The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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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

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BUSINESS RISK EXCLUSIONS DON'T APPLY TO PROPERTY DAMAGE OCCURING DURING SUSPENDED OPERATIONS

Last Wednesday, the Fifth Circuit examined the business risk exclusions in a commercial general liability policy and determined that they did not apply to preclude coverage for damage that developed during a time period where construction work had been suspended. In *Mid-Continent Casualty Co. v. JHP Development, Inc.*, 2009 WL 189886 (5th Cir. (Tex.), January 28, 2009), the insured agreed to build a five unit condominium project with one designated as a finished model but the other four were to remain unfinished until sold. The insured failed to properly water seal the exterior finish and large quantities of water penetrated the structure causing extensive damage to the interior of the structure. The project owner sued the insured, Mid-Continent refused to defend and a default judgment was taken against the insured. Mid-Continent then filed a declaratory judgment action seeking a finding that the losses claimed were excluded under its policy. The trial court found that Mid-Continent had a duty to defend and indemnify under the policy.

On appeal, the court examined exclusion j(5) excluding property damage for real property on which the insured is "performing operations." The court looked at the ordinary meaning of "performing operations" and found that "[t]he prolonged, open-ended, and complete suspension of construction activities pending the purchase of the condominium units does not fall within the ordinary meaning of 'performing operations.'" And because the insured was not actively engaged in construction activities when the water damage occurred, exclusion j(5) did not apply. The court also looked at exclusion j(6) and found that it only bars coverage for "property damage to parts of a property that were themselves the subject of defective work by the insured; the exclusion does not bar coverage for damage to parts of a property that were the subject of only nondefective work by the insured and were damaged as a result of defective work by the insured on other parts of the property."

Lastly, the court found that because the insured, not an assignee, sought recovery *Gandy* did not apply and Texas law holds under these circumstances that "an insurer who fails to defend when they have a duty to do so is bound by the amount of the judgment against the insured." Accordingly, the trial court's judgment finding coverage was affirmed.

COURT APPLIES "BUT FOR" STANDARD TO PROFESSIONAL LIABILITY BROKERAGE EXCLUSION, FINDS NO COVERAGE

Last Thursday, the U.S. District Court for the Eastern District, Lufkin Division found that an insured who engaged in a scheme to sell insurance policies to additional insureds under a policy procured for another customer, had no coverage under their own professional liability policy for related lawsuits. In *Baldwin v.*

Nutmeg Insurance Company, CA No. 9:07-CV-84-TH (E.D. Tex. January 29, 2009), the insured was sued by victims of the scheme who alleged causes of action, some of which would have been covered absent the causation linked to the insurance scheme. The court agreed with the insurer that the policy excludes coverage "arising from" the named insureds acting as "insurance agents" or "insurance brokers" and finding that the exclusion applied to all claims, the court observed that "though the conduct that forms the basis for this suit is further along in the story, it nonetheless has its origins in the insurance scheme itself." Accordingly, the court granted summary judgment in favor of the insurer. **Note:** Our firm had the privilege of representing the insurer in this case and we congratulate them on this significant win.

NOTICE AND SETTLEMENT WITHOUT CONSENT CONDITION PRECLUDES SUBROGATION CLAIM AGAINST ADDITIONAL INSURER

Last Thursday, the Houston Court of Appeals held that settlement of a lawsuit by two insurers on behalf of their insured, prior to notifying a third insurer under which the insured may have qualified as an additional insured, precluded the subrogation effort by application of the notice and settlement without consent provisions of the additional insurer's policy. In *Maryland Casualty Co. v. American Home Assurance Co.*, 2009 WL 214550 (Tex.App. – Houston [1st Dist.] January 29, 2009), the court provides a detailed examination of Texas case law addressing the prejudice element of these provisions and determined that the insurer was prejudiced as a matter of law under the facts presented.