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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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UM WAIVER IS SUFFICIENTLY EXPLICIT WITHOUT REQUIRING TRANSLATION FOR NON-ENGLISH SPEAKING INSURED

Last Friday, in *Lopez v. Farmers Texas County Mutual Insurance Company*, 2007 WL 703496 (March 9, 2007), the Texarkana Court of Appeals addressed the issue of a non-English-speaking insured who executed a UM waiver. Farmers' insured, Santos Lopez, had executed four separate waivers of UM coverage all of which were clearly stated in English. Lopez sued Farmers for breach of contract and extra-contractual damages following the carrier's denial of a UM claim. The trial court granted Farmers' summary judgment motion based on the four UM waivers executed by Lopez.

On appeal Lopez challenged the sufficiency of the English-only waivers. Lopez conceded that the waivers were clear, but complained that he did not speak or understand the English language and that the insurer and/or its representatives had allegedly failed to explain the waivers to him. Lopez argued that it was the insurer's burden to demonstrate that an insured *knew* he or she was rejecting UM coverage. The Texarkana Court rejected this claim. Tex. Insur. Code Art. 5.06-1(1) requires only that the insured "reject [UM] coverage in writing." The Court acknowledged that *Unigard Sec. Insurance Company v. Schaefer*, 572 S.W.2d 303 (Tex. 1978) imposes upon carriers the requirement of a clear and express waiver of UM coverage. However, the Court did not interpret *Schaefer* to impose any further burden to show that the insured actually understood the effect of the waiver. The Court refused to recognize a duty to translated the waiver form into a language the insured would understand or to show that an otherwise explicit form was more fully explained to the insured before it was executed. Instead, the Texarkana Court held that the waiver must only be sufficiently explicit to objectively communicate its effect as a waiver or rejection the coverage in question.

FOURTEENTH COURT OF APPEALS RE-VISITS MATERIALITY OF BREACH OF CONDITIONS PRECEDENT TO COVERAGE

This past week, on March 8, 2007, the Fourteenth Court of Appeals reconsidered its opinion in *Coastal Refining & Marketing, Inc. v. United States Fidelity and Guaranty Company*, 2007 WL 707465, No. 14-04-00651-CV. The Court withdrew its May 30, 2006 opinion and substituted this new opinion, to address three common conditions found in most liability insurance policies: the Notice Clause, the Settlement without Consent Clause, and the Cooperation Clause. The Court described the traditional view that breach of a condition precedent to coverage discharges and relieves a carrier from liability for coverage of a claim, irrespective of any prejudice flowing from the breach. The Court noted that this traditional approach has been substantially eroded however by a modern trend – apparent in various regulatory orders, statutes, common law and treatises – holding that breach of a policy condition will only void coverage where the insurer establishes that it was prejudiced by a material change in position brought about by the breach. Following this modern trend, the question of whether an insurer has been prejudiced is generally a question of fact and the carrier must show actual prejudice and not merely theoretical or presumed prejudice.

The court relied on the Texas Supreme Court's opinion in *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691 (Tex. 1994), to hold that only a material breach voids coverage. Materiality of the breach must be ascertained to determine whether the carrier had been deprived of an anticipated benefit from the insurance contract. The court distinguished and rejected the authorities cited by appellants, including *Westchester Fire Insurance Company v. Admiral Insurance Company*, 152 S.W.3d 172 (Tex. App. – Fort Worth 2004, pet. filed) and *The Kroger Company v. Champion Maintenance Specialists, Inc.*, 1999 WL 418380. Finally, the court did acknowledge that prejudice need not be monetary even though the insurer *must* prove actual sustained prejudice which resulted from the breach of condition to avoid coverage based on the breach of a listed condition.

