The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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March 29, 2010

INSURERS TO PAY PRO-RATA SHARE OF POLICY LIMITS WHEN BOTH HAVE DUTY TO DEFEND

In *Amerisure Mutual Insurance Company v. Travelers Lloyds Insurance Company*, No. H-09-662, 2010 WL 1068087 (S.D. Tex. March 22, 2010), the court held that in a situation where an insured has coverage from either of two policies, and the language in each policy reasonably conflicts with a provision of the other policy, the conflict between the two policies is resolved by ignoring the conflicting provisions of the policy and prorating the coverage in proportion to each policy.

Ameriprise Mutual Insurance Company ("Ameriprise") insured Rosenberger Construction ("Rosenberger"), who was hired by Beltway Houston Industrial ("Beltway") to construct an industrial warehouse building. Rosenberger then hired two subcontractors and contractually required them to obtain insurance covering Rosenberger. The subcontractors carriers were Beacon National Insurance Company ("Beacon"), Western Heritage Insurance Company ("Western"), and Travelers Lloyds Insurance Company ("Travelers"). After the completion of the project, Beltway brought a suit against Rosenberger alleging that the workmanship of the subcontractor(s) was improper and caused the roof deck to corrode. The insurers disputed indemnity and duty to defend. Ultimately, the court found that Travelers and Ameriprise had to pro rata share relative to the policy limits of each policy the costs to defend Rosenberger pursuant to each carrier's duty to defend.

COMMERCIAL GENERAL LIABILITY CARRIER WINS BIG IN DEFECTIVE DRYWALL CASE

Last Wednesday, the U.S. District Court for the Eastern District of Virginia granted Builders Mutual Insurance Company's ("BMIC") Motion to Dismiss Dragas Management's ("Dragas," a residential construction company) breach of contract and bad faith claims in *Builders Mutual Insurance Company v. Dragas Management Corporation and Fireman's Insurance Company of Washington, D.C.*, No. 2:09cv185, ___ WL _____ (E.D. Va. March 24, 2010).

Dragas constructed new homes in Virginia and later learned that they contained defective drywall. In March 2009, Dragas sent letters to its insurance carriers notifying the carrier of the company's intentions to being remediation immediately. The insurance companies had several meetings and exchange correspondence with BMIC, and BMIC never indicated that it intended to deny the claim. In early April 2009, Dragas sent a letter to BMIC stating that it interpreted BMIC's failure to object to the remediation plan as an indication of consent to the plan and coverage. Five days later, BMIC denied Dragas' claim for coverage for drywall-related losses.

On April 23, 2009, BMIC filed a declaratory judgment action in federal court seeking a judgment that it owes no duty to defend or indemnity Dragas for drywall-related claims. Dragas filed a counterclaim against BMIC and Fireman's Fund Insurance Company of Washington, D.C. (FIC) for breach of contract and against BMIC for bad faith. BMIC moved to dismiss the breach of contract and bad faith claims in a Rule 12(b)(6) motion.

The counterclaim sought damages for breach of contract on the theory that BMIC and FIC breached their duty to indemnify Dragas for remediation costs. Like most states, the policyholder bears the burden of proving coverage under the policy. BMIC argued that Dragas had not adequately pled it was "legally obligated to pay" sums "as damages," because their remediation plan was voluntary and undertaken without legal obligation that would arise from a lawsuit or regulatory action.

The Court dismissed the breach of contract claim and found that Dragas failed to allege facts regarding the extent to which the remediation plan was executed or why it was taken on at that time. Further, Dragas failed to allege any threats of lawsuits by individual homeowners or that any demands were made before their plan was implemented. In fact, Dragas made a business decision to remediate after sending a letter of inquiry to its customers. Finally, some lawsuits were eventually filed, but they were voluntarily dismissed by the homeowners without a settlement agreement. The Court gave Dragas 14 days to amend its pleadings.

Dragas sought bad faith on the grounds that BMIC breached the implied covenant of good faith and fair dealing by failing to perform a proper investigation before denying coverage. Dragas also sought attorneys fees under Virginia Code Annotated Section 38.2-209.

Like many states, in Virginia, the existence of coverage is a prerequisite to a bad faith claim. In this case, BMIC later agreed to defend Dragas in the suits pursuant to a reservation of rights letter, which was issued after the denial letter but before suit was filed. Because coverage is a prerequisite and Dragas failed to plead a claim for coverage with respect to the costs of its remediation plan, the bad faith claim was also dismissed. Again, the Court gave Dragas 14 days to amend its counterclaim.

SOUTHERN DISTRICT OF TEXAS RULE CHANGE

The Southern District of Texas now requires litigation counsel ***and*** party representatives to attend any alternative dispute requirement. Local Rule 16.4.F reads:

> 16.4.F. ***Attendance; Authority to Settle.*** Party representatives (in addition to litigation counsel) with authority to settle and all other persons necessary to negotiate a settlement, such as insurance carriers, must attend the ADR proceeding.