The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TEXAS SUPREME COURT FINDS "ACTUAL INJURY" OR "INJURY-IN-FACT" TRIGGERS PROPERTY DAMAGE COVERAGE UNDER CGL OCCURRENCE-BASED POLICY

As a matter of first impression, the Texas Supreme Court recently answered a certified question from the Fifth Circuit to determine when property damage "occurs" under a CGL occurrence-based policy. In *Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 2008WL 3991187 (Tex., August 29, 2008), the insured sold and distributed a synthetic stucco product (EIFS) which was installed on homes during the policy period. Years later, the effects of moisture penetration resulted in lawsuits against the insured. But the homeowners alleged that the water penetration began within six months after the EIFS was applied. Confronted with conflicting appellate opinions, the Fifth Circuit asked the Texas Supreme Court to provide "the proper rule under Texas law for determining the time at which property damage occurs for purposes of an occurrence-based commercial general liability policy?"

To address the issue, the Court examined Texas case law applying various trigger theories in the liability context and rules of insurance contract construction. Here, the policy defined property damage and then stated that "all such loss shall be deemed to occur at the time of the "occurrence" that caused it." 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."

TEXAS SUPREME COURT CLARIFIES *WILKINSON* EXCEPTION TO THE GENERAL RULE THAT COVERAGE CANNOT BE CREATED BY WAIVER AND ESTOPPEL

Recently, the Texas Supreme Court considered "whether an insurer's contractual coverage under a claims-made policy can be expanded by the doctrines of waiver and estoppel to coverage risk not otherwise within the policy coverage." In *Ulico Casualty Co. v. Allied Pilots Association*, 2008 WL 3991083 (Tex., August 29, 2008), the insured was served with suit papers during the policy period but failed to get them to the insurer until one month later and eleven days after the policy expired. Five months later, the adjuster wrote the insured's attorney and told them the insurer would reimburse reasonable and necessary defense costs. The trial court later granted summary judgment in the insured's favor and the insured sought reimbursement for $635,000 in defense costs. The trial court found that the insurer waived the coverage defense and was estopped from asserting that the policy did not cover the defense costs.

The Texas Supreme Court examined Texas case law addressing the general rule that coverage cannot be created by waiver and estoppel was founded. Under Texas law, the "*Wilkinson* exception" 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. In last week's decision, the Texas Supreme Court rejected *Wilkinson's* statement that noncoverage of a risk could be waived and therefore "create coverage for risk not contractually assumed." 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." Here, the claims made policy did not provide coverage for losses first reported outside the policy period, the trial court's judgment was reversed and judgment was rendered that the insured take nothing.

MULTIDISTRICT LITIGATION PANEL GRANTS INSURER'S REQUEST TO TRANSFER HURRICANE RITA CASES TO A SINGLE COURT TO COORDINATE PRE-TRIAL PROCEEDINGS

Last Friday, the Texas Multidistrict Litigation Panel held that multiple lawsuits with virtually identical allegations against several insurers arising from Hurricane Rita were "related" which enabled them to transfer the cases to a single pretrial judge. In *In re Delta Lloyds Insurance Company of Houston, Texas*, No. 08-0142, *In re Hurricane Rita Homeowners Claims*, No. 08-0208, and *In Re Southeast Surplus Underwriters General Agency, Inc.* No. 08-0427, all of the plaintiffs were represented by the same law firm, The Mostyn Law Firm (from Houston and Beaumont), and in virtually identical pleadings, alleged unfair claim practices, breach of contract, fraud and bad faith arising out of the insurers' handling of Hurricane Rita claims. The discovery requests were found to be voluminous and nearly identical. Finding that the transfer of the cases would serve the goals of Rule 13 to "(1) serve the convenience of the parties and witnesses and (2) promote the just and efficient conduct of litigation," the Panel found two of three motions, involving sixteen of the twenty-one lawsuits, were "related" so as to warrant transfer and consolidation of the cases for the purposes of addressing discovery and other pre-trial matters.

Editor's Note: This is the first group of individual insurance bad faith cases to be consolidated into an MDL in Texas as far as we know.