The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
www.mdjwlaw.com
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

January 29, 2007

WHAT CONSTITUTES EVIDENCE OF "VACANCY" FOR PURPOSES OF HOMEOWNERS' INSURANCE VACANCY CLAUSE/EXCLUSION

Recently, the Fifth Circuit Court of Appeals considered what type of evidence may be used to prove up "vacancy" for purposes of a homeowners' insurance policy Vacancy Clause/Exclusion. In *Barlow v. Allstate Texas Lloyds*, 2007 WL 143388 (Jan. 18, 2007), the trial court rendered summary judgment based upon the Vacancy Clause eliminating coverage under the homeowners' policy. The Vacancy Clause provided the residence was vacant "[i]f the insured moves from the dwelling and a substantial part of the personal property is removed from that dwelling," and coverage will be suspended sixty (60) days after a dwelling becomes vacant.

Barlow and Peveto claimed that their residence was not vacant when it was damaged by fire and they sought full payment of their claim under their Allstate homeowners' policy. Allstate argued the policy was suspended at the time of the fire because the house had been vacant for more than 60 days. Allstate relied upon evidence and deposition testimony indicating Peveto and Barlow had not lived in the house for approximately three (3) months prior to the fire because they were remodeling a bathroom and they each admitted almost all of the furniture had been removed from the house. Based upon such evidence, the trial court granted summary judgment.

On appeal, the Court noted Peveto and Barlow had responded to Allstate's MSJ and proffered controverting affidavits. In her affidavit, Peveto claimed her prior deposition testimony was incorrect due to faulty memory and she and Barlow had moved out of the house less than a month before the fire. Also, Peveto claimed in her affidavit that the electricity and water remained on, furniture remained in the house, and tools and a refrigerator were there too. The Fifth Circuit summarily discounted Peveto's controverting affidavit as failing to show that there was a genuine issue of material fact: "Self-serving assertions contradicting previous testimony are insufficient evidence to overcome a summary judgment motion." Because no coverage existed under the homeowners policy due to vacancy, summary judgment was proper. Because Barlow and Peveto's other claims were premised upon the existence of coverage under the policy, summary judgment on their extra-contractual claims was also proper.

CARRIER'S PROTECTION OF SUBRO INTEREST AND ITS IMPACT ON THE COMMON FUND DOCTRINE

Last Friday, the Dallas Court of Appeals again addressed the Common Fund Doctrine. In *Allstate Insurance Company v. Edminster*, 2007 WL 196433 (Jan. 26, 2007), Edminster and her two children were injured when another driver rear-ended her automobile as she sat at a traffic light. The other driver's insurance company was represented by the third-party administrator, Custard Insurance Agency, Inc. Edminster retained an attorney to pursue her claim against the other driver.

Allstate paid Edminster $3,760 in medical benefits under her personal automobile insurance policy. Edminster subsequently settled her claim against the other driver for $12,075. Custard issued two checks on behalf of the

other driver: one for $8,315 to Edminster and her attorney and one for $3,760 for the amount of the Allstate Med Pay subrogation interest.

Thereafter, Edminster asked Allstate to reduce its subrogation lien by $1,286.85, or one-third of its subrogation lien, as Allstate's pro-rata share of attorneys' fees. Allstate refused, and Edminster filed her declaratory judgment action against Allstate. The parties filed competing MSJs and the trial court rendered judgment in favor of Edminster.

On appeal, Edminster argued that Allstate was equitably obligated to Edminster under the Common Fund Doctrine. Allstate countered that it presented summary judgment evidence that conclusively established, or at least raised a fact issue, about whether it took steps to protect its own subrogation claim and does not owe Edminster any attorneys' fees. Specifically, prior to Edminster making demand upon Custard, Allstate notified Custard of its subrogation claim, stated that it was pursuing the subrogation claim independently of any claim by Edminster, asked Custard to issue a separate check in the amount of the subrogation claim with Allstate as the sole payee, notified Edminster's attorney not to take any action to collect Allstate's subrogation claim, and submitted Edminster's medical bills to Custard to support its subrogation claim. The Dallas Court of Appeals found that such evidence raised a fact issue as to whether the Common Fund Doctrine applied or whether such affirmative actions on the part of Allstate was sufficient "independent pursuit of claim" as to protect Allstate's interest separate and apart from Edminster's pursuit of claim.

FIFTH CIRCUIT ADDRESSES FEDERAL COURT DISMISSALS

In *Conseco Life Insurance Company v. Judson*, 2007 WL 162775 (Jan. 19, 2007), the Fifth Circuit recently reiterated its position that Fed. R. Civ. P. 41 gives a party the unrestricted right to dismiss their claims without leave of court. Specifically, a party may dismiss its claims without order of the court by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment. In such circumstances, upon the filing of such notice of dismissal, no hearing or order is required by the trial court. The provisions of Fed. R. Civ. P. 41 apply to the dismissal of counterclaims, cross-claims and third party claims.

NEW FIRM WEBSITE

Please visit our firm's new home on the internet at www.mdjwlaw.com. We have redesigned our firm's website to make it more useful to both clients and others interested in our firm. As always, we are interested in different perspectives on how we can improve our firm (and our new website), so please forward any comments to any of our lawyers.