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
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

August 7, 2006

POST-OFFER ABATEMENT OF EXTRA-CONTRACTUAL CLAIMS REQUIRED REGARDLESS OF WHEN OFFER EXTENDED

Last week, the San Antonio Court of Appeals, in *In re Maryland Casualty Company*, 2006 WL 2135052 (August 2, 2006), revisited the necessity of a post-offer abatement of extra-contractual claims. Baby's Paradise, Inc. sued its property insurer, Maryland, Casualty after the carrier denied a theft claim filed by the insured. Baby's Paradise asserted both contractual and extra-contractual claims. After suit was filed against Maryland Casualty, the carrier submitted its written settlement offer to Baby's Paradise, which the insured rejected. Shortly thereafter, Maryland Casualty sought severance and abatement, requesting that the extra-contractual claims against it be severed from the contractual claims and abated until the contractual claims were resolved. The trial court denied the motion for severance and abatement. Some time later, Maryland Casualty filed its petition for writ of mandamus based upon the denial of severance and abatement.

The San Antonio Court began its analysis by restating established precedent holding that when a plaintiff has filed a breach of contract claim as well as extra-contractual claims against an insurer, and a settlement offer has been made, severance and abatement are required, and a trial court abuses its discretion to deny a motion to sever and abate. Baby's Paradise argued, however, that severance was not applicable because the offer was made after the suit was filed and was an offer to settle the entire case, not just the contractual claims. The Court summarily held that "neither of these distinctions is convincing as other courts have applied the law requiring severance in suits in which the offer to settle was made after the suit was filed and was an offer to settle the entire case." Thus, the Court of Appeals found that the trial court abused its discretion in denying the motion to sever and abate.

WHAT IS *NOT* SUFFICIENT TO SATISFY THE CONSPICUOUSNESS ELEMENT OF THE EXPRESS NEGLIGENCE TEST FOR CONTRACTUAL INDEMNITIES

In *American Home Shield Corporation v. LaHorgue*, 2006 WL 2170132 (August 3, 2006), the Dallas Court of Appeals addressed the conspicuousness element of the "express negligence test" in Texas for contractual indemnity obligations. The Court restated well accepted precedent that the conspicuousness requirement mandates that "something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it." It went on to explain: "Language is conspicuous if it appears in larger type, contrasting colors, or otherwise calls attention to itself." The Court noted that whether an agreement meets the conspicuous requirement is a question of law for the court to determine.

The Court then examined the contact and the contractual indemnity at issue. The service agreement was a single page which was printed on both front and back, and contained twenty-two numbered paragraphs. The signature lines were at the bottom of the front side of the contract. Two lines above the signature line, the contract stated that the parties understood and agreed to the additional terms set forth on the back of the contract. The last paragraph of the front side required the indemnitor to obtain certain types of insurance but specified that such insurance would not relieve the indemnitor of liability under the contract. The indemnity

provision was the first of a series of numbered paragraphs located on the back side of the agreement. The indemnity provision is in the same font, typeface, and color as the rest of the agreement. There were no descriptive headings in the agreement. Finding that the indemnity provision was no more visible than any other provision in the agreement and did not appear to be designed to draw the attention of a reasonable person against whom the clause was to operate, the Court found that the indemnity clause failed to satisfy conspicuousness requirements.

Next, the Court addressed the actual knowledge exception to the conspicuousness requirement. If both contracting parties have actual knowledge of the contract's terms, an agreement can be enforced even if the fair notice requirements were not satisfied. American Home argued that the indemnitor had actual knowledge of the indemnity clause by admittedly reading the contract. The court explained: "In effect, American Home argues any time there is evidence the indemnitor read an agreement containing the indemnity provision, the fair notice requirements do not apply." The Court rejected American Home's argument, finding that "something more is required to do away with the fair notice requirements than mere evidence a party read the agreement before signing it. . . . To hold that reading the agreement is enough to by-pass the fair notice requirements would allow the exception to swallow the rule and render the fair notice requirements ineffectual in all but the most rare instances."

The following evidence and testimony were sufficient to defeat the conspicuousness element, obtain a