The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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NATIONAL FLOOD INSURANCE PROGRAM DOES NOT PREEMPT NEGLIGENT MISREPRESENTATION CLAIMS AGAINST WRITE-YOUR-OWN INSURER

Last Tuesday, the Fifth Circuit determined that negligent misrepresentations made by an insurer and its representatives that allegedly caused the insured to not renew his flood policy, were not preempted by FEMA and were actionable against a write-your-own flood insurer. In *Campo v. Allstate Insurance Co.*, 2009 WL 682619 (5th Cir. (La.) March 17, 2009), the insured failed to pay his flood insurance premium which was due before Hurricane Katrina destroyed his home. He could have avoided a lapse in coverage by paying the premium during the grace period. During this time, however, he received $2,500 advance and a letter from Allstate advising that they had requested a check from the program for his policy limits of $98,200. But they failed to tell him that the payment was contingent upon his paying the $1,237 past due premium. After the policy lapsed, Allstate denied the claim and requested a refund of the $2,500 advance. The district court granted summary judgment to the insurer and this appeal followed.

On appeal, the Fifth Circuit observed that federal law preempts "state law tort claims arising from *claims handling*" against a write your own carrier. But the FEMA legislation did not preempt "*policy procurement"* based claims and the fiscal reasons for preemption did not apply to procurement based claims because FEMA does not reimburse carriers for them. And in this case, the court held that the claims asserted were procurement based and were thus actionable by the insured. Summary judgment was reversed and the lawsuit remanded for further proceedings.

ATTORNEY ERRORS & OMISSIONS POLICY PROVIDES DEFENSE FOR THIRD-PARTY SUIT ALLEGING CONVERSION, WRONGFUL LEVY & SALE

Last Wednesday, the U.S. District Court for the Northern District of Texas held that a law firm's errors and omissions insurer had a duty to defend a suit against the firm by third-parties who claimed damages arising from a default judgment taken against them. In *Westport Insurance, Co. v. Cotton Schmidt, LLP*, 2009 WL 701054 (N.D.Tex. March 18, 2009), attorneys filed suit on behalf of their clients and took a default judgment, but there were alleged improprieties in the manner of service. After the default, equipment was seized and sold for "millions of dollars" less than its alleged value to satisfy the judgment. The third parties against whom judgment was taken then sued the attorneys alleging conversion, wrongful levy, execution and sale. This declaratory judgment action was then filed by the attorneys' insurer to determine its duties under the policy.

First, the court examined the insurer's argument that there was no "wrongful act" to trigger coverage under the policy based in part on the common-law rule that attorneys owe no duty to third parties. The court applied an eight-corners analysis and dismissed this argument finding that the attorneys' qualified immunity from did not relieve the insurer of its duty to defend. Second, the court rejected a "prior knowledge" exclusion defense based in part on the qualified immunity from third-party lawsuits noted above finding in part that "a reasonable attorney in Texas would be aware that, as a general rule, his litigation conduct is not actionable by a third party, including a party opponent." Lastly, the court examined an exclusion precluding coverage for "conversion, misappropriation or commingling of funds" and rejected the insurer's argument that it precluded coverage against the conversion claims in this third party context.

RENOVATED PROPERTY ENDORSEMENT PROVIDES DEFENSE FOR NEGLIGENT RENOVATION CLAIMS

Last Monday, the U.S. District Court for the Southern District of Texas granted summary judgment finding that the insurer had a duty to defend negligent renovation claims arising from property sold by the insured. In *Essex Insurance Co. v. Hines*¸ 2009 WL 700100 (S.D.Tex. March 16, 2009), the insured purchased a policy from November 4, 2004 through February 4, 2005 to cover a house while under renovation. The house was sold on August 17, 2005 and a few months later, rotted floors starting breaking through and the new owners sued the insured alleging in part negligence in the renovation of the house.

Addressing the duty to defend, the court observed that the policy contained a "renovated Property Endorsement" that stated in part that "This policy covers a renovation project." And based on this language, the court liberally interpreted the endorsement and disregarded the "expected or intended injury" exclusion, the incorrectly performed work exclusion, and the "your work" or "arising from your work" exclusions. Lastly, the court found that the damage allegedly occurred during the renovation and, therefore occurred during the policy period.