



www.mdjwlaw.com

The Weekly Update of Texas Insurance News

# TEXAS INSURANCE LAW NEWSBRIEF



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  
106 East Sixth Street, Suite 900 Austin, Texas 78701 512.322.5757 FAX 512.322.5707  
900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

October 16, 2006

## FIFTH CIRCUIT EXAMINES EXCESS CARRIER'S SUBROGATION RIGHTS

The Fifth Circuit Court of Appeals recently examined an excess insurer's subrogation rights against two consecutive primary insurers and determined that one was obligated to exhaust its limits while the other was not due to the divisible nature of the underlying injuries and because the excess policy period did not overlap with the first primary insurer's policy period. In *Royal Insurance Company of America v. Caliber One Indemnity Co.*, 2006 WL 2716506 (5<sup>th</sup> Cir. (Tex.) September 25, 2006), an elderly patient suffered injuries over a three year period which ultimately caused her death. The first year, the nursing home was insured by Hartford and evidently had no excess coverage. During the second and third year of the patient's care, the nursing home was insured by Caliber One Indemnity and had an excess policy with Royal Insurance Company. The patient's family filed suit and the matter settled for \$2,000,000 with Hartford paying \$200,000, Caliber One \$800,000 and Royal contributing \$1,000,000 under protest. Royal then filed a subrogation action against the two primary insurers seeking recovery of the \$1,000,000 it paid in settlement. The trial court rejected the effort and granted summary judgment in favor of the primary insurers. This appeal followed.

The Fifth Circuit examined Texas law, addressed both contractual and equitable subrogation rights available to excess insurers, and concluded that the excess insurer Royal was entitled to pursue an equitable subrogation claim against the primary carriers. The court examined the manner in which the two primary policies and the excess policy defined an "occurrence" and observed that the breaches of the standard of care and relatively minor injuries during the Hartford policy period were "divisible from the alleged acts of negligence that occurred a year later that caused pneumonia, and a massive, infected Stage IV pressure sore and resulting sepsis, leading to" the patient's death. Furthermore, the excess policy issued by Royal was not in force and did not overlap with the policy issued by Hartford. Accordingly, the court affirmed summary judgment in favor of Hartford and reversed and remanded for further proceedings in the equitable subrogation claims against Caliber One.

## APPELLATE COURT AFFIRMS JUDGMENT REJECTING HOMEOWNERS' SEISMIC TESTING DAMAGE CLAIMS

The Houston 14<sup>th</sup> Court of Appeals recently affirmed a trial court's judgment rejecting property damage claims asserted against a seismic testing company allegedly caused by the company's negligence in the manner in which it conducted the seismic tests. In *Barnett v. Veritas DGC Land, Inc.*, 2006 WL 2827379 (Tex.App.-Houston [14<sup>th</sup> Dist.] October 5, 2006), two hundred and sixty-two plaintiff's in Galveston County filed suit against several defendants alleging that seismic testing and related vibrations caused property damage to their homes. The defendants' experts claimed the damage was related to natural soil movement, not vibration. The trial court granted summary judgment on some of the claims and the jury rendered a verdict in favor of the defendant Veritas on the remaining claims.

On appeal, the plaintiffs' asserted several issues that were rejected by the court of appeals including a challenge to the legal and factual sufficiency of the evidence. Addressing the legal sufficiency issue, the court examined the expert testimony offered by both sides and concluded: "Numerous defense experts testified that the damage

to the homes was not caused by the seismic vibrations, and Appellants' experts failed to conclusively establish that vibrations from the seismic survey damaged the homes." The court also found the evidence factually sufficient to support the court's findings and, after rejecting the other issues presented on appeal, affirmed the judgment in favor of Veritas.

If you wish to discuss legal principles mentioned herein, reply to this e-mail or contact any of our lawyers at Martin, Disiere, Jefferson & Wisdom L.L.P.  
If you would prefer to receive this *Newsbrief* by fax rather than e-mail, or wish to unsubscribe, please reply to this e-mail with your request  
For past copies of the *Newsbrief* go to [www.mdjwlaw.com](http://www.mdjwlaw.com) and click on our Texas Insurance News page.