The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.
Principal Office 808 Travis, Suite 1800 Houston, Texas 77002 713.632.1700 FAX 713.222.0101
111 Congress Avenue, Suite 1070 Austin, Texas 78701 512.610.4400 FAX 512.610.4401
900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

June 9, 2008

NON-WAIVER AGREEMENT PROTECTED INSURER'S RIGHT TO SEEK REIMBURSEMENT DESPITE DELAY IN RAISING COVERAGE QUESTION

Last Monday, a three-judge panel of the Fifth Circuit considered an apportionment dispute arising out of a non-waiver agreement executed in connection with the settlement of an underlying wrongful death suit. In *American International Specialty Lines Inc. Co. v. Res-Care, Inc.*, __ F.3d __ (5th Cir. 2008), American sought reimbursement from Res-Care under the non-waiver agreement for the uncovered claims included in its $9 million settlement of the underlying claim, asking the district court to apportion the settlement costs among covered and uncovered claims. The panel determined the non-waiver agreement satisfied the conditions set forth by the Texas Supreme Court for reimbursement. Turning to the merits, the panel determined the district court properly considered all evidence relevant to the settlement decision, and was not limited to considering only the evidence admissible in the underlying suit. Res-Care sought to defend American's coverage claims using waiver and estoppel because American waited 18 months after coverage issues were apparent before raising a coverage question. The panel further held Res-Care waived the defense by entering into the non-waiver agreement, and the court found no merit in Res-Care's contention that it was "forced" to enter into the non-waiver agreement. Lastly, the panel found Texas public policy did not provide coverage for punitive damages in this instance given the circumstances and nature of the avoidable conduct that caused the injuries.

FIFTH CIRCUIT FINDS COVERAGE FOR INSPECTION OF LADDER DESPITE POLICY'S PROFESSIONAL SERVICES EXCLUSION AND TESTING OR CONSULTING ERRORS AND OMISSIONS EXCLUSION

Also on Monday, another three-judge panel of the Fifth Circuit held claims against an insured for personal injury caused by the failure of a petroleum storage tank ladder, which the insured was responsible for inspecting, were covered despite the existence of the Professional Services Exclusion and the Testing or Consulting Errors and Omissions Exclusion. As to the first, the panel in *Davis-Ruiz Corp. V. Mid-Continent Cas. Co.*, Cause No. 07-40727 (5th Cir. June 2, 2008) (slip opinion), determined the Professional Services Exclusion did not apply because the schedule where professional services should have been described was left blank, and the declarations page listed "radi[o]grapher program" as the business description and "pipe testing and consultant." Because the inspection of the ladder did not fall within either description, the court held that the exclusion did not apply. In considering the second, the panel found that the errors and omission exclusion would have read a Professional Liability endorsement

out of the policy. The panel determined the policy's coverage would, thus, be illusory. The panel then adopted the insured's reading of the policy, holding that the errors and omission exclusion only applied to those services that do not rise to the level of "professional" so as to maintain the integrity of the Professional Liability endorsement.

TWO POLLUTION EXCLUSION CLAUSES HELD UNAMBIGUOUS AND ENFORCED TO EXCLUDE COVERAGE

In a pair of decisions released last Monday, a district court in the Western District of Texas and a three-judge panel of the Fifth Circuit considered the application of Pollution Exclusion Clauses to coverage disputes before them. In the first, *Nautilus Ins. Co. V. Country Oaks Apartments, Ltd.*, __ F. Supp.2d __, 2008 WL 2284992 (W.D. Tex. 2008), the district court granted summary judgment to Nautilus. The district court considered whether the build up of carbon monoxide, which was released by a properly functioning furnace, in an apartment because of a covered roof vent was excluded. The district court held it was an "emission" of a "pollutant" involving "but for" causation as required by the policy, and that there was no reason for the court to examine the parties' reasonable expectations given the policy's unambiguous language. In the second opinion, *Noble Energy, Inc. v. Bituminous Cas. Co.*, __ F.3d __, 2008 WL 2232085 (5th Cir. 2008), the Fifth Circuit also found the exclusion was unambiguous and that the plaintiff's allegations, under the eight-corners rule, fell within the exclusion. The allegations were that escaping vapors from oilfield waste materials caused an explosion and fire at a recycling facility. The Court also refused to consider the parties' reasonable expectations as extrinsic evidence.

DALLAS COURT HOLDS THAT INSURER'S FAILURE TO ACCEPT *STOWERS* DEMAND ACCORDING TO ITS TERMS MAY HAVE CONSTITUTED COUNTEROFFER

Last Wednesday, the Dallas Court of Appeals issued an opinion of note for insurers responding to *Stowers* demands in Texas. In *French v. Henson*, 2008 WL 2266119 (Tex. App—Dallas 2008, n.p.h) (not designated for publication), the Dallas Court considered whether Henson's liability insurer had successfully created a binding settlement agreement with French. French sent a demand for policy limits, offering an unconditional release to Henson and also offering to assume responsibility for all medical bills and subrogation interests. Henson's insurer sent a release that included Henson and itself along with three checks - one to French and his wife, one to French and a lab, and one to French and a medical provider. French refused to sign the release, did not cash the checks, and sued Henson. Reviewing a summary judgment granted to Henson on the settlement agreement, the court held that a question of fact existed as to whether Henson's liability insurer's actions constituted a counteroffer because it included the co-payees and the broad release language and the appellate court remanded the case to the trial court for further proceedings. The court never named Henson's insurer.

ARKANSAS SUPREME COURT REFUSES TO RECOGNIZE REIMBURSEMENT RIGHTS FOR INSURERS ON UNCOVERED CLAIMS

The Arkansas Supreme Court accepted a certified question from the Eastern District of Arkansas to consider whether "[an] insurer may rely on its reservation of rights letter to recoup its attorney's fees and costs" after winning the declaratory judgment action. In its opinion delivered on May 29, 2008, the high

court of Arkansas held that insurers could not recover attorney's fees and costs citing the general rule followed in many jurisdictions holding that attorney's fees are not recoverable unless authorized by statute. Before reaching its decision, the court surveyed the decisions of other states. It found that the majority rule was to allow reimbursement for uncovered claims and the minority rule, which Texas follows, does not allow reimbursement unless there is an express agreement authorizing reimbursement. The court did not discuss the insurance policy language at issue or the public policy concerns arising from the issue with which other courts have struggled. The dissent noted that the "rule" relied upon by the majority only applies to situations involving prevailing parties in the actual litigation, not to a claim for reimbursement arising under an insurance policy. And, the dissent noted that liability insurers in Arkansas *may* never be able to recoup costs. As the majority opinion reads, an insurer could only recoup its costs if an Arkansas statute permitted it. Because the court stopped short of discussing the applicable policy language but did reject the availability of statutory help, the ability of a liability insurer to recover attorney's fees and costs under Arkansas law after winning a coverage action is in great doubt.