The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
www.mdjwlaw.com
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

March 31, 2008

TEXAS SUPREME COURT HOLDS INSURANCE COMPANIES MAY USE STAFF ATTORNEYS TO DEFEND LIABILITY CLAIMS AGAINST INSUREDS IF INTERESTS ARE "CONGRUENT"

On Friday, a divided Texas Supreme Court held insurance companies are permitted to use staff attorneys to defend a claim against an insured if the insurer's interest and the insured's interest are congruent, but not otherwise. In *Unauthorized Practice of Law Committee v. Am. Home Assurance Co., Inc.*, No. 04-0138 (Tex. March 20, 2008), the high court addressed whether a liability insurer that uses staff attorneys to defend claims against its insureds is representing its own interests in handing the defense in such a manner (which is permitted), or whether it is engaging in the unauthorized practice of law (which is obviously not permitted). Citing *Tilley* and *Traver*, the court recognized in every instance, the insured's lawyer "owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured" and "must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions."

In essence, the appeal presented two issues:

1. In using staff attorneys to discharge their contractual duty to defend insureds against liability claims, are [Insurance Companies] engaging in the unauthorized practice of law?; and
2. If not, must a staff attorney's affiliation with an insurer be fully disclosed to the insured?

The court began its analysis by noting the American Bar Association Committee on Ethics and Professional Responsibility and the State Bar of Texas Committee on Interpretation of the Canons of Ethics have both concluded use of staff attorneys was not unethical. The court next reviewed its analysis from a 1944 opinion in *Hexter Title & Abstract Co. v. Grievance Committee*, 179 S.W.2d 946 (Tex. 1944), and applied three factors to be considered in determining whether a liability insurer is practicing law by using staff attorneys to defend claims against insureds.

One factor is whether the company's interest being served by the rendition of legal services is an existing interest or only a prospective interest. A second factor is whether the company has a direct, substantial financial interest in the matter for which it provides legal services. Most important, a third factor is whether the company's interest is aligned with that of the person to whom the company is providing legal services. Applying these factors, the high court concluded a liability insurer does not engage in the practice of law by providing staff attorneys to defend claims against insureds, provided that the insurer's interests and the insured's interests in the defense in the particular case at bar are "congruent." The court

indicated the insurer's interests are congruent with their insured's interests when they are aligned in defeating the third party claim against the insured and there is no conflict of interest between the insurer and the insured. The staff attorneys must, however, disclose their relationship to the insured. It is important to note that the high court did not hold that a conflict existed automatically just because the liability insurer issued a reservation of rights or non-waiver agreement. Instead, the court held such conflicts had to be addressed on a case-by-case basis.

Editor's note: This decision will generate some confusion. For example, the court recognized that merely issuing a reservation of rights letter does not create an automatic conflict of interest between the insurer and insured. The court, however, didn't use this opinion to explain the factors or standards to evaluate and resolve such potential or alleged conflicts. Of similar importance, some carriers have been defending UM/UIM value disputes with staff counsel. Although not specifically addressed in Friday's decision, a disputed UM/UIM claim would seem to involve non-congruent interests and would presumably no longer be appropriate for handling by staff counsel.

HOUSTON COURT OF APPEALS RULES NON-INSURED CANNOT RECOVER FROM INSURER OR ITS AGENT ON INFORMATION OUTSIDE THE ACTUAL POLICY

A Houston First Court of Appeals panel recently held a non-insured may not recover from an insurance company or its agent for damages emanating from incorrect information regarding the scope of coverage. In *Brown & Brown of Texas, Inc. v. Omni Metals, Inc*., 2008 WL 746522 (Tex. App.—Houston [1st Dist.] March 20, 2008), Port Metal Processing ("PMP") stored Omni's finished steel coils for a fee. PMP purchased an insurance policy to insure PMP's warehouse and inventory, but the policy excluded coverage for property held in storage or property for which a storage charge was paid.

The agent informed PMP the policy did not provide coverage for property stored on its premises that was unrelated to its business. The agent was aware PMP was charging Omni a storage fee and no coverage existed for Omni's steel. Omni's bank required certificates of insurance to document PMP's coverage. The certificates issued to Omni contained a misrepresentation that PMP's policy covered "all risk." The certificates, however, contained the standard disclaimer language limiting their use to information and not policy amendment.

PMP's warehouse burned down in 1995 and Omni lost $2,600,000 in steel. PMP's carrier denied the claim. Omni sued PMP's carrier and the agent for misrepresentation, failure to disclose, and violations of the DTPA. The carrier and agent successfully moved for summary judgment and the decision was appealed. On appeal the court reversed and remanded. The jury subsequently found the carrier and agent knowingly committed negligent misrepresentations and unfair and deceptive acts. The carrier and agent appealed the decision.

Neither party claimed the policy was ambiguous, so the issue on appeal was whether the policy provided coverage for Omni as a matter of law. Omni was not a party to the insurance contract and did not read the policy or certificate of insurance. Applying the reasoning in *Via Net v. TIG Ins., Co*., 211 S.W.3d 310 (Tex. 2006), the court concluded as a matter of law Omni could not detrimentally rely on either the certificates of insurance or the oral representations in order to recover on its negligent misrepresentation and DTPA claims.

MDJ&W UNDERWRITES UNIVERSITY OF HOUSTON LAW FOUNDATION'S ADVANCED INSURANCE AND TORT CLAIMS SEMINAR

Partnering with the University of Houston Law Foundation, Martin, Disiere, Jefferson & Wisdom is Chairing this years Advanced Insurance & Tort Claims seminar to be held live in Dallas on April 10-11 and in Houston on April 17-18, and by video in Austin on May 29-30, 2008. Founding partner David D. Disiere is serving as Course Director and the seminar has once again gathered together some of Texas best insurance law practitioners and speakers to present timely and interesting discussions of recent developments in Texas insurance and tort law. The two day seminar also provides 12 hours CE credit including 2 hours consumer protection for adjusters. The University of Houston is offering insurance professionals attending as our guests a significant discount off of the registration fee. To make arrangements to attend as our guest, e-mail us at uhlawseminar@mdjwlaw.com with your contact information and let us know the city where you would like to attend. We will then get back with you to get you on our invitee list. For more information, the course brochure may be viewed at www.mdjwlaw.com/docs/advins08.pdf. We hope to see you there!

If you wish to discuss legal principles mentioned herein, reply to this e-mail or contact any of our lawyers at Martin, Disiere, Jefferson & Wisdom L.L.P.
If you would prefer to receive this *Newsbrief* by fax rather than e-mail, or wish to unsubscribe, please reply to this e-mail with your request
For past copies of the *Newsbrief* go to www.mdjwlaw.com and click on our Texas Insurance News page.