



The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF



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TEXAS SUPREME COURT HOLDS INSURED'S FAILURE TO COMPLY WITH CGL POLICY'S PROMPT-NOTICE PROVISION DOES NOT DEFEAT COVERAGE UNLESS THAT INSURER WAS PREJUDICED BY THE DELAY

In *PAJ, Inc. v. Hanover Insurance Company*, 2008 WL 109071 (Tex. 2008), the Texas Supreme Court ruled that PAJ's failure to notify Hanover of a lawsuit against it until four to six months had passed without prejudice to Hanover was an insufficient basis for Hanover to deny PAJ's claim under its CGL policy. After PAJ sued Hanover for wrongful denial, the parties submitted cross motions for summary judgment, stipulating that PAJ failed to notify Hanover "as soon as practicable" and that Hanover was not prejudiced by the untimely notice. These stipulations left only the construction of the prompt-notice provision for the court. Hanover argued the provision was a condition precedent to coverage, effective without prejudice to the insurer. PAJ argued that the provision is a covenant, which requires a material breach to excuse performance. In reaching its decision, the court distinguished its earlier decision in *Members Mut. Ins. Co. v. Cutaia*, 476 S.W.2d 278 (Tex. 1972) (holding prejudice not required), pointing out that the Texas Department of Insurance changed the relevant provision in CGL policies in Board Order 23080, which requires a mandatory endorsement to all Texas CGL policies that requires a showing of prejudice when the insured fails to comply with the prompt-notice provision.

CORPUS CHRISTI COURT OF APPEALS LIMITS ANALYSIS OF FORTUITY DOCTRINE TO EIGHT-CORNERS OF PETITION AND POLICY

In an unpublished decision, *Maryland Cas. Co. v. South Tex. Med. Clinics, P.A.*, 2008 WL 98375 (Tex. App.—Corpus Christi 2008), the Corpus Christi Court of Appeals limited its analysis of the fortuity doctrine to the eight-corners of the petition and the policy relying, in part, on *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 307, 310-311 (Tex. 2006). Under the fortuity doctrine, the insured is precluded from insuring a loss where the insured is, or should be, aware of an ongoing progressive loss or known loss at the time the policy is purchase. The court determined that the underlying petition had to "conclusively establish" that the insured was aware of the conduct giving rise to the liability and actively sought to insure a known loss.

DALLAS COURT OF APPEALS HOLDS THAT CLAIM UNDER BROAD FORM LIABILITY POLICY MAY FALL WITHIN BOTH CGL COVERAGE AND CPPL COVERAGE, AFFORDING INSURED HIGHEST APPLICABLE LIMITS

US Fire and Scottsdale insured a nursing home owner and operator as primary and excess carriers, respectively. Several lawsuits were brought against the insured and US Fire and Scottsdale disagreed as to the amount of insurance available. Agreeing to litigate their disagreements later, the insurers defended and settled the suits. Scottsdale then filed a subrogation suit against US Fire for amounts it expended defending and settling suits. Scottsdale won a judgment for \$1,647,766.27 from the trial court on cross motions for summary judgment. On appeal in *US Fire Ins. Co. v. Scottsdale Ins. Co.*, 20008 WL 62561 (Tex. App.—Dallas 2008), the Dallas Court of Appeals reduced the award to \$744,410.82, affirming in part and reversing in part. The Court upheld the trial court's determination that US Fire's CGL's \$2 million per location aggregate limit, not the CPPL's \$1 million per location aggregate limit, applied to the underlying claims. The court concluded that the liability policy permitted a claim to fall under both the CGL form and the CPPL form. The court further determined that when that occurred, as was the case here, that the higher limit would apply to the claim. The Court reversed the trial court's ruling that the self-insured retention limits did not apply to the claims, thereby reducing Scottsdale's recovery. The Court determined that US Fire's breach of contract and wrongful denial did not waive the applicable self-insured retention limits.

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