WAIVER AND/OR ESTOPPEL CONCERNING THE DUTY TO DEFEND

Recently, a federal district court in the Northern District of Texas considered the principles of waiver and/or estoppel as applied solely to a defense obligation, in *Hartford Casualty Insurance Company v. White*, 2007 WL 582909 (Feb. 23, 2007). In *White*, the underlying state court lawsuit was filed against the insured in 2003. Hartford issued its insured a reservation of rights which it subsequently supplemented. Hartford also defended its insured throughout the course of the underlying lawsuit, and committed to continue defending its insured through the April 2, 2007 trial setting. Hartford also participated in mediation and settlement negotiations on behalf of its insured. In late 2006, Hartford initiated its declaratory relief action in the federal district court. The insured sought to stay the declaratory relief proceeding based upon theories of waiver and/or estoppel.

The insured argued that Hartford had waived its right to have the issue of coverage determined before the state court litigation was completed because Hartford had not brought the declaratory judgment action earlier and in light of the April 2007 trial setting. The defendants also alleged that principles of equitable estoppel should prevent Hartford from asserting the declaratory relief action prior to the conclusion of the state court litigation.

The Court noted that the doctrines of waiver and estoppel cannot be used to create insurance coverage where none exists under the terms of the policy, but recognized that an exception to such general rule exists when an insurer assumes an insured's defense without declaring a reservation of rights or obtaining a non-waiver agreement. This exception applies if the insured shows: (1) the insurer had sufficient knowledge of the facts or circumstances indicating non-coverage; (2) the insurer assumed defense or continued in its defense of the insured without obtaining an effective reservation of rights; and (3) the insured suffered some form of harm.

In *White*, the insured argued that even though Hartford had expressly reserved its right to file an action for declaratory judgment, the carrier's action of providing a defense for more than three years created a temporary waiver or estoppel, precluding it from filing the declaratory judgment action until after the underlying litigation was resolved. The insured provided no legal basis to support this assertion however, and the Court summarily rejected the insured's argument.

WAIVER OF CARE, CUSTODY OR CONTROL EXCLUSION

In *National Fire Insurance Company v. Entertainment Specialty Insurance Services, Inc.*, No. 3:05-CV-1557-M (March 8, 2007), a federal district court in the Northern District of Texas addressed the possible waiver of a policy defense pursuant to the Care, Custody or Control Exclusion. Entertainment Specialty Insurance Services alleged that its insurer, National Fire Insurance Company, had waived its right to assert the Care, Custody or Control Exclusion by failing to raise it in its denial of coverage letter. The court noted that, ordinarily, when one specific ground of forfeiture is urged against a policy of insurance and the validity thereof denied on that ground alone, all other grounds are waived. However, before a carrier may be held to have waived a ground of forfeiture or be estopped from asserting it merely because it had denied liability on another ground, the insured must show that the carrier knew the facts which would entitle it to insist on forfeiture at the time the carrier denied liability. Knowledge of applicable facts is a necessary element because waiver is the *intentional* relinquishment of a known right or intentional conduct inconsistent with claiming it. Because the Care,

Custody or Control Exclusion was not implicated by the factual pleadings and allegations of the underlying lawsuit until a subsequently amended petition filed some time after the declination letter, the exclusion could not have been known to apply and could not be intentionally waived by the previous denial of coverage letter.

The insured's claim of waiver was also found to be without merit because the denial letter did not purport to rely only on a particular defense against policy coverage. Instead, National Fire's denial letter also included several paragraphs reserving other potential policy defenses and stating that the evaluation of coverage was not intended to be exhaustive, and that there may be other terms and conditions of the policy which may result in no coverage for the claim. The additional reserving language effectively reserved other defenses to coverage.

The Court then addressed the merits of the Care, Custody or Control Exclusion defense and found that the insured had maintained total, physical control of the third-party claimant's assets sufficient to invoke the Care, Custody or Control Exclusion. The Court held that the Care, Custody or Control Exclusion did not require the insured to be entitled to the benefits of ownership of the subject property. Where the insured maintained total physical control of the third-party claimant's assets, the Care, Custody or Control Exclusion precludes coverage for claims alleging losses to such property.

LEGISLATIVE UPDATE

- H.B. 1913 – This House Bill proposes a change to the Insurance Code, §551.107(c) providing that an insurer may assess a premium surcharge upon policy renewal if the insured has filed two (a proposed increase from one) or more claims in the preceding three policy years.