The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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FAILURE TO TIMELY PRODUCE DOCUMENTS RESULTS IN $1,250,000 MILLION IN SANCTIONS AGAINST INSURER AND COUNSEL

Although not directly involving Texas insurance law, a recent sanctions order out of a New York federal court warrants discussion and review. Last Monday, the United States District Court for the Southern District of New York, entered an order imposing sanctions against an insurer and their counsel, jointly and severally, for a total amount of $1,250,000. The sanctions resulted from a failure to timely produce relevant documents sought by plaintiffs in a coverage action following the September 11, 2001 World Trade Center attacks. In *In re September 11th Liability Insurance Coverage Cases*, No. 03 Civ.332 (AKH) (S.D.N.Y. June 18, 2007), the court found that despite a proper request for the documents, an order of production from the court, fourteen separate productions and not until after the appropriate witness was deposed, did the insurer and their counsel produce the policy, the additional insured endorsement and related guidelines that were at issue in the declaratory judgment action. These facts combined with evidence revealing an intent to delete, and the deletion of the electronic version of the documents, were given by the court in further support of the sanctions imposed.

INSURER'S FAILURE TO PRODUCE DAMAGE PHOTOS SUPPORTS SPOLIATION INSTRUCTION AGAINST INSURED

Last Thursday, the Fort Worth Court of Appeals affirmed a damage award in favor of an injured claimant and rejected an argument that a spoliation instruction - creating a presumption that the non-produced evidence is against the non-producing party – was an abuse of the trial court's discretion. In *Conditt v. Morato,* 2007 WL 1776063 (Tex. App. – Fort Worth June 21, 2007), the parties were involved in an auto accident. The insured stipulated to liability and defended on damages. The insured produced four black and white copies of photos but was ordered, and failed to produce other color and digital photos of the vehicles taken by her insurer. At the time of trial and in the insured's defense, the insured's attorney presented clear, color photos in an effort to support a minimal impact. The appellate court observed that the insured's "attorney gave no explanation for why he had clear, color photographs" of the other vehicle, "but he nor the insurance company had in its possession at least the four originals" of the photos produced. As a result, the trial court did not abuse its discretion in submitting the spoliation instruction and the appellate court affirmed the judgment in favor of the claimant.

FAILURE TO DISCLOSE PRIOR INJURY IS BREACH OF CONDITION PRECEDENT PRECLUDING COVERAGE

In a loss of use claim involving a lame horse, the United States District Court for the Eastern District of Texas, Sherman Division, the court concluded that the insured's failure to disclose a prior injury to a show horse, that predated the current policy period was a breach of a condition precedent that voided the policy and precluded coverage. In *Thompson v. Diamond State Insurance Co.*, No. 4:06cv154 (E.D. Tex. June 15, 2007), while granting summary judgment in favor of the insurers, the court also cautioned them and their counsel by stating that "Counsel for Diamond and National Equine have failed to follow the procedures contemplated by the Rules of Civil Procedure in raising the issue. As kind as the court can state it, a first year law student could have done a better job in this case." Nevertheless, the magistrate recommended that summary judgment be granted in favor of the insurers.