The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TEXAS LAW RESTRICTING INSURER'S PROMOTION OF OWNED BODY SHOPS HELD TO VIOLATE 1st AMENDMENT / FREE SPEECH

Last Wednesday, the Fifth Circuit determined that H.B.1131 - prohibiting insurers from owning and operating their own body shops (but exempting those already in operation and regulating communications to insured's in referring them to the owned shops) – did not violate the Commerce Clause of the United States Constitution, but did violate the First Amendment's "protection of truthful and non-deceptive commercial speech." In *Allstate Ins. Co. v. Abbott,* 2007 WL 2192895 (5th Cir.(Tex.) August 1, 2007), H.B. 1131 (which became effective in Texas on September 1, 2003), addressed Allstate's ownership of Sterling Collision Centers, Inc. – the only body shops in Texas directly owned by an insurer – by exempting them from the prohibitive effects of the statute, but requiring Allstate to identify at least one non-owned shop when referring insureds. In upholding the trial court's finding that the law violated the First Amendment, the Fifth Circuit found that the script used by Allstate in referring insured's was neither false nor misleading. It also held the statute's restriction on commercial speech was "not narrowly tailored to meet the asserted state objectives." Accordingly, the Texas' statute's restriction on commercial speech was held to be unconstitutional.

WATER AND MOLD DAMAGE TO FIVE BUILDINGS IN APARTMENT COMPLEX FOUND TO BE A SINGLE OCCURRENCE

Last Monday, the Dallas Court of Appeals upheld a declaratory judgment in favor of an insured against their excess insurer which held that the policies provided coverage for the cost of repairing mold damage to an apartment complex and loss of rents. In *Federal Insurance Co., v. State Thomas, L.P.*, 2007 WL 2165315 (Tex. App. – Dallas July 30, 2007), the court determined that the policy provided coverage and, under the facts presented, it concluded the damage "was the result of a single cause, poor construction management resulting in defective construction." After addressing other challenges involving the "reasonable and necessary" charges for mold remediation, loss of rents under the business interruption coverage, and conditions precedent related to questions involving the exhaustion of underlying policies, the court affirmed the trial court's finding of coverage for the loss.

COURT EXAMINES MODIFIED MANIFESTATION RULE FROM REVISED CGL EXCLUSION AND INTERPRETS "DELIVERED OR ISSUED FOR DELIVERY IN TEXAS"

The Houston Court of Appeals recently analyzed a CGL exclusion designed to preclude coverage for known losses or losses in progress, and also examined the meaning of a Texas statute requiring policies or endorsements "delivered or issued for delivery in Texas" to be filed with and approved by the commissioner, both issues being matters of first impression in Texas. In *Williams Consolidated I, Ltd./BSI Holdings, Inc. v. TIG Insurance Co.*, 2007 WL 2212802 (Tex.App.-Houston [14th Dist.] July 31, 2007), homeowners filed suit against a subcontractor alleging improper installation of a moisture barrier during construction of the home in 1991 causing mold damage (which the owners first became aware of in 2000).

The subcontractor's policy with TIG became effective in 1999 and excluded "property damage" … "**which has first occurred or begun** prior to the effective date of this policy**."** The court rejected TIG's position that the exclusion is "based on the beginning of the process leading to the ultimate injury or damage." Instead, "the exclusion is based on the beginning of the actual injury or damage." The court also concluded that the line of Texas cases setting forth the "manifestation rule," did not address this same exclusionary language and the rule requiring manifestation of damages, even though the process had begun, was also inappropriate. The court held:

> We conclude, under the unambiguous language of the CGL Policy, that there is no coverage for alleged property damage or bodily injury that first occurred or began prior to the effective date of the CGL Policy. However, if the alleged property damage or bodily injury did not occur or begin before the effective date but the alleged process leading to the ultimate injury or damage began before that date, coverage is not excluded for this reason.

In this case, the court held that the summary judgment evidence was insufficient to establish the date the *damage* first occurred or began and it reversed summary judgment in favor of TIG, but it upheld the denial of the insureds' motion for summary judgment on this issue.

The court also examined, as a matter of first impression in Texas, the Texas statute requiring a policy or endorsement for the types of insurance involved, "not to be **delivered or issued for delivery in this state** unless the form has been filed with and approved by the commissioner." The court concluded that the language of the statute applies "only to insurance policies or endorsement forms that are delivered in Texas or issued for delivery in Texas." Because the evidence only showed TIG's administrative office was in Texas but the agent and the insured to whom the policy was issued were in California, the evidence was insufficient to establish that the statute applied as a matter of law.