The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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## ATHLETIC, SPORTING, OR EXERCISE EXCLUSION NOT APPLICABLE WHEN PERSON INJURED WHILE PLAYING THE HELICOPTER GAME

The Fort Worth Court of Appeals recently upheld a district court ruling which held the "helicopter game" at a local gymnastic center was not a "sporting or exercise" activity as described by the insurance policy; therefore, the policy's sport and exercise exclusion did not apply. Similar to jump rope, the helicopter game is a game played by the insured's employee where the employee swings a rope in a circle as children circled around the employee attempting to jump the rope. In this instance, a child was injured when the rope was swung too high, causing the child to fall and break her arm.

In *Markel Insurance v. Muzyka*, No. 2-09-030-CV, 2009 WL 2414327 (Tex. App.—Fort Worth 2009), the insured, the gymnastic center, was covered by a policy at the time of the injury, which stated the insurer would pay medical expenses for bodily injury caused by an accident that occurred either on the insured's premises or because of the insured's operations. The policy also contained an exclusion providing the medical payment provision under "Coverage C Medical Payments" did not apply to bodily injury incurred by "Participants, Students, and Members while participating in Athletic, Sporting or Exercise Activities."

The insurer argued the helicopter game was an athletic, sporting, or exercise activity; therefore, the exclusion applied, and the insured was not responsible for the medical expenses of the claimant. Ultimately, the trial and appellate courts disagreed, and the insurer was responsible for repayment of the injured child's medical expenses.

## NO DUTY TO INDEMNIFY EXISTS IN NEGLIGENT MISREPRESENTATION CLAIM SURROUNDING SUBDIVISION PLOTS AND PLANS

The Austin Court of Appeals recently upheld a district court's ruling that, as a matter of law, an insurer did not breach its duties to defend or indemnify the insured when they were sued by homeowners. In the underlying suit, the homeowners alleged that the insured's negligent conduct caused property damage and thereby triggered the insurer's duty to defend and indemnify appellants under the policy.

*In Daneshjou Daran, Inc. v. Truck Insurance Exchange*, No. 03-06-00206-CV, 2009 WL 2410932 (Tex. App.—Austin, 2009), the insured argued that, pursuant to a commercial general liability coverage policy, the insurer was obligated to provide them coverage and a defense in a suit by the homeowners. In the underlying case, the homeowners alleged they were injured by appellants' misconduct in preparing to develop a housing subdivision. Further, the homeowners alleged the insured misrepresented several aspects of an agreement concerning the platting and zoning for the subdivision.

The homeowners claimed they suffered economic loss due to the actions of the insured. The insurer based it's motion for summary judgment on three grounds: (1) that the homeowners alleged intentional conduct, which is not covered by the policy, (2) that the policy did not provide coverage because there was no allegation of bodily injury, advertising injury, or personal injury, and (3) that the policy did not provide coverage because there was no allegation of property damage.

The trial court, using the "eight-corners rule," granted the motion and explained it did not find any factual allegations of negligence. The court further explained it did "not see an allegation of any injury covered under the policy." In affirming the district court's ruling, the court of appeals reiterated the general rule that property damage in the insurance context must be something more than a pure economic loss.

## SCOPE OF COMMERCIAL POLICY EXCLUSION TURNS ON THE DIFFERENCE BETWEEN TORT AND CONTRACT ALLEGATIONS IN THE UNDERLYING SUIT

In *Century Surety Co. v. Hardscape Construction Specialties*, No. 06-10930, 2009 WL 2413935 (5th Cir. 2009), the Fifth Circuit Court of Appeals recently restated that the scope of a commercial policy exclusion turns on the difference between tort and contract allegations in an underlying lawsuit.

In this case, Hardscape Construction Specialties was hired to construct a swimming pool and other structures at a residential development. Hardscape executed a contract with the insured, Elite Concepts, to assist in the construction. The contract contained an indemnification provision. After construction was concluded, the developer sued Hardscape, Elite, and others. The developer alleged faulty design and construction had caused physical and aesthetic damage to the pool and some of its surroundings.

Elite was insured by Century Surety Company, and the policy provided coverage for certain "occurrences," which the policy defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy excluded "'bodily injury' or 'property damages' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement," but excepted from that exclusion certain contractual obligations to pay for another party's tort liability.

The court applied the eight-corners rule and looked to whether the suit "sounded in tort or contract" and, thus, whether the suit triggered coverage under the contract. In making its determination, the court focused on the source of liability and the nature of the plaintiff's loss.

