The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.
www.mdjwlaw.com
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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As we start a new year, we pause to reflect on the changes to the Texas insurance law landscape witnessed in 2008. This special edition of our weekly Newsbrief offers a reflection on the biggest changes to Texas insurance law over the past twelve months.

MOST IMPORTANT DECISIONS OF 2008

The Texas Supreme Court has shown that it is not afraid of hard work or of changing its mind. It made such an impression on the national coverage landscape that Mealey's Litigation Report (Vol. 23, No. 8, Dec. 18, 2008) gave it special kudos in its annual insurance coverage report, and named two of the Texas decisions to the Top Ten coverage opinions issued nationwide. Here's a quick recap of the Court's work this year with a link its original Newsbrief article:

In ***PAJ, Inc. v. Hanover Insurance Company***, 2008 WL 109071 (Tex. 2008), the Texas Supreme Court ruled that PAJ's failure to notify Hanover of a lawsuit against it until four to six months had passed without prejudice to Hanover was an insufficient basis for Hanover to deny PAJ's claim under its CGL policy. In reaching its decision, the court distinguished its earlier decision in *Members Mut. Ins. Co. v. Cutaia*, 476 S.W.2d 278 (Tex. 1972) (holding prejudice not required), pointing out that the Texas Department of Insurance changed the relevant provision in CGL policies in Board Order 23080, which requires a mandatory endorsement to all Texas CGL policies that requires a showing of prejudice when the insured fails to comply with the prompt-notice provision. Texas Ins. Law Newsbrief (Jan. 14, 2008).

On rehearing, in ***Excess Underwriters v. Frank's Casing***, __ S.W.3d __ (Tex. 2008), the Court withdrew its three-year old opinion that initially created a firestorm in the Texas insurance industry (and also lead to great consternation with commercial insureds) regarding the rights of reimbursement that a liability carrier possesses under Texas law when it pays a potentially non-covered claim. But, after keeping the industry waiting for more than two years for clarification since it granted the rehearing, last Friday a deeply divided Court reversed course by withdrawing and disregarding its earlier decision and refused to recognize an exception to the Texas rule that an insurer is only entitled to reimbursement for settling a claim against its insured if (1) the policy provides for it, or (2) the insured has given "clear and unequivocal consent to the settlement and the insurer's right's to reimbursement." Texas Ins. Law Newsbrief (Feb. 4, 2008).

In ***Fairfield Insurance Co. v. Stephens Martin Paving, L.P.***, 2008 WL 400397 (Tex. February 15, 2008), the Court in a limited holding, found "Texas public policy does not prohibit coverage under the type of workers' compensation and employer's liability insurance policy at issue in this case." In reaching its decision that coverage for punitive damages was not against Texas public policy, the court focused on the statutory workers' compensation scheme and accompanying insurance regulations. Texas Ins. Law Newsbrief (Feb. 18, 2008).

In ***National Union fire Insurance Co. v. Crocker***, 2008 WL 400398 (Tex. February 15, 2008), the Texas Supreme Court concluded that "insurers owe no duty to provide an unsought, uninvited, unrequested, unsolicited defense." As such, the insurer had no duty to inform the employee of available coverage or to voluntarily undertake his defense. And, the high court concluded actual knowledge of the suit against him did not establish prejudice as a matter of law. Texas Ins. Law Newsbrief (Feb. 18, 2008).

In ***Unauthorized Practice of Law Committee v. Am. Home Assurance Co., Inc.***, No. 04-0138 (Tex. March 20, 2008), a divided Texas Supreme Court held insurance companies are permitted to use staff attorneys to defend a claim against an insured if the insurer's interest and the insured's interest are congruent, but not otherwise. Texas Ins. Law Newsbrief (Mar. 31, 2008).

In ***Evanston Ins. Co. v. Atofina Petrochemicals, Inc.***, 2008 WL 400394 (Tex. Feb. 15, 2008), the Texas Supreme Court withdrew its earlier opinion (for a second time—*see MDJW Newsbrief* dated February 18, 2008) In its new opinion from last week, the Texas Supreme Court reversed itself as to whether article 21.55 of the Texas Insurance Code applied. The court observed that the claim in this case was a third-party claim involving the insured's liability to another and not a first-party claim falling within the statute, and held that the additional insured was not entitled to attorney fees or damages under article 21.55. Texas Ins. Law Newsbrief (Mar. 31, 2008).

In ***Don's Building Supply, Inc. v. OneBeacon Ins. Co.***, 2008WL 3991187 (Tex., August 29, 2008), as a matter of first impression, the Texas Supreme Court refused to recognize the manifestation rule as applied by various appellate courts in Texas and stated, "occurred means when *damage* occurred, not when *discovery* occurred." Texas Ins. Law Newsbrief (Sept. 8, 2008). *Named to Mealey's Top Ten List.

In ***Ulico Casualty Co. v. Allied Pilots Association***, 2008 WL 3991083 (Tex., August 29, 2008), the Texas Supreme Court rejected the "*Wilkinson* exception" that says an insurer who assumes the insured's defense without reserving its rights with knowledge of facts of non-coverage, waives "all policy defenses, *including those of noncoverage*" or may be estopped from asserting them. The Court held "if an insurer's actions prejudice its insured, the insurer may be estopped from denying benefits that would be payable under its policy as if the risk had been covered, but the doctrines of waiver and estoppel cannot be used to re-write the contract of insurance and provide coverage for risks not insured." Texas Ins. Law Newsbrief (Mar. 31, 2008). *Named to Mealey's Top Ten List.

Editor's Note: We hope that each of our readers had a good holiday season. As we look ahead to 2009, we expect the trial courts and courts of appeal in Texas will continue to struggle with many of the same issues being addressed by other courts around the country. The insurance cases pending before the Texas Supreme Court show promise for another big year in terms of Texas insurance law. Hurricanes Dolly and Ike will lead to many new suits and many new issues. Liability coverage and property coverage issues will remain hot. And, the Texas Legislature will be in session again soon and is already the focus of significant industry attention with the enrollment of several bills that would significantly change the way some insurance claims (including hurricane claims) are handled. As always, the MDJW Newsbrief team will work to keep these cutting edge items and trend-spotting reports in your in-box each Monday.

As we start a new year, I also need to specifically recognize our core team of researchers and writers who make this possible each week. Founding partner David Disiere, along with Jamie Cooper and Andrew Schulz of our Insurance Practice Group, handle the research and writing responsibilities each week. The number of weekend hours they put in each year reading the most recent cases and writing up the summaries are amazing. They represent the best-of-the-best at MDJW and I hope our readers appreciate

their hard work and personal sacrifice to make it possible for each reader to keep updated on the latest developments in Texas insurance law. 2009 will be a busy year for Texas insurers. We will keep reporting and trend-casting for as long as there is news to report and trends to identify. Happy New Year!

Christopher W. Martin
Editor