



The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF



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**DUTY TO DEFEND DOES NOT EXTEND TO DEFENSIVE COUNTERCLAIMS
AFTER SUMMARY JUDGMENT GRANTED TO INSURED**

Last Thursday, the Corpus Christi Court of Appeals held that an insurer had no duty to pay the insured's attorneys fees after summary judgment was granted in the insured's favor and the only claims remaining were the insured's counterclaims against the plaintiff. In *Vansteen Marine Supply, Inc. v. Twin City Fire Ins. Co.*, 2008 WL 599850 (Tex. App. – Corpus Christi, March 6, 2008), the insured terminated the president of the company who then sued alleging libel and defamation, and who also sought to have his non-competition clause declared invalid. The insured filed various counterclaims against the former president as part of its overall defensive strategy. Summary judgment was granted on all claims against the insured and all that remained were the counterclaims. The liability insurer for the company then withdrew from the defense and refused to pay the continuing litigation costs. In the separate coverage litigation, the trial court agreed with the carrier's coverage position and this appeal followed.

Addressing the issues on appeal, the Corpus Christi court examined the policy language and applied the eight-corners rule, comparing the pleadings to the insurance policy to determine the insurer's duties in this context. Observing that the only "live pleadings" were "independent and purely offensive counterclaims" the court determined that the insurer's duty to defend did not apply. The court also examined the insured's efforts to assert waiver, estoppel and quantum meruit and found that the insurer, defending under a reservation of rights, was not subject to the limited *Wilkinson* exception under these facts. The trial court's judgment in favor of the insurer was upheld.

**MID-CONTINENT V. LIBERTY MUTUAL SHOCK WAVES CONTINUE –
INSURER DENIED CONTRIBUTION RIGHTS AGAINST CO-INSURER**

A Federal District Court Judge from the Southern District of Texas' Galveston Division recently granted summary judgment against an insurer seeking to enforce identical pro rata sharing provisions contained in multiple primary insurance policies. In *Nautilus Ins. Co. v. Pacific Employers Ins. Co.*, No. G-04-619 (S.D. Tex. February 25, 2008), several insurers were called on to defend and indemnify a seismic testing company which allegedly damaged over 200 buildings in Galveston County while conducting seismic testing. All insurers except Pacific Employers contributed to the settlement and Nautilus Insurance sought to recover from Pacific by way of subrogation and enforcement of the policies respective pro rata other insurance sharing provisions. Relying on the Texas Supreme Court's recent decision in *Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co.*, 236 S.W.3d 756 (Tex. 2007), (reported in *Texas Insurance Law Newsbrief* October 15, 2007), the court held that because the insured had been fully indemnified, the settling insurer had no claim against the non-settling insurer because "there is nothing to which Plaintiff can be subrogated."

FIFTH CIRCUIT CONTINUES CONSISTENT TREATMENT OF MOLD CLAIMS UNDER TEXAS HOMEOWNERS' POLICY

On Friday, the Fifth Circuit issued its third opinion in the last month holding mold is not covered under the Texas Standard Homeowners Policy – Form B in *Sailer v. State Farm Lloyds*, No 07-40180 (5th Cir. February 29, 2008). In a one paragraph decision, the court summarily rejected plaintiffs' "exclusion repeal" provision arguments based on its recent decision in *Carrizales v. State Farm Lloyds*, 2008 WL 467097 (5th Cir. February 22, 2008) (reported in *Texas Insurance Law Newsbrief* February 25, 2008) and affirmed the lower court's decision. This decision arose from another case where the insured continued to argue for exceptions and limitations on the Texas Supreme Court's mold coverage decision in *Fiess v State Farm Lloyds*. In rejecting those arguments for the third time, the Fifth Circuit's commitment to the broad coverage ruling in *Fiess* seems well established. Editor's Note: Our firm had the privilege of representing State Farm in this matter on appeal before the Fifth Circuit.

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 Charing 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 uhlawsseminar@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 your there!

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