The Weekly Update of Texas Insurance News
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**October 13, 2008**

## FIRST COURT OF APPEALS HOLDS "WHOLLY LACKING NOTICE" SUPPORTS FINDING OF PREJUDICE AS A MATTER OF LAW

Last Thursday, the Houston First Court of Appeals followed the Texas Supreme Court's opinion in *National Union Fire Ins. Co. v. Crocker*, 246 S.W.3d 603 (Tex. 2008) (Newsbrief February 18, 2008), enforcing Maryland Casualty's policy's notice and settlement-without-consent provisions against an additional insured who did not give notice of its claim until after it settled the underlying lawsuit in *Maryland Cas. Co. v. American Home, et al.*, slip op. (No. 01-07-00711-CV. It was undisputed that the notice occurred *after* the settlement occurred. But, American Home argued Maryland had not shown that it was actually prejudiced by the notice. Maryland argued it was deprived of any opportunity to adjust, defend, or settle the claim. Relying on *Crocker*, the Houston court distinguished late-notice situations from situations involving "wholly lacking notice" like *Crocker* and the case at bar. The Court then determined that Maryland *had* established prejudice as a matter of law under the facts presented, and reversed and rendered judgment for Maryland on its policy defenses.

## APPLICANT CHARGED WITH KNOWLEDGE OF THE POLICY PROVISIONS AS A MATTER OF LAW CANNOT REASONABLY RELY ON AGENT'S STATEMENTS TO THE CONTRARY

Also on Thursday, the Eastland Court of Appeals held an applicant for health insurance coverage was not entitled to rely on an agent's misrepresentation in the face of written documentation clearly excluding coverage. *Jeffries v. Pat A. Madison, Inc.*, __ S.W.3d __, 2008 WL 4516647 (Tex. App.—Eastland Oct. 9, 2008). The applicant had purchased three consecutive short-term medical group insurance policies through the agent. During the second policy period, the applicant was diagnosed with a thyroid condition that required surgery. Before buying the third policy and without yet having the surgery, the applicant met with the agent. The agent told the applicant not to switch carriers because the diagnosis would be treated as a pre-existing condition. When asked about the current carrier's response, the agent said it "wouldn't be very nice of them but that [she] would have to pay an additional $1,000 deductible." The court held the statement was actionable, but could not be reasonably relied upon in the face of the applicant being charged with knowledge as a matter of law of the actual policy provisions. The court affirmed summary judgment for the agent.

# MOTION FOR REHEARING TO CHALLENGE SUPREME COURT RULING IN *DON'S BUILDING SUPPLY* REFUSING TO RECOGNIZE MANIFESTATION TRIGGER RULE FOR LATENT PROPERTY DAMAGE

Arguing that the Texas Supreme Court set aside twenty years of established jurisprudence applying the manifestation trigger rule to latent property damage claims in its opinion in *Don's Building Supply, Inc., v. OneBeacon Ins. Co.*, 2008WL 3991187 (Tex., August 29, 2008) (Newsbrief September 8, 2008), OneBeacon has filed a motion for rehearing. In the initial opinion, the Texas Supreme Court answered a certified question from the Fifth Circuit to determine when property damage "occurs" under a CGL occurrence-based policy. The 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." The court held that the "property damage under this policy occurred when the actual physical damage to the property occurred." OneBeacon also argues in its motion for rehearing that the opinion incorrectly interprets the policy's insuring language and the opinion conflicts with the court's ruling in *Mid-Continent v. Liberty Mutual*, 236 S.W.3d 765, 773-76 (Tex. 2007) (Newsbrief October 15, 2007).

We will continue to watch the developments in this case and we will report on events surrounding the Court's landmark ruling as they develop.