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FIFTH CIRCUIT RULES KNOWING VIOLATION OF THE DTPA COULD STILL CONSTITUTE AN "OCCURRENCE" UNDER A COMMERCIAL UMBRELLA POLICY

Last Monday, a three-judge panel of the Fifth Circuit considered one of the implications of the Texas Supreme Court's landmark decision last year in *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 22 S.W.3d 1 (Tex. 2007), in *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Puget Plastics Corp.* --- F.3d ----, 2008 WL 2487054 (5th Cir. 2008). In doing so, the Fifth Circuit considered a deceptively simple question: could an insured's knowing violation of the Texas Deceptive Trade Practices Act still be an "occurrence" under a commercial umbrella policy? In the case at hand, the panel considered National Union's declaratory judgment action that it had no duty to indemnify its insured after the jury in the underlying case awarded the claimant $36 million against the insured, having found a "knowing" violation of the DTPA. National Union contended the insured's actions, which the jury in the underlying suit found to be "knowing," could not be an "occurrence" under the policy because it could not constitute an "accident." Relying on *Lamar Homes*, the Fifth Circuit stated the "knowing" finding by the jury in the underlying lawsuit did not control the coverage issue because "knowing" only meant "deliberate." And, as applied to the case at bar, the Fifth Circuit characterized *Lamar Homes's* holding that a "deliberate" act *could still be an "occurrence"* unless the injury was highly probable or the insured intended or expected the harm that was suffered. The Court explicitly rejected National Union's argument that a "knowing" violation of the DTPA could never constitute an "occurrence." The panel went on to instruct that the coverage lawsuit should include evidence and issues that were not adjudicated in the underlying lawsuit, such as whether the injury was highly probable, expected or intended.

TYLER COURT OF APPEALS OPINES ON BASIC *STOWERS* REQUIREMENTS: A *STOWERS* DEMAND MUST OFFER TO RELEASE THE SAME PARTY FROM WHOM THE ASSIGNMENT OF THE *STOWERS* CLAIM IS LATER TAKEN

Last Wednesday, the Tyler Court of Appeals reversed and rendered judgment in a *Stowers* dispute for Home State County Mutual Insurance Company on cross motions for summary judgment in *Home State County Mut. Ins. Co. v. Horn*, 2008 WL 2514332 (Tex.App.-Tyler 2008, n.p.h.). George Horn was a passenger in car driven by Eric Hulett and owned by Hulett's sister, Shirley Berry. Horn was injured and Hulett was killed in a single-car accident. Horn sent a time-limited demand to Berry's insurer, Home State, for Berry's auto policy limits, offering to fully release Home State's insured, Berry. Horn contended that Home State did not timely accept and then later obtained a $10 million judgment against Hulett's Estate. Horn then took an assignment from Hulett's Estate to pursue a *Stowers* claim. Looking to the terms of the demand letter, the Tyler court found that the demand did not create a *Stowers* duty as to

Hulett's Estate because the initial demand only sought to release Berry, not Hulett's Estate. The court was unpersuaded by Horn's argument that later negotiations with Home State supplemented the initial demand to include releases for both Hulett's estate and Berry. The court also rejected Horn's contention that Home State's attorney's comments at oral argument on the summary judgment motions were admissions on the issue. Because Horn produced no evidence that a *Stowers* demand was made against Hulett's Estate, the entity from whom Horn had taken the *Stowers* assignment, the Tyler court reversed and rendered judgment for Home State.

TEXAS SUPREME COURT HOLDS "CHAPTER 33 PROPORTIONATE RESPONSIBILITY SCHEME" APPLIES TO U.C.C. ARTICLE 2 BREACH OF IMPLIED WARRANTY CLAIM ARISING IN TORT

On Friday, the Texas Supreme Court determined that the proportionate responsibility scheme in Chapter 33 of the Texas Civil Practices and Remedies Code applied to a breach of implied warranty claim for damages for personal injury or wrongful death in *JWC Electronics, Inc. v. Garza,* et al., Cause No. 05-1042 (June 27, 2008) (slip opinion). Garza sued JWC and others when her son was found dead in his jail cell hanging from the phone cord in his cell. JWC had installed the phones in the cells for inmate use under a contract with the jail. The jury found for Garza on claims of negligence, misrepresentation, and breach of implied warranty. But the jury attributed sixty percent (60%) of the fault to the decedent. JWC moved for judgment on the liability finding because a claimant's own proportion of fault cannot exceed 50% under Chapter 33. The trial court denied JWC's motion, and entered judgment for Garza against JWC over its objections. The Corpus Christi Court of Appeals modified the judgment against JWC to include only the breach of implied warranty claim finding that Chapter 33 did not apply to that claim.

In deciding the case, the Texas Supreme Court first considered Chapter 33's legislative history. It noted that in the 1987 version, the text had specifically included breach of implied warranty. But the 1995 version, instead of listing individual causes of action, states that it applies to *all claims* based in tort. The court then noted that a breach of implied warranty claim sounds in tort, meaning that Chapter 33 must apply to it. The court next considered whether applying Chapter 33 to a UCC Chapter 2 cause of action would disrupt the UCC's purpose. It noted that Chapter 2 does not have its own comparative fault scheme, unlike UCC Chapter 3. The Court then reversed and rendered judgment for JWC. A concurring opinion discussed the proper way to submit the proportionate responsibility question to the jury.