In this case, the court found that the underlying petition alleged a cause of action that fell within the policy's definition of "occurrence," but the policy's "contractual liability" exclusion operated to exclude the claims arising from the underlying suit, and no tort claim triggered the exclusion's "insured contract" exception. As such, the insurer was absolved from the duty to indemnify and defend the insured in the underlying law suit.

## FAILURE TO FILE A PROOF OF LOSS PRECLUDES RECOVERY UNDER A STANDARD FLOOD INSURANCE POLICY

In *Wientjes v. American Bankers Insurance Company of Florida*, No. 0831212, 2009 WL 2391407 (5th Cir. 2009), the Fifth Circuit Court of Appeals recently held a proof of loss is a condition precedent to the insured receiving payment for covered damages under a Standard Flood Insurance Policy.

In this case, the plaintiffs argued the FEMA Bulletin extending the time to file a proof of loss was an unconditional waiver, the adjuster's estimate satisfied the purpose of the proof of loss requirement, and the requirement violated their equal protection and due process rights established under the Constitution. All of the arguments were rejected by the lower court and the Fifth Circuit. In the end, the Fifth Circuit held the proof of loss was required, the plaintiffs did not provide one and, therefore, they were precluded from recovery.

## TRADEMARK INFRINGEMENT CLAIMS ARE NOT ADVERTISING INJURY CLAIMS, AND AS SUCH, THERE IS NO DUTY TO INDEMNIFY

Last week, the Fifth Circuit, in *America's Recommended Mailers Inc. v. Maryland Casualty Co.*, No. 08-41106, 2009 WL 2391523 (5th Cir. 2009) held that under Texas law, trademark infringement claims are not advertising injuries, and as such, there was no duty to defend or indemnify under the policy at issue. In the case, Maryland issued an insurance policy containing a duty to defend against suits regarding "personal and advertising injury." There were only two parts of the definition at issue on appeal: (1) "misappropriation of advertising ideas or style of doing business," and (2) "infringing upon another's copyright, trade dress or slogan in your 'advertisement.'"

In 2004, the AARP sued Mailers, alleging that Mailers falsely claimed to be endorsed by AARP. Allegedly, Mailers distributed millions of cards to seniors across America that included the AARP's trademarked abbreviation.

In 2007, Mailers filed a declaratory action in state court, and Maryland removed the case to federal court. Both sides filed competing motions for summary judgment, and the district court granted Maryland's motion. The lower court found that the AARP's claims involved only trademark infringement, which is not included under the policy definition of personal and advertising injury; therefore, there was no duty to defend or indemnify. The Fifth Circuit affirmed on the same grounds.

## TEXAS HEALTH INSURANCE RISK POOL WAIVED SUBROGATION RIGHTS

The Austin Court of Appeals recently determined the Texas Risk Pool could not pursue its subrogation rights against a settling tortfeasor in *Texas Health Ins. Risk Pool v. Sigmundik*, 2009 WL 2341837 (Tex. App.—Austin, July 31, 2009). The Risk Pool presented two arguments to the court. As to the first, the court agreed with the Risk Pool that a settlement with a tortfeasor could not destroy an insurer's right to subrogation if the tortfeasor is aware of the subrogation claim. But, the court found the Risk Pool waived the argument by failing to raise it prior to appeal. As to the second, the Risk Pool contended it was entitled to some portion of the settlement monies paid by the tortfeasor. The court found, however, the Risk Pool can only recover against settlement monies paid to its deceased insured's estate. And, the settlement specifically paid only the widow and children. The Risk Pool did not request that the trial court find that settlement monies should have been paid to the estate.

## 2009 WORKERS' COMPENSATION EDUCATIONAL CONFERENCE

The TDI, Division of Workers Compensation, is hosting two upcoming conferences. The conferences will provide information about the Texas workers' compensation system to health care providers, employers, insurers, administrators, attorneys, and others involved in the workers' compensation system. The early bird registration ends this week on August 15, 2009. More information about these conferences can be found at the TDI website: www.tdi.state.tx.us

# TDI RELEASES BULLETIN CLARIFYING AGENT DUTIES AND RESPONSIBILITIES FOR SUBMITTING TWIA APPLICATIONS AND PREMIUMS

In response to "numerous inquiries and complaints" after Hurricane Ike, the TDI has issued a bulletin to address agent duties and responsibilities. The TDI directs inquiries to the Texas Insurance Code Chapter 2210 and the Texas Administrative Code Title 28. These documents govern the process for submitting insurance applications and renewals. The TDI has not yet determined the impact that House Bill 4409, recently enacted by the Texas Legislature, will have on the required documentation.