The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TRANSFER OF POSSESSION AND CONTROL DETERMINES AUTO OWNERSHIP FOR INSURANCE PURPOSES

Last Tuesday, the Houston Court of Appeals affirmed summary judgment in favor of an auto dealer's insurer finding no duty to defend or indemnify a purchaser who had taken possession of the vehicle, but had not yet completed the purchase transaction when he was involved in an auto pedestrian accident. In *Trull v. Service Casualty Ins. Co.,* 2008 WL 2837775 (Tex. App. – Houston, July 22, 2008), the purchaser signed a purchase order agreement and took possession of a vehicle from Baker-Jackson Nissan. The next day, the purchaser was driving the vehicle and hit a pedestrian. A few days later, he returned to the dealership and completed the remaining paperwork and arranged for financing to complete the sale. Baker-Jackson's insurer refused to defend the purchaser and a default judgment in excess of $500,000 was taken against him. The trial court granted summary judgment in favor of the insurer and this appeal followed.

On appeal, the court observed that the issue of ownership at the time of the accident would determine whether the auto dealer's insurance extended to the purchaser as a permissive user, and if he was the owner no coverage would be afforded. The court examined Texas law noting that "the right to possess and the power to control" a vehicle's use "determines its ownership for insurance purposes." The court found that both possession and control had been transferred "pursuant to the parties' intent to effect the sale," and thereby determined ownership for insurance purposes. Summary judgment in favor of the auto dealer's insurer finding no coverage was affirmed.

COURT FINDS "CANCELLATION OF PRIOR INSURANCE" PROVISION IS AMBIGUOUS

Last Monday, the U.S. District Court for the Northern District of Texas addressed an insurance coverage dispute involving crime insurance policies and found that a "cancellation of prior insurance" provision was ambiguous and coverage was afforded under the current and prior policy for the losses sustained. In *Great American Ins. Co. v. AFS/IBEX Financial Services, Inc.* 2008 WL 2795205 (N.D.Tex., July 21, 2008), Charles McMahon Insurance Agency, owned by Charles McMahon, Sr., contracted to arrange for insurance policy financing. Charles McMahon, Jr. who worked for the agency, submitted false applications, endorsed the checks received and deposited the funds in a personal account. The insurer filed a declaratory judgment action asserting several policy defenses and also asserted that a prior policy did not apply.

Addressing the cancellation of prior insurance provision which stated that "by acceptance of this policy you give us notice cancelling your prior policy", the court found that because the policy failed to define "cancel" or "cancellation" it was possible that the term had "retroactive as well as prospective effect" and

was therefore ambiguous. The court also rejected the insurer's argument that because Charles McMahon, Jr. endorsed the checks "Charles McMahon Insurance Agency" and his name was part of the endorsement, the signature was not a forgery as defined in the policy. In rejecting the argument, the court found that the insurer's construction of the forgery definition would yield "unreasonable and arbitrary results." The court found that the losses fell within the scope of the forgery coverage of both policies and issues of material fact remained with respect to the defendant's claims for attorney fees and improper claims handling.

FACT ISSUES EXIST ON UM INSURER'S LATE NOTICE POLICY DEFENSE; EMOTIONAL INJURY IS NOT "BODILY INJURY"

Last Monday, the U.S. District Court for the Northern District of Texas denied summary judgment to an insurer asserting a "late notice" policy defense when the insured contacted the insurer five months after the final judgment against the other driver and his employer became final. In *Lizanetz. v. St. Paul Guardian Ins. Co.*, 2008 WL 2815561 (N.D.Tex., July 21, 2008), the insured, spouse and two children were involved in an accident with a truck whose insured filed for bankruptcy and whose insurer went into receivership and was declared insolvent. Five months after a default judgment became final, the insured notified their insurer of their intent to file a UM claim.

The court rejected the insurer's stated examples of how they were prejudiced as "speculative and conclusory assertions" "insufficient to establish prejudice as a matter of law." Because the two children in the insured vehicle only claimed "emotional trauma" and no physical injuries, however, the court ruled as a matter of law that the injuries claimed by the children failed to trigger coverage for them under the policy. The late notice defense and the parents' injury claims were allowed to proceed.