



The Weekly Update of Texas Insurance News

## TEXAS INSURANCE LAW NEWSBRIEF



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**December 8, 2008**

### **DALLAS COURT LIBERALLY INTERPRETS *DON'S BUILDING SUPPLY* TO DETERMINE DUTY TO DEFEND**

Last Thursday, the Dallas Court of Appeals examined the Texas Supreme Court's recent decision in *Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 2008 WL 3991187 (Tex., August 29, 2008) (stating "occurred means when *damage* occurred, not when *discovery* occurred" and holding that "property damage under this [CGL occurrence-based] policy occurred when the actual physical damage to the property occurred.") and liberally construed the factual allegations so as to trigger the duty to defend.

In *Thos. S. Byrne, Ltd. v. Trinity Universal Insurance Co.*, 2008 WL 5095161 (Tex.App. – Dallas, December 4, 2008), construction and design defects were discovered following completion of an apartment complex. The contractor sought coverage under a subcontractor's CGL policies and the insurer refused to defend based on factual allegations asserting in part that the "problems arose well after [Byrne] completed its operations at the property" and "the building façade experienced leaks after completion due to improper construction" which indicated that the damages claimed either occurred outside the policy period or fell within applicable exclusions. The court disagreed and based on the holdings in *Don's Building Supply*, found that "problems" "appears to mean only visible problems requiring repair, not latent property damage that could have been occurring for a long time."

Stretching the factual allegations to an extreme, the court also stated that "it requires no speculation to recognize that the first instances of water infiltration and resulting property damage potentially occurred the first time it rained after these subcontractors started performing their work." Thus, based on the mere "potential, generated by the open ended allegations" that some leaks and other problems *could have* generated damage before completion; the court held the insurers had a duty to defend.

### **TYLER COURT APPLIES *DON'S BUILDING SUPPLY* TO FIRST PARTY CLAIM REQUIRING INSURER TO PROVE ACTUAL DATE OF LOSS TO VACANCY EXCLUSION**

Applying the third-party liability coverage trigger concept established by the Texas Supreme Court in *Don's Building Supply, Inc. v. OneBeacon Ins. Co.* to a first-party property damage claim, the Tyler Court of Appeals recently held an insurer failed to meet "its burden of proof with regard to the exclusionary vacancy provision" which limited coverage for theft if the building had been vacant for more than 60 days before the loss occurred. In *Central Mutual Ins. Co. v. KPE Firstplace Land, LLC*, 2008 WL 5005535 (Tex. App. – Tyler, November 26, 2008), it was undisputed the property had been vacant for more than 60 days at the time the insured discovered copper coiling from the air conditioners on the roof had been stolen. The dispute centered, however, on the fact that neither party could pinpoint the exact date the actual theft or loss occurred.

The Tyler court treated the vacancy condition as an exclusion, thereby placing the burden of proof to establish the date of loss on the insurer. Relying on *Don's Building Supply*, the court then rejected the insurer's contention that the loss "occurred" when the loss was "discovered" or "manifested itself." And because neither party knew the date the theft occurred, the court upheld summary judgment in favor of the insured.

**Editors Note:** The two decisions summarized above reflect an apparent new trend in Texas courts to stretch the factual allegations in a claim or lawsuit so as to trigger coverage based on the recent decision by the Texas Supreme Court in *Don's Building Supply*. Both decisions are an extreme stretch in our opinion and reflect a misapplication of the third-party liability coverage trigger concepts articulated in *Don's Building Supply*. Both the Dallas and Tyler Courts of Appeal are historically conservative but these decisions are result-oriented conclusions that stray far from the legal pronouncements in *Don's Building Supply*. We will continue to monitor these decisions as the parties evaluate their appellate options and we will report if any significant developments occur.

## **PROPOSED TEXAS INSURANCE LEGISLATION PRE-FILED**

Pre-filed legislation for the 81st Regular Session set to begin January 13, 2009, continues:

- 2009 TX S.B. 264 (NS) - Relating to prior approval of residential property insurance rates of certain insurers.
- 2009 TX S.B. 262 (NS) - Relating to an exemption from public insurance adjuster license requirements for certain persons.
- 2009 TX S.B. 225 (NS) - Relating to the classifications used in rating personal automobile insurance.
- 2009 TX S.B. 150 (NS) - Relating to the determination of the amount of payment on certain claims under residential property insurance policies.
- 2009 TX S.B. 149 (NS) - Relating to the availability of property insurance under the Fair Access to Insurance Requirements (FAIR) Plan.
- 2009 TX S.B. 147 (NS) - Relating to coverage under residential property insurance policies for certain losses incurred because of compliance with an emergency evacuation order.
- 2009 TX S.B. 110 (NS) - Relating to prohibition of the use of credit scoring in underwriting and rating certain personal lines of insurance coverage.
- 2009 TX S.B. 103 (NS) - Relating to rates charged for residential property and personal automobile insurance in certain rating territories.
- 2009 TX S.B. 102 (NS) - Relating to required use by insurers of certain standard insurance policy forms for residential property insurance.
- 2009 TX S.B. 91 (NS) - Relating to regulation of property and casualty insurance rates.

We will continue to monitor these bills and other pending legislation, reporting as significant developments occur. Meanwhile, if you have any questions or would like copies of any of these bills, just let any of our lawyers know.

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