The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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EASTERN DISTRICT COURT RULES SINGLE ACCIDENT INVOLVING TWO VEHICLES CONSTITUES TWO OCCURRENCES

Recently, a federal District Court judge in the Eastern District of Texas, in *Esparza v. Eagle Express Lines, Inc.*, 2007 WL 969585 (March 28, 2007), addressed the issue of number of occurrences implicated by trucker's liability coverage limits and surprisingly found that a vehicle colliding with two other vehicles in the same incident/accident constituted two occurrences. In *Esparza*, KV Express owned the tractor and Eagle Express Lines owned the trailer jointly operated by Miroslaw Jozwiak. Jozwiak crossed the median on U.S. Highway 75 and collided with two vehicles traveling southbound on Hwy 75. The two vehicles struck were a Ford F-150 pick-up and a Ford Expedition. Five of the seven pick-up truck passengers were fatally injured in the collision. All five of the Expedition's occupants were fatally injured.

Each of the relevant policies provided limits on a "per accident" or "per occurrence" basis. In this declaratory judgment action, the parties sought a declaration under the terms of the insurance polices as to whether the events involved one or two accidents/occurrences so as to implicate the policies' various limits of liability.

The Court began its analysis by examining the express terms and conditions of the various policies, including the policies' insuring agreements and Limits of Liability Clauses. Notably, none of the parties alleged that the terms "accident" or "occurrence" as defined by the policies were ambiguous. Further, the parties did not argue that the Court's determination of the number of accidents or occurrences hinged on the resolution of a factual dispute. Thus, the Court noted that "Texas courts agree that the proper focus in interpreting 'occurrence' is on the events that cause the injuries and give rise to the insured's liability, rather than on the number of injurious effects." The Court relied heavily on *H.E. Butt Grocery Co. v. National Union Fire Insurance Company of Pittsburgh, PA*, 150 F.3d 526 (5th Cir. 1998) and *Maurice Pincoffs Co. v. St. Paul Fire & Marine Insurance Company*, 447 F.2d 204 (5th Cir. 1971) in holding that the collision consisted of two accidents/occurrences.

The carriers argued the two other vehicles struck by the insured were exposed to continuous or repeated exposure to the same condition, that is, Jozwiak crossing the median into the southbound lanes of Hwy 75. The carriers alleged the insured tractor-trailer crossed into the southbound traffic in one continuous event. Further, the carriers argued the evidence did not indicate the insured tractor-trailer stopped and then started again, nor did the evidence indicate that Jozwiak lost control of the rig and then subsequently regained control between the two impacts. In rejecting the carriers' arguments, the Court found the insurance carriers' argument was "over-reaching." The Court analogized to *Maurice Pincoffs* and held this loss involved two separate and independent collisions which subjected the insureds to liability. Finding that one collision did not cause or affect the second collision, the Court concluded that each separate collision with the rig created the "continuous or repeated exposure" to the same or substantially same conditions. Finally, the two collisions were separated by both time and distance. Thus, the Court concluded that the incident resulted in two occurrences.

Note: This is an extremely significant decision for carriers who write personal auto or business auto coverage in Texas. Notice of an appeal has already been filed and the Fifth Circuit Court of Appeals will have a chance

to consider this potentially far-reaching coverage interpretation by the District Court. Our firm will be involved in the appeal. As such, any carriers wishing to join an amicus brief in support of the carriers' position should contact Chris Martin or Levon Hovnatanian for more information.

COURT ADDRESSES CARRIER'S RETRO PREMIUM BASED UPON SUBCONTRACTOR'S MAINTENANCE OF LIABILITY LIMITS ENDORSEMENT

A federal District Court judge in the Western District of Texas recently had the opportunity to interpret the Subcontractor's Maintenance of Liability Limits Endorsement as it applies the to the carrier's right to adjust and increase the policy premium upon premium audit. In *Callaway Development Corporation v. Steadfast Insurance Company*, 2007 WL 1032303 (April 3, 2007), Callaway initially paid Steadfast $157,560 for insurance premiums for the time period February 2004 to February 2005. Subsequently, Steadfast conducted a premium audit and notified Callaway that it owed another $189,574 in premiums because some of Callaway's subcontractors did not maintain commercial liability coverage provided by an insurance company with an "A" Best rating or better. After some negotiation, Steadfast adjusted this amount to $180,622.

