The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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FIFTH CIRCUIT BROADLY INTERPRETS "ARISING OUT OF" EXCLUSION

The Fifth Circuit recently examined an exclusion for personal and advertising injury "arising out of a breach of contract" when a newly hired employee allegedly used confidential customer lists taken from a prior employer to solicit customers for the new employer. In *Gemini Insurance Co. v. The Andy Boyd Co., L.L.C.*, No. 06-204464 (5th Cir. (Tex.) June 26, 2007), Gemini insured the new employer who sought a defense and indemnity in the lawsuit. Gemini filed a declaratory judgment action arguing that it had no duty to defend the underlying litigation based on the breach of contract exclusion. The court examined Texas law finding that "when an exclusion prevents coverage for injuries 'arising out of' particular conduct, '[a] claim need only bear an *incidental relationship'* to the described conduct for the exclusion to apply.'" Also, that Texas law finds that the words "arising out of" have much broader significance than 'caused by' wording seen in other exclusions. The court disregarded arguments over the separation- of-insureds provision and determined that the "breach of contract need not have caused the injuries." The court noted: "Instead, the breach of contract must merely have had an incidental relationship to or connection with the injuries." Accordingly, the court concluded that all of the claims "arose out of the breach of contract" and the insurer had no duty to defend.

COURT FINDS NO DUTY TO DEFEND WATER INTRUSION AND OTHER CONSTRUCTION DEFECTS CLAIMS AGAINST HOME REMODELER

Recently, a federal District Court judge for the Western District of Texas ruled that a commercial general liability policy issued to a remodeling contractor provided no coverage for the insured's alleged failure to "provide construction services, materials and management at the property." In *Charlton v. Evanston Insurance Co.*, No. SA-06-CA-480-H (W.D.Tex. June 29, 2007), the underlying lawsuit alleged several construction related defects including allegations of improperly installed flashing which damaged "stucco walls" and other damage to "real and personal property…as a result of the Defendant's negligence in failing to properly and appropriately place waterproofing at the residence." The policy excluded damage resulting from "your work" improperly performed and also damage caused by water intrusion.

After surveying Texas law addressing construction defect cases, and applying Texas "eight corners" or "complaint allegation" rule, the court agreed with the insurer's position that despite the "conclusory negligence allegations…the injuries are contractual in nature and that breach of contract or warranty claims do not constitute an 'occurrence' under the terms of the policy." Accordingly, the court ruled that the insurer had no duty to defend or indemnify the insured in the underlying lawsuit.

INSURER'S DIRECT LIABILITY FOR TOWING AND STORAGE CHARGES ON TOTAL LOSS VEHICLE AFFIRMED

The Tyler Court of Appeals recently affirmed a trial court's ruling that an insurer was liable for towing and storage charges under § 2303.156(b) of the Texas Occupations Code holding insurers jointly and severally liable for charges incurred when the vehicle is deemed a total loss and towed without the owner's consent. In *Canal Insurance Company v. Hopkins*, No. 12-06-00411-CV (Tex.App.- Tyler June 29, 2007), the driver of the insured tractor-trailer rig lost control of the vehicle which went into a large ditch, hit several trees and rolled on its side. The driver was injured and taken away by ambulance. Special equipment and air bags were required to upright the vehicle and to tow it from the scene. After paying for damage in excess of the tractor and trailer's fair market value, the insurer refused to pay for towing and storage charges. The towing company filed suit against the owner and its insurer seeking over $12,000 in fees and charges. Following review of § 2303.156(b) and issues involving consent and standards for determining whether a vehicle is a total loss, the Tyler court affirmed the trial court's ruling holding the insurer jointly and severally liable for the towing and storage charges.