The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TEXAS SUPREME COURT HOLDS RIGHT TO ARBITRATION WAIVED

The Supreme Court of Texas has considered arguments on numerous occasions that a party has waived an arbitration clause by "substantially invoking the litigation process to the other party's detriment or prejudice" but had never before found a waiver, until last Friday. In *Perry Homes v. Cull*, 2008 WL 1922978 (Tex. May 2, 2008), the Cull's purchased a home for $233,730 and a home warranty policy that contained an arbitration provision. After having numerous problems with the home and no satisfaction from the builder or the warranty, the Cull's filed a lawsuit. The defendants sought to invoke the arbitration provision and the homeowner vigorously and successfully fought the effort. After litigating the matter for 14 months and conducting extensive discovery, the Cull's changed their minds and invoked the arbitration provision just four days before trial. The arbitrator awarded $1.3 million in damages including punitive damages, mental anguish and attorney fees. The defendants sought to overturn the award arguing that arbitration had been waived.

The Texas Supreme Court has "said on many occasions that a party waives an arbitration clause by substantially invoking the litigation process to the other party's detriment or prejudice." They also observed that there is a "strong presumption against waiver" and the "hurdle is a high one" but they had never before found waiver. Applying a totality-of-the-circumstances test" and looking at numerous factors in this case, however, the Court said it believed the hurdle was met in this instance. The Court also refused to reconsider its position that "prejudice is a necessary requirement of waiver by litigation conduct." Applying the Federal Arbitration Act's definition of "prejudice" as referring to the "inherent unfairness" of forcing one of the parties to litigate an issue and then later seeking to arbitrate that same issue, the Court found the Cull's could not have it both ways, reversed the arbitration award, and remanded the case to trial.

COURT AFFIRMS EXEMPLARY DAMAGES AWARD AGAINST INSURED

Last Wednesday the Austin Court of Appeals affirmed an award of $5,077,390 in compensatory damages and $2,500,000 in exemplary damages against an insured based on the insured's misrepresentations of the companies' payroll to evade an experience rating system and fraudulently induce the insurer into issuing insurance policies. In *Quintinsky v. Texas Mutual Ins. Co.*, 2008 WL 1911319 (Tex.App. – Austin April 30, 2008), the insured used several companies, different addresses, false financial reports and other methods to understate payroll to pay lower premiums. The court rejected the insured's argument that the insurer's claims "sounded only in contract" observing that "tort damages are recoverable for a fraudulent inducement claim irrespective of whether fraudulent representations are later subsumed in a contract or whether the plaintiff only suffers an economic loss related to the subject matter of the contract." The judgment, including exemplary damages, was affirmed.