The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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INJURIES CAUSED BY ALZHEIMER'S PATIENT WHO "KNOCKED DOWN" ANOTHER HELD WITHIN COVERAGE

Recently, the San Antonio Court of Appeals concluded that allegations against an insured suffering from dementia and Alzheimer's who "knocked down" another patient at an assisted care facility triggered his insurer's duty to provide a liability defense. In *Hochheim Prairie Casualty Ins. Co. v. Appleby*, 2008 WL 141587 (Tex.App.-San Antonio January 16, 2008), the insured's estate filed a declaratory judgment action seeking a defense and indemnity under his Farm Liability Policy for a lawsuit filed against him by the estate of another patient who was "knocked down" on two occasions and ultimately died from her injuries. The insured allegedly engaged in impulsive and aggressive behavior as a result of his illness. The trial court found the insurer had a duty to defend the underlying litigation and this appeal followed.

The appellate court first addressed the insurer's argument that the trial court erred when it considered extrinsic evidence in determining the duty to defend. Noting that Texas follows a relatively strict version of the "eight-corners rule," the court observed the extrinsic evidence of the insured's mental state, as well as his inability to form the requisite intent necessary to hold him accountable for his aggressive behavior, should not have been considered. The factual allegations stating he "knocked down" the other patient, however, were potentially within the scope of coverage because they raised the question of whether the insured may have acted "unintentionally." Applying the eight-corners analysis to the factual allegations and the policy language, the court held the insurer had a duty to defend the lawsuit.

NO COMP BENEFITS FOR DEPENDENT GRANDCHILD AFTER DEPENDENT CHILD (i.e. THE MOTHER) LOSES ELIGIBILITY

Last Wednesday, the San Antonio Court of Appeals considered Texas Labor Code provisions which establish dependent eligibility for workers' compensation death benefits and held a dependent grandchild was not eligible for benefits after the dependent daughter (the grandchild's mother) lost her eligibility. In *Craig v. Texas Mutual Insurance Company*, 2008 WL 182742 (Tex.App.-San Antonio January 23, 2007), an employee was killed in a work related accident and was survived by her sixteen year old daughter and two year old granddaughter. The daughter received death benefits but lost her eligibility because she turned eighteen and ceased to be enrolled as a full time student for two consecutive semesters. The daughter then sought to have her own daughter, the granddaughter, declared eligible for the death benefits based on her own lack of eligibility.

At issue was Section 408.182 of the Texas Labor Code which provides in relevant part:

(c) If there is an eligible child or grandchild, and no eligible spouse, the death benefits shall be paid to eligible children or grandchildren.

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(2) "Eligible grandchild" means a grandchild of a deceased employee who is a dependent of the deceased employee and whose parent is not an eligible child.

In affirming the trial court's decision, the court found Section 408.182 determines eligibility on the date of the employee's death and, as a result, the granddaughter was not entitled to a redistribution of the death benefits once the daughter lost eligibility.

NOTICE OF CLAIM TO EMPLOYEE IMPUTED TO INSURED

Last Tuesday, the Fifth Circuit examined an insurer's contention that a demand letter sent to the insured and received by the insured's *employee* prior to the policy's inception date precluded coverage under the professional liability policy. In *Virginia Surety Company, Inc. v. Wright*, 2008 WL 181495 (5th Cir. (Tex.) January 22, 2008), the insured denied he was aware of the demand until after suit was filed (and during the policy period). Applying general principles of Texas agency law, the Fifth Circuit agreed with the insurer and imputed knowledge of the demand to the insured when it was clear the demand was sent and received to the *employee* prior to the inception of the policy. Consequently, no coverage was afforded under the professional liability policy and summary judgment rendered by the trial court in favor of the insurer was upheld.