The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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REASONABLE BELIEF AS TO PERMISSION TO USE A VEHICLE MUST BE "OBJECTIVELY REASONABLE" TO AVOID EXCLUSION IN STANDARD TEXAS AUTO POLICY

Last Friday, a federal district court for the Northern District of Texas resolved a question of first impression when it determined that the standard Texas auto policy's "reasonable belief" exclusion requires an objective test. The dispute in *Empire Indem. Ins. Co. v. Allstate County Mut. Ins. Co.*, Slip Copy, 2008 WL 1989452 , N.D.Tex. May 08, 2008), pitted two insurers against each other over which policy – a commercial liability policy or standard Texas auto - was responsible for defense and indemnify costs incurred when a repossession company employee caused a car wreck while street racing a repossessed car. Empire insured the repossession company; Allstate insured the car through the former owner. Allstate contended that the "reasonable belief" exclusion applied. The reasonable belief exclusion applies when any person uses "a vehicle without a reasonable belief that that person is entitled to do so."

Allstate offered the underlying plaintiffs' pleadings as support for its position. The underlying plaintiffs, who were injured by the employee, had alleged that the employee's actions involved an extreme degree of risk and that the employee was acting with conscious disregard for others. Empire offered extrinsic evidence to show the employee had permission to use the repossessed car and the employee's subjective belief based on the permission. While the court noted the eight-corners rule, it did not disregard the extrinsic evidence. Instead, by adopting the objective test, the court held that the subjective belief must be objectively reasonable. Because the Court found the driver's testimony failed this test, Allstate's reliance on the "reasonable belief" exclusion was upheld and Allstate won.

Editor's Note: this is an important case because of the ease with which some claimants have abused the reasonable belief/permissive use test. By imposing an objective reasonability standard on an otherwise subjective test, this Court recognized the need to more intensely scrutinize some drivers alleged belief that their use of the vehicle was permissible. It also demonstrates the Court's creative use of the eight-corners rule in balancing pleadings from an underlying tort case and the testimony of the parties in a coverage case.

TRIAL COURT IMPROPERLY PROHIBITED PARTIES FROM INTERVIEWING JURORS DISCHARGED AFTER A MISTRIAL IN FIRST-PARTY INSURANCE CASE

On Thursday, the Dallas Court of Appeals determined that a trial court in Collin County had abused its discretion by entering an order prohibiting post-trial juror interviews in *In re State Farm Lloyds*, __

S.W.3d __ 2008 WL 1960834 (Tex. App.—Dallas 2008, orig. proc.) In the underlying case, State Farm was defending breach of contract and extra-contractual claims. After a full trial on the merits, a jury was unable to agree on a verdict. The court declared a mistrial and discharged the jury, but ordered the parties and their lawyers not to interview the jurors. The trial court stated: "The reason I don't want you to talk to the jurors is because I do think it will have irreparable harm to the plaintiffs in this case and the defense. I don't want one side or the other talking to the jurors and then basing their strategy later on for the case which may or may not help resolve it or it goes in a different direction." State Farm filed a mandamus with the Dallas Court of Appeals seeking to interview the jurors to determine why they couldn't reach a verdict. In deciding this mandamus, the Dallas Court of Appeals looked to the Texas Constitution's provisions for the freedom of speech and the Texas Supreme Court's prior instructions that post-verdict interviews with jurors are helpful. So, before the re-trial of the case, State Farm will have the opportunity to interview the jurors who failed to reach a verdict in the first trial.

Editors Note: Our law firm had the privilege of representing State Farm in this case as co-counsel before the trial court and the Dallas Court of Appeals. We want to congratulate State Farm and its Dallas counsel Armando De Diego on this victory for Texas insurers.

TEXAS SINK HOLES AND COVERAGE

The small Texas community of Daisetta in Liberty County (about 60 miles northeast of Houston) found itself in the center of national news last week when a huge sink hole developed and began "swallowing" oil field equipment, buildings, trees, and vehicles. Now home to about 1,000 residents, the small rural town of Daisetta enjoyed its heyday as an oil boom town – the signs of which dot the surrounding landscape. Geologically, it sits over oil deposits and a large salt dome. The salt dome's collapse has apparently caused the sink hole to develop. The Liberty County Office of Emergency Management reported that there are about 100 homes in the vicinity of the 900-foot-wide sink hole, and that it may be months before the sink hole can be declared stable.

Although we are not aware of any property insurance claims that have been made to date, any claim for sink-hole damage would obviously have to be evaluated upon the particular facts of the claim and the particular policy at issue. For example, the standard Texas Homeowners' Policy contains a provision for coverage for structural collapse, but it excludes damages caused by "earth movement." Many commercial property policies have a similar exclusion. We have found no cases in Texas in which a Texas court has determined whether damages caused by a sink hole were covered by insurance, but it appears that the "earth movement" exclusion *may* result in such claims being excluded. The coverage lawyers with our firm certainly enjoyed debating the issue over the last week due to the national media exposure of the Daisetta sink hole, but we will continue to monitor the insurance implications of this condition and report on any legal developments of interest to Texas insurers.

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