The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TEXAS SUPREME COURT REVERSES SUMMARY JUDGMENT IN DECLARATORY JUDGMENT ACTION FOR INSURER ON CGL POLICY BASED ON "YOUR WORK" EXCLUSION

On Friday, the Texas Supreme Court reversed, without hearing oral argument, a summary judgment for Great American in *Grimes Const., Inc. v. Great American Lloyds Ins. Co.*, --- S.W.3d ----, 2008 WL 542470 (Tex. 2008). The summary judgment arose in a declaratory judgment action to determine whether coverage existed under a commercial general liability policy issued to Grimes for construction defects arising from its own work. In its brief opinion, the court instructed the trial court to conduct further proceedings consistent with its opinion in *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1 (Tex.2007), and summarized its holdings there as determining that allegations of unintended construction defects might constitute an "accident" or "occurrence" under the CGL policy and that allegations of damage to or loss of use of the home itself might also constitute "property damage" sufficient to trigger the duty to defend under the policy.

INSURER UNABLE TO OBTAIN SUMMARY JUDGMENT ON INSURED'S BREACH OF COOPERATION CLAUSE THAT RESULTED IN DEFAULT JUDGMENT.

In *Nejati v. Royal Indemnity Co.*, Cause Number 3:06-CV-1027M, Royal was sued by Nejati to enforce a $1.4 million default judgment obtained against Royal's insured under a commercial auto policy. Nejati obtained a default judgment because the insured did not forward suit papers to Royal and repeatedly refused to communicate with Royal about the lawsuit. Royal had actual notice of the suit but it did not file an answer on its insured's behalf. Royal also never issued a reservation of rights or submitted a non-waiver agreement. It did, however, engage in limited discussions with Nejati's attorneys, including efforts to settle the lawsuit before a default judgment was entered. On February 19, 2008, the district court for the Northern District of Texas (Dallas Division) ruled on cross motions for summary judgment filed by Nejati and Royal pending before it. The court determined that two fact issues existed: (1) whether Royal was prejudiced by its insured's breach of the cooperation clause; and (2) whether Royal waived the cooperation clause as a condition precedent to coverage through its conduct. Consistent with the actions of other Texas courts in recent months, this court implicitly rejected the concept of "prejudice as a matter of law" in finding the referenced fact issues despite the insured's gross failure to cooperate or to even demand defense or indemnity benefits from his liability insurer. We will continue to monitor this case as it proceeds through the federal system.

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

On Thursday, the Fifth Circuit issued another opinion holding that mold is not covered under the Texas Standard Homeowners Policy – Form B in Cause Number 06-401201, *Salinas v. State Farm Lloyds* (5th Cir. February 29, 2008) (unpublished decision). With very little discussion, the court upheld the trial court's partial summary judgment on the mold coverage issue. The court spent considerably more time discussing the jury charge, which it found without error, and the insureds' contention that the district court erred by refusing to enforce the policy's appraisal provision. With respect to the latter, the court explained that the appraisal provision cannot be invoked as to matters of coverage, only value. The court found that the insured's appraisal request involved only matters of coverage.

Editor's Note: Our firm had the privilege of representing State Farm in this matter on appeal before the Fifth Circuit and we appreciate their commitment to have this important coverage issue consistently and finally resolved by the Fifth Circuit Court of Appeals.

$9 MILLION BAD FAITH AWARD IN CALIFORNIA HEALTH INSURANCE CASE CONSISTENT WITH INCREASED TREND IN SUCH SUITS IN TEXAS

A breast cancer patient in Lakewood, California whose medical insurance coverage was cancelled while she was undergoing treatment was recently awarded over $9.3 million due to her heath insurer's cancellation of her coverage due to her alleged material misrepresentations in her application for insurance. Health Net Inc., one of California's largest health insurers, cancelled the policy because it claimed the insured failed to disclose on her application that she had received treatment for heart valve problems ten years prior to the application, and she had also been to the emergency room with chest pain just before she completed the application. The cancellation of the policy left Patsy Bates (the insured) with more than $129,000 in unpaid medical bills, and forced her to complete her cancer treatment through a state-funded program. On February 22, 2008 arbitration Judge Sam Cianchetti ordered Health Net to pay all the unpaid medical bills, pay $8.4 million in punitive damages, and pay an additional $750,000 for emotional distress. This award came the day after the Los Angeles City attorney sued Health Net claiming it illegally cancelled the coverage of approximately 1,600 patients. This recent decision immediately captured the attention of plaintiff's lawyers who specialize in the prosecution of these types of cases in Texas and other jurisdictions. Bad faith claims arising out of health insurance claims in general, and material misrepresentation cancelations in particular, have spiked dramatically in Texas and Oklahoma in the past 12 months. Life and health insurers doing business in Texas or Oklahoma need to be aware of these developments because the law in these states is extremely conducive to claims such as these. Our firm has seen a significant increase in new bad faith suits against life and health insurers, particularly in material misrepresentation cancellation cases, in both Texas and Oklahoma during the last twelve months. Media reports on this big bad faith verdict in California were immediately picked up on the electronic communication boards of plaintiff lawyers in Texas and other jurisdictions and will serve as fuel for the proverbial fire for the filing of more such suits in Texas, California, Oklahoma and other jurisdictions requiring evidence of an "intent to deceive" before health or life insurance policies can be cancelled due to an insured's material misrepresentations. We will continue to track these bad faith cases as we do the bad faith litigation in the P&C field as well.