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A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.
Principal Office 808 Travis, Suite 1800 Houston, Texas 77002 713.632.1700 FAX 713.222.0101
111 Congress Avenue, Suite 1070 Austin, Texas 78701 512.610.4400 FAX 512.610.4401
900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

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NO PREJUDICE REQUIRED FOR LATE NOTICE POLICY DEFENSE IN FIRST-PARTY HOMEOWNER'S POLICY CLAIM

Last week, in *Caddell v. Travelers Lloyds of Texas Insurance Company*, 2007 WL 1574244 (June 1, 2007), the Texarkana Court of Appeals addressed whether prejudice is a required element to an insurance policy's late notice defense in a first-party homeowner's claim. In April 2002, the insured's roof suffered damage due to a hailstorm. But, the insured waited until July 2002 to *call* Travelers' toll-free number to present a claim which included a request for coverage for other damage including mold growth. The insured never filed a *written* notice of loss.

In response to the telephone claim, an inspector visited the Caddell residence and afterwards, Travelers wrote Caddell advising her that they had issued a check. However, Caddell claimed that she never received the check. And, Travelers claimed that it never received a report that Caddell did not receive its check. Approximately two years later, Caddell sued Travelers. In her pleadings, Caddell claimed that the unrepaired leaky roof caused the growth of dangerous mold throughout the home and that the existence of the mold caused her health problems, along with emotional trauma. Caddell also claimed bad faith on the part of Travelers.

Travelers defended by asserting that Caddell failed to mitigate damages, failed to cooperate in the investigation of the loss and repair of damages, limitations, boundaries of coverage, failed to comply with provisions of the policy, and damages occurring outside the termination date of the policy. Travelers then sought summary judgment relief alleging that: (1) Caddell failed to comply with the terms of the policy by not filing a written timely notice of loss, (2) Caddell had violated an obligation to mitigate the loss, and (3) Caddell's claim included uninsured losses. The trial court granted Travelers' summary judgment and Caddell appealed.

The Court began its analysis by reviewing the policy's notice provision and the insured's "Duties After A Loss" clause. Notably, the Court observed that the insured was to "give prompt written notice" to the company. "There is nothing in the insurance policy which restricts this notice requirement to circumstance in which the insurer is prejudiced by a delay in making the claim." On the other hand, the letter of transmittal of the policy provides a "Claim Service" toll-free telephone number. Caddell never gave Travelers any written notice at all, but, instead, called the Claim Service number.

Caddell relied upon *Duzich v. Marine Office of America Corporation*, 980 S.W.2d 857 as authority that, although there was no substantial compliance with the written notice provision of the insurance contract, failure to comply was not fatal to the insured's claim unless the insurer was unduly prejudiced. Also, the Court noted several cases consistent with *Duzich*, including *Harwell v. State Farm Mutual Automobile Insurance Company*, 896 S.W.2d 170 and *Liberty*

Mutual Insurance Company v. Cruz, 883 S.W.2d 164. The Court, however, found that this line of cases was not controlling. Each of the cases relied upon by Caddell involved third-party liability policies, not first-party casualty insurance. The court also found the above decisions were rendered after the Texas Supreme Court opinion in *Members Mutual Insurance Company v. Cutaia*, 476 S.W.2d 278.

In *Cutaia*, the Texas Supreme Court acknowledged the seemingly-harsh treatment of notice as a condition precedent to coverage. The Court also observed the State Board of Insurance's response and Board Order 23080 which, by its express terms, only applied to liability policies, not first-party casualty policies. Because the Board Order addressed only liability policies, not casualty policies, the "*Cutaia* case remains the law as to this kind of insurance policy." Thus, compliance with the notice provision is a condition precedent, the breach of which voids policy coverage. Consequently, the Court determined that the filing of written notice was a condition precedent to coverage under the policy and trial court properly found that Caddell failed to comply.

Notably, the Court questioned whether Travelers' provision of a toll-free telephone number for its policyholders to use in calling in claims, and Travelers' prompt response to the claim called in by Caddell, raised a question of waiver of policy terms and its conditions. The Court questioned whether Travelers could have been estopped to deny that its actions in responding to the telephonic notice precluded it from raising this defense at trial. But, because neither waiver nor estoppel was pled or pursued by Caddell, the Court declined to explore these issues further.

"YOUR WORK" AND "YOUR PRODUCT" EXCLUSIONS RE-VISITED BY FIFTH CIRCUIT

Recently, in *National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Liberty Mutual Insurance Company*, 2007 WL 1455961 (May 18, 2007), the Fifth Circuit had the opportunity to revisit the "Your Work" Exclusion in the ISO standard CGL policy. *National Union* involved a dispute between Rubicon, Inc. and S&B Engineers and Constructors, Ltd. Rubicon hired S&B to provide engineering services for an expansion project. As part of the project, S&B obtained weld shop fabricated pipes from American Pipe Fabricating. In the middle of the project, Rubicon terminated S&B's involvement, litigation ensued, and Rubicon sued S&B. S&B and Rubicon subsequently settled their dispute and S&B sought payment from its insurer, National Union, for the costs of the Rubicon suit. National Union and S&B settled that claim and S&B assigned its rights against any third party to National Union.

Pursuant to S&B's assignment of the claim, National Union then sued Liberty Mutual, American Pipe's insurer, to recover the amount of the settlement to Rubicon. National Union argued that S&B was an additional insured under the Liberty Mutual policy to American Pipe. Liberty Mutual admitted that S&B was indeed an additional insured under its policy in favor of American Pipe, but asserted that S&B cannot recover because of the "your work" and "your product" exclusions. National Union responded that S&B was not excluded under such provisions because S&B was not the "you," named insured (American Pipe), under the Liberty Mutual policy so the exclusions did not apply to S&B. Moreover, National Union argued that the "your work" exclusion did not apply because of the subcontractor exception: American Pipe acted as a subcontractor to S&B so the "your work" exclusion did not apply.

The Court began its analysis by examining the express terms of the policy and the "your work" and "your product" exclusions. Further, the Court took as a given that the "you" in the Liberty Mutual policy referred to Liberty Mutual's named insured, American Pipe, according to the

policy's express definition of that word. Read with such definition, the policy excluded claims based on American Pipe's work or product, because American Pipe was substituted for "you" in the two relevant exclusions. Thus, the "your work" and "your product" exclusion would read to exclude: (1) "Property damage to [American Pipe's] work arising out of it or any part of it and included in the "products-completed operations hazard.'"; and (2) "Property damage to [American Pipe's] product arising out of it or any part of it."

Next, the Court observed that S&B's claim as an additional insured was based on American Pipe's work or product. Substituting "American Pipe" for "you" in the exclusions and subcontractor exception revealed that S&B was not entitled to relief under the policy. S&B was excluded from coverage because American Pipe's work or product was the basis of the claim, and American Pipe did not hire a subcontractor to work on its behalf. Therefore, the District Court correctly determined that S&B's claim was excluded under the Liberty Mutual policy.

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