The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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INSURER'S TIMELY PAYMENT OF APPRAISAL AWARD DOESN'T VIOLATE ARTICLE 21.55

The Houston First Court of Appeals recently held the insurer's payment of an appraisal award shortly after it was issued fully complied with Texas' Prompt Payment statute even though the umpire awarded more damages than the insurer initially paid to the insured. The issue in the case was whether an insurer's payment of a higher appraisal award than it initially paid the insureds violated Texas Insurance Code Article 21.55 (recently recodified as Texas Insurance Code § 542.055). Specifically, in *Amine v. Liberty Lloyds of Texas Ins. Co.*, 2007 WL 2264477 (Tex. App.—Houston [1st Dist.] August 9, 2007), the insureds argued that the carrier violated article 21.55 by not initially paying the amount found by the appraisal umpire. On appeal, the court set forth the requirements to prevail under a 21.55 claim and noted Texas courts have concluded "full and timely payment of an appraisal award under the policy precludes an award of Article 21.55 penalties as a matter of law."

In *Amine*, the insureds filed five claims related to water damage to their home. Eventually, the insureds invoked the policy's appraisal clause. After an umpire awarded additional damages for the claim, the carrier timely made the additional payment. There was no record evidence of a finding of liability on the part of the carrier. The insureds, however, maintained that the carrier owed an amount equal to five times the award. The appellate court observed the carrier's decision to pay the amount of the appraisal award does not constitute a finding of liability as required by Article 21.55. Furthermore, a delay in payment of the claim due to the parties participation in the appraisal process does not implicate Article 21.55.

COURT HOLDS ARTICLE 21.21 MANDATES RECOVERY OF ATTORNEYS' FEES TO PREVAILING PARTY WHO RECOVERS DAMAGES ON CLAIM, BUT EVIDENCE WAS NOT CONCLUSIVE AS A MATTER OF LAW TO RENDER AWARD FOR ATTORNEYS' FEES

In *Rosenblatt v. Freedom Life Ins. Co. of America*, 2007 WL 2215157 (Tex. App.—Houston [1st Dist.] August 2, 2007), the Houston First Court of Appeals adopted the insured's argument that section 16(b)(1) of former Article 21.21 (recently recodified as Texas Insurance Code § 541.152(a)(1)) "mandates recovery of attorney's fees to a party who prevails and recovers damages on a claim." But, the Court concluded the insured failed to establish the proper amount of those fees as a matter of law. After sustaining injuries in an auto accident, Plaintiff asserted claims for healthcare benefits. Plaintiff later sued his carrier seeking damages for the company's delays in investigating his claims and in

paying him compensation. At the conclusion of trial, the jury awarded Plaintiff $10,000 in damages for future physical impairment and $20,000 for damages due to the carrier's "knowing" conduct allegedly in violation of Texas law. The jury awarded no other damages including zero damages in response to a request for attorneys' fees.

On appeal, the insured argued he was entitled to judgment as a matter of law because no evidence supported the jury's failure to award any damages in response to the question concerning attorneys' fees. The insured argued the zero finding for attorneys' fees should be disregarded and the court should render judgment for attorney's fees which were argued at trial to have a value of $500,000 (reflecting an estimated 997 hours worked on the case, expenses, and law clerk fees). After a thorough analysis of the reasonableness of an award for attorneys' fees, the court concluded Plaintiff did not provide undisputed testimony that was "clear, positive, direct and otherwise credible." Because the evidence was not conclusive, the court could not render judgment for the Plaintiff.

FIFTH CIRCUIT CERTIFIES TWO QUESTIONS TO TEXAS SUPREME COURT RELATED TO THE PROPER PROPERTY DAMAGE "TRIGGER" FOR CGL POLICIES

Last Wednesday, the Fifth Circuit Court of Appeals certified two "unresolved questions" (for which there is no controlling Texas precedent) to the Texas Supreme Court. In *OneBeacon Ins. Co. v. Don's Building Supply, Inc.*, 2007 WL 2258192 (5th Cir. August 8, 2007), OneBeacon sought a declaration that it had no duty to defend or indemnify its insured, Don's Building Supply (DBS), in twenty-two lawsuits that various homeowners filed against DBS and other defendants. The lawsuits stem from water intrusion into the wall cavities of Defendants' homes due to an allegedly defective synthetic siding system known as Exterior Insulation and Finish Systems (EIFS). The central question before the District Court was whether the property damage described in the underlying suits was alleged to have occurred within the policy period such that OneBeacon's duty to defend DBS was triggered under its liability policies. The district court granted summary judgment to OneBeacon and DBS appealed.

In a per curiam opinion Justices King, Demoss, and Owen noted differences among Texas appellate courts related to the particular rule for determining when property damage occurs for purposes of an occurrence-based liability policy. The court observed several Texas appellate courts (Dallas, San Antonio, and Austin) have held property damage occurs at the time the damage "manifests," which the courts have further defined as the time that the damage becomes apparent or identifiable. The two Courts of Appeals in Houston, however, have in two separate cases rejected the "manifestation rule" and instead applied an "exposure rule" to harm allegedly caused by continuous or repeated exposure to conditions during the policy period.

Additionally, the court wrote, "as the Supreme Court of Texas has not yet weighed in on the proper rule to be applied, it has not yet had the occasion to clarify its scope." Stated differently, *OneBeacon* presented the additional determinative issue of whether property damage can be deemed to have occurred during a time in which the pleadings state that the damage was "undiscoverable" for purposes of the discovery rule on limitations.

The Fifth Circuit certified the following two determinative questions of law to the Texas Supreme Court:

1. When not specified by the relevant policy, what is the proper rule under Texas law for determining the time at which property damage occurs for purposes of an occurrence-based commercial general liability insurance policy?

2. Under the rule identified in the answer to the first question, have the pleadings in lawsuits against an insured alleged that property damage occurred within the policy period of an occurrence-based commercial general liability insurance policy, such that the insurer's duty to defend and indemnify the insured is triggered, when the pleadings allege that actual damage was continuing and progressing during the policy period, but remained undiscoverable and not readily apparent for purposes of the discovery rule until after the policy period ended because the internal damage was hidden from view by an undamaged exterior surface?

[Editor's Note: Assuming the Texas Supreme Court agrees to take the certified questions in *OneBeacon,* our firm will be preparing an amicus brief to the high court of Texas on behalf of several major P&C carriers. Any insurer wishing to join such an amicus brief should contact Chris Martin or Levon Hovnatanian.**]**