Callaway filed its declaratory judgment seeking a determination that it did not owe Steadfast additional premiums, and if it did owe additional premium, for a judicial declaration of the amount it owed. Callaway sought summary judgment relief, and Steadfast responded with its counter-motion.

In its motion for summary judgment, Callaway first argued the Subcontractor's Maintenance of Liability Limits Endorsement was not part of the policy. Callaway argued the endorsement was not part of the policy because Callaway did not sign the endorsement, which included a countersignature block for the insured's authorized representative. Callaway alleged the unsigned signature line indicates that the terms of the endorsement required a signature to indicate Callaway's acceptance of the endorsement. In response, Steadfast maintained the mere existence of a signature block does not create a signature requirement, and that no policy provision, insurance regulation, or judicial decision requited a signature for the endorsement to be effective. Instead, Steadfast explained that it includes a signature line on all of its endorsements to avoid duplicate sets of endorsements because some states (not Texas) require endorsements to be signed. Further, Steadfast relied upon *Dunn v. Traders & General Insurance Company*, 287 S.W.2d 682 (Tex. Civ. App. – Dallas 1956, writ ref'd n.r.e.), for the proposition that riders attached to a policy, when delivered, are properly treated as a part thereof, though not independently signed; as the policy signatory is inclusive of all riders." The Court noted that *Dunn* was dispositive of Callaway's argument – when an unsigned endorsement is attached to a policy at the time of its delivery to an insurance contract, the endorsement becomes part of the policy – signing the policy has the effect of signing all endorsements properly attached. In the absence of any authority requiring the insured's signature on the individual endorsements, it argued Callaway couldn't receive a summary judgment.

Callaway argued the endorsement did not apply to Callaway's subcontractors because no subcontractors were specifically listed or shown in the endorsement or schedule. Instead, the endorsement's schedule noted that the designated subcontractors were "ALL." Steadfast responded that "ALL" meant the requirement to maintain commercial liability insurance applied to all of Callaway's subcontractors. Steadfast said construing the endorsement in the manner suggested by Callaway resulted in a strained and unnatural construction that would require Callaway to identify all of its subcontractors in advance in order for the endorsement to be effective.

The court ruled the endorsement had only one reasonable interpretation – the endorsement applied to all of Callaway's subcontractors. Although Callaway's subcontractors are not specifically listed in the schedule of designated subcontractors, the use of the word "ALL" encompasses all of Callaway's subcontractors. The Court noted the distinction between the terms "all subcontractors specifically listed in the schedule" versus the endorsement's terms of "all subcontractors shown in the schedule." Because the schedule *shows* "ALL" subcontractors, the endorsement is clear, meaning that all of Callaway's subcontractors must maintain

commercial general liability insurance coverage. Thus, Callaway was not entitled to summary judgment on the grounds that the endorsement did not apply to its subcontractors.

Finally, the court addressed whether the endorsement was ambiguous about the required insurance rating. Specifically, Callaway maintained the "A-"rating met the endorsement's requirement that the subcontractor's maintain insurance with an "insurance company with an 'A' Best rating or better." Alternatively, Callaway argued the terms were ambiguous about whether an "A-" Best rating complies with the provision. Steadfast's response was straight forward: "an 'A' Best rating or better" means that Callaway's subcontractors must have an "A" or an "A+" rating, not an "A-" rating. Noting that both Callaway's and Steadfast's interpretations were reasonable, the Magistrate found an ambiguity as to the interpretation of "'A' Best rating or better." Once the contract was found to be ambiguous, the court noted the interpretation was then a question of fact precluding summary judgment. Accordingly, the court denied summary judgment relief because the fact question about what Best rating will satisfy the endorsement's requirement to maintain liability insurance.

THIRD-PARTY CLAIMANT CAN SEEK DECLARATORY RELIEF FROM INSURANCE CARRIER ON THE DUTY TO DEFEND AND INDEMNIFY THE TORTFEASOR/INSURED

The Fort Worth Court of Appeals, in *Richardson v. State Farm Lloyds Insurance*, 2007 WL 1018651 (April 5, 2007), relied upon *Farmers Texas County Mutual Insurance Company v. Griffin*, 955 S.W.2d 81 (Tex. 1997) in holding that, because a declaratory judgment action is permissible in Texas when brought by an insurance company against a third party seeking to have the insurance company defend or indemnify for conduct of its insured, it is permissible for a third-party claimant to assert a declaratory judgment action against the liability insurer seeking to have it defend or indemnify its insured for the third-party claimant's claims.

