



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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FIFTH CIRCUIT HOLDS NO COVERAGE UNDER COMMERCIAL PROPERTY POLICY FOR PROPERTY DAMAGE TO AC UNITS CAUSED BY THEFT OF COPPER TUBING FROM UNITS

Last Tuesday in a case of first impression, a three-judge panel of the Fifth Circuit held that damage to AC units caused by the theft of copper tubing from within the units was not covered by a commercial property policy. *Certain Underwriters v. Law*, __ F.3rd __, 2009 WL 1524631 (5th Cir. June 2, 2009). Having won a summary judgment in favor of coverage from the district court, the insured argued that the policy provided coverage under either the vandalism provision or the ingress/egress exception to the theft exclusion from vandalism coverage. The panel was not persuaded by the insured's arguments.

The panel found that the policy's language was unambiguous. It then considered each of the policy provisions in turn. Looking at the vandalism provision, the panel noted that vandalism requires "malicious" damage to property. And the panel noted that the damage to the AC units was done only to gain access to the copper tubing. Having made this determination, the panel concluded that the theft exclusion to the vandalism coverage applied. But, the panel then turned to the narrower question of whether the ingress/egress exception to the theft exclusion applied. Turning to Texas law on burglary, the panel held that ingress/egress means attempting to enter bodily into the interior space of a building. The panel, therefore, determined that merely gaining access to a fixture like the AC unit here did not satisfy the policy's ingress/egress exception. Having determined that the policy did not provide coverage, the panel reversed and rendered judgment for the insurer.

DISTRICT COURT HOLDS COMMERCIAL LIABILITY POLICY'S HAZARDOUS MATERIALS EXCLUSION APPLIES TO DEADLY CONCENTRATION OF ARGON GAS

Following the Fifth Circuit's decision in *Nautilus Ins. Co. v. Country Oaks Apts., Ltd.*, 2009 WL 1067587 (5th Cir. April 22, 2009), the U.S. District Court for the Northern District of Texas granted summary judgment to an insurer holding that no coverage existed for deaths caused by a concentration of argon gas under a general liability policy's hazardous materials exclusion. *Colony Nat'l Ins. Co. v. Specialty Trailer Leasing, Inc.*, __ F.Supp.2d __, 2009 WL 1532056 (N.D. Texas June 2, 2009). In the decision issued last Tuesday, the court noted that the policy provision at issue was strikingly similar to the provision in *Nautilus*. The court held that the insurer had no duty to defend or indemnify its insured in the underlying lawsuits.

DISTRICT COURT REFUSES TO CONSIDER EVIDENCE DISCLOSING CONFIDENTIAL COMMUNICATIONS MADE DURING MEDIATION

In a decision issued last Monday, a U.S. District Court for the Northern District of Texas refused to consider an affidavit purporting to disclose representations made by an insurance representative to its insured during settlement negotiations at mediations. *KY II Realtors v. DIPS Pest Control Serv.*, 2009 WL 1532061 (N.D. Tex. June 1, 2009) (slip opinion). At issue was whether the insurer was entitled to summary judgment under the policy's no action provision following the insured's settlement of an underlying claim. The affidavit supported the insured's contention that the insurer was present at mediation, participated in mediation, agreed to the settlement, and approved the settlement's terms. The district court, applying Texas Civil Practice and Remedies Code section 154.073(a), refused to consider the affidavit and granted summary judgment to the insurer under the policy's no action provision.

TRAVELERS SUCCESSFUL IN INSTITUTIONAL BAD FAITH/PUNITIVE DAMAGE TRIAL IN FLORIDA

Last Thursday afternoon, a unanimous federal court jury in Ft Myers, Florida found St Paul Fire & Marine Insurance Company, a Travelers company, was not liable for any punitive damages in an institutional bad faith case arising out of Hurricane Charlie in 2004. Chris Martin of our firm, along with Matt Litsky and Kevin O'Brien from the Tampa office of Phelps Dunbar, tried the case to verdict in *Edward Jablonski vs St Paul Fire & Marine*. Plaintiff sought substantial punitive damages for Travelers' alleged general businesses practices in handling claims in Florida.

The trial spanned three weeks and featured national bad faith experts Gary Fye and Stephen Prater testifying for Plaintiff in support of the institutional bad faith claims. The insured owned a large sail boat which suffered some damage in Hurricane Charlie in August 2008. A protracted value dispute was finally resolved through the appraisal process under the policy and the District Court ultimately ruled St Paul paid all it owed under the policy. Plaintiff's counsel, the national bad faith firm of Ver Ploeg & Lumpkin from Miami, led the assault on the business practices of St Paul and Travelers. The jury found no liability upon which punitive damages could be predicated. Because St Paul made an offer of settlement under Florida statute, and because Plaintiff failed to recover actual damages on its bad faith claims greater than the amount of the offer, St Paul will be entitled to recover its attorney fees from the date of the offer through the end of trial.

We want to congratulate the Law Department, the Ocean Marine Division, and senior Claims management at Travelers for having the courage to face a punitive damage risk in a dangerous south Florida venue. Our lawyers always appreciate the opportunity to try cases in diverse jurisdictions and we were honored to defend the business practices of this outstanding company in the face of the false allegations made against it. Our firm wants to thank and congratulate everyone involved in this great trial win.

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