The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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INSURANCE CODE DOES NOT REQUIRE INSURERS TO FILE INSTALLMENT PLAN CHARGES WITH THE TEXAS DEPARTMENT OF INSURANCE

Last week the Austin Court of Appeals rejected plaintiffs' claims arguing that Texas Insurance Code section 912.201, formerly article 17.25 section 6, requires that charges to policyholders electing to pay premiums in installments be filed with the Department of Insurance. In *Farmers Texas County Mutual Insurance Company v. Romo*, --- S.W.3d ----, 2008 WL 1753566 (Tex.App.-Austin April 15, 2008), Romo sued Farmers and USAA alleging their premium charges were not authorized by the Insurance Code, violated the filed-rate doctrine, and breached the insurance contract. The plaintiffs also sought to certify a class of similarly situated policyholders.

The plaintiffs' claims spanned both the prior version and the recodified version of the statute thus requiring the court to consider the claims under both versions. The decision was complicated by changes to the statutory language made during the recodification process. The court noted that changes due to recodification must be given effect even if they were intended to be nonsubstantive. In reaching its decision, the court construed the policy language under the standard construction rules, considered the statutory history and legislative intent, and the Department of Insurance's regulatory scheme.

Editors Note: Our law firm had the privilege of representing USAA in this case before the Austin trial court and the Austin Court of Appeals. We want to congratulate both Farmers and USAA on this significant victory for Texas insurers.

FIFTH CIRCUIT COURTS CONTINUE TO TANGLE WITH TEXAS' EIGHT-CORNERS' RULE

In a pair of decisions – one by a three-judge panel of the Fifth Circuit and one from the Houston Division of the Southern District – the courts of the Fifth Circuit once addressed Texas' eight-corners rule in coverage disputes arising out of liability claims. In the first decision issued last Tuesday, *United National Insurance Company v. Hydro Tank, Inc.*, --- F.3rd ---, 2008 WL 1799963 (5th Cir. April 22, 2008), the panel amended its previous opinion after considering a petition for rehearing. Specifically, the panel considered the interpretation of "and/or" as it appeared in the plaintiff's petition and how such language impacted coverage. After setting forth the standard for liberal interpretation of the pleadings, the court limited the analysis by stating that the rule "does not require us to adopt unreasonable interpretations of plain language, ignore ordinary usage, or set aside the basic tools of construction."

In the second, *BJB Construction, LLC v. Atlantic Casualty Insurance Company*, Slip Copy No. H-07-0157, 2008 WL 1836384 (S. D. Tex. April 23, 2008), issued last Wednesday, the federal District Court was undeterred by the Texas Supreme Court's decision in *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305 (Tex. 2006). The court refused to construe the petition's *silence* as to the plaintiff's employment status to mean that it was *possible* the plaintiff was an employee, thus impacting coverage. In the face of that silence, the court considered extrinsic evidence of the issue, including deposition testimony admitting that the plaintiff was not an employee.

NEW MEXICO HIGH COURT HOLDS ACTUAL NOTICE FROM ANY SOURCE TRIGGERS DUTY TO DEFEND

In what can only be called a significant turn around, the New Mexico high court overruled twenty-four years of precedent recently when it announced that actual notice from any source to an insurer of a lawsuit against its insured triggers the duty to defend. In *Garcia v. Underwriters at Lloyd's, London*, --- P.3d ----, 2008 WL 943502 (N.M. 2008), the counsel for the plaintiffs, wrongful-death beneficiaries, provided the insurer with a copy of the filings in a related probate proceedings. The insurer issued a reservation of rights letter, and Lloyd's New York counsel responded to the probate administrator and provided guidance to Lloyd's as to how to proceed under New Mexico law. Despite the probate administrator's request to participate in the probate proceeding, Lloyd's followed its New York counsel's advice and did not participate. The court entered a $3 million order for the plaintiffs and the probate administrator assigned all claims against Lloyd's to the plaintiffs. The plaintiffs then sued Lloyd's for breach of contract, bad faith, and violations of the New Mexico Insurance Code and Unfair Practices Act.

Lloyd's won a summary judgment based on, among other things, the existing rule that an actual demand for a defense must be made by the insured to trigger the duty to defend. On appeal, the New Mexico high court found the "interests of fairness" favored placing the burden on the insurer once it has actual notice to inquire if its insured desired a defense. While the New Mexico court noted their was a split among the states as to whether notice must come from the insured, it found that Lloyd's offered no compelling reason that it should not allow actual notice "from any source" to suffice. The New Mexico court thus reversed the summary judgment for Lloyd's and held the new rule applied because Lloyd's did not affirmatively rely on the lack of a demand when it made its decision not to defend its insured. It determined that Lloyd's instead relied on incorrect advice from its New York counsel that Lloyds did not need to participate in the probate proceeding. The court pointed out Lloyd's use of New York counsel seven times in its opinion.