SUPREME COURT HEARS ARGUMENTS IN *ULICO CASUALTY*

Last week, the Texas Supreme Court heard oral arguments in *Ulico Casualty Company v. Allied Pilots Association*, 06-0247. The April 11th arguments focused on whether an insurance company that mistakenly agreed to pay to defend an insured whose policy had expired is liable for those defense costs even though the insurer had no say about the defense. *Ulico* provides the Texas Supreme Court an opportunity to decide whether an exception exist to the general rule that waiver and/or estoppel cannot be used to create insurance coverage where none existed under the insured's policy. *Ulico* affords the Texas Supreme Court an opportunity to evaluate the waiver and estoppel principles of coverage as enunciated in *Farmers Texas County Mutual Insurance Company v. Wilkinson*.

Ulico's counsel argued that *Wilkinson* should not be adopted by the Supreme Court; instead, insured's have other remedies, such as promissory estoppel and negligent misrepresentation when an insurer reneges on an agreement to pay the insured's defense costs. Also, several Supreme Court justices asked questions at oral argument about the prejudice element of the *Wilkinson* exception – whether the insurer's conduct may harm the insured, especially in situations where the policyholder chose their own attorney. Ulico's counsel stated that any conflict of interest should be obviated when the insured has its own counsel representing it. Allied's counsel countered that, based upon Ulico's agreement to pay for Allied's defense, the insurance company received attorney/client privileged information about its insured's defense. We will continue to monitor this case and report on the decision from the high court when it is issued.

HOUSTON FEDERAL COURT REJECTS CONSEQUENTIAL MOLD DAMAGE THEORY IN PLAINTIFF'S EFFORT TO OVERCOME *FIESS*

Houston Federal District Court Judge Vanessa Gilmore recently granted summary judgment in favor of State Farm after finding that Plaintiff's new theory asserting that State Farm's delays in handling their covered water

damage claims caused mold was barred by judicial estoppel and plaintiff's failure to segregate covered and non-covered causes of loss. In *Bonds v. State Farm Lloyds*, No. H-04-3910 (S.D.Tex. March 26, 2007), after the case was abated pending a ruling in *Fiess v. State Farm Lloyds* (and after the Texas Supreme Court found no coverage for mold under the HO-B policy form in Fiess), plaintiffs attempted to "repackage" their "mold" claims as claims for covered water damage that were mishandled by State Farm and resulted in "consequential" mold damage.

In addressing State Farms' judicial estoppel arguments, the court noted that before *Fiess*, plaintiff's sought recovery for mold damage as an ensuing loss. Post-*Fiess*, however, plaintiffs "overhauled their response" to State Farm's policy defenses and extracted any statements suggesting their claims were mold claims and not water leak claims. The court noted:

> Plaintiff's current position is clearly inconsistent with their earlier position and is an obvious attempt to side-step the Texas Supreme Court's holding in *Fiess*, which excludes coverage for mold damage. Accordingly, Plaintiff's are judicially estopped form now asserting that any mold damage is merely consequential and is a result of Defendants' mishandling Plaintiffs water leak claims.

The court, nevertheless addressed Plaintiff's allegations that "any damage (mold) resulting from Defendant's alleged delay" was recoverable as consequential damages. Plaintiff's attempted to do so by applying the policy's ensuing loss provision. But the court noted that *Fiess* and other Texas cases have rejected similar misapplication of the ensuing loss provision, observing that it "cannot serve as an exception to the policy's exclusions of coverage caused by mold." Accordingly, the court granted State Farm's motion for summary judgment on the breach of contract action as to the dwelling.

The court then examined plaintiff's claims for personal property damage caused by mold. The court observed that accidental discharge of water from within a plumbing system was a named peril under the personal property coverage. But the court also noted non-covered sources of water contributed as a source of moisture as well. As a result, plaintiffs bore the burden of proof to segregate and allocate the covered and non-covered causes of loss under Texas law and, because their expert failed to allocate plaintiff's losses, it was fatal to plaintiffs' contents claims. Accordingly, State Farm's motions for summary judgment on all contractual and extra-contractual claims were granted. **Note**: our firm had the privilege of representing State Farm in this case.