benefits to Barragan. Ace sent correspondence to Garriga reminding him of Ace's notice of subrogation, which was sent before the settlement with Hickman, and notified Garriga that Ace was aware of the settlement with Hickman and would assert a future credit against all medical and indemnity benefits pursuant to the Texas Labor Code. Ace subsequently filed suit against Garriga to recover the entire amount of the workers' compensation lien, which was greater than the amount of the settlement. The court explained that a party should not benefit from wrongfully receiving a settlement in contravention of a carrier's subrogation right. But, the court determined that the carrier's recovery was limited to the settlement amount ($12,600), and that the employee and the third-party tortfeasor were jointly and severally liable for the wrongfully appropriated funds.

If you wish to discuss legal principles mentioned herein, reply to this e-mail or contact any of our lawyers at Martin, Disiere, Jefferson & Wisdom, L.L.P.
If you would like to add additional recipients or would like to unsubscribe , please reply to this e-mail with your request
For past copies of the *Newsbrief* go to www.mdjwlaw.com and click on our Texas Insurance News page.