The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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INSURED CANNOT TRIGGER REPLACEMENT COST COVERAGE BY PURCHASING COMMERCIAL OFFICE BUILDING TO "REPLACE" DESTROYED APARTMENT COMPLEX

Last Wednesday, in a case of first impression, the Dallas Court of Appeals considered whether an insured could satisfy the "replacement" provision of a commercial property policy by purchasing a new building instead of "repairing or replacing" the insured building damaged in a covered loss. Here, the insured's apartment complex was damaged by fire. The insured then "replaced" the complex by purchasing an interest in a commercial office building and submitted a claim for "replacement cost coverage." After the insurer denied the "replacement" claim, the insured sued for a declaratory judgment and breach of contract in *Fitzhugh 25 Partners, L.P. v. KILN Syndicate KLN 501, et al.*, 2008 WL 3854536 (Tex. App.—Dallas Aug. 20, 2008). Finding that "replacement" is an undefined term in the commercial property policy, the Dallas court applied standard rules of contract construction to determine the Policy requires "substitution" of an asset that is "functionally similar" to the asset being replaced. The court disagreed with the insured's contention that it could replace the destroyed property with *anything* that it liked, holding that the insured's purchase of a commercial office building did not "replace" the destroyed apartment complex. In dicta, however, the court did opine that the insured could "replace" the destroyed property by purchasing different buildings at a different site devoted to the same use as the prior property.

FIFTH CIRCUIT DETERMINES PRIMARY INSURANCE POLICIES CANNOT BE STACKED TO INCREASE COVERAGE AVAILABLE TO INSURED TO RESPOND TO NURSING-HOME NEGLIGENCE CASE

On Friday, the Fifth Circuit determined that claims for nursing-home negligence constitute a single occurrence under a health-care liability policy providing coverage for a "medical incident." In *North Amer. Spec. Ins. Co. v. Royal Sur. Lines Ins. Co., et al.*, 2008 WL 3877235 (5th Cir. Aug. 22, 2008), North American sued Royal in an effort to "stack" underlying policy limits spanning multiple policy periods so as to increase the amount of primary coverage available to the insured. North American argued for stacking as to indemnity, defense costs, and additional separate coverages – commercial and health liability – within a single policy. While North American conceded that the Texas Supreme Court's anti-stacking rule as to a single indivisible injury from *American Phys. Ins. Exch. v. Garcia* (876 S.W.2d 842, 854-55 (Tex. 1994)) remains valid, it contended that the underlying claims were multiple, discrete covered events that would fall outside *Garcia*. To resolve the issue, the Fifth Circuit turned to Royal's Policy definition of a "medical incident." To answer the indemnity claim, the court determined that the Policy defined the negligence claims as a single incident such that *Garcia*'s anti-stacking rule applied. Turning to the defense costs, the court did not find North American's argument that the "eroding" nature of the Policy's should give rise to a different result. Lastly, the court held that the nature of the claims

could not be artfully pled to avoid being cast as medical negligence claims thus falling under the health liability coverage.

TRIAL COURT NOT REQUIRED TO ENTER FINDINGS OF FACT OR CONCLUSIONS OF LAW ON ORDER GRANTING INTERPLEADER AND DISMISSING INSURER

On Thursday, the Dallas Court of Appeals held a trial court properly disposed of an interpleader of uninsured motorists proceeds (UIM) after a dispute arose between the claimant and her attorneys. The claimant contended that the trial court improperly granted the interpleader and dismissed the insurer without findings of fact or conclusions of law. The Dallas court determined that the claimant was not entitled to findings of fact or conclusions of law because the trial court granted the interpleader without hearing evidence in a full trial on the merits. In resolving the claims to the interplead funds, the Dallas court upheld the jury's award of the one-third contingency fee and attorneys fees to the claimant's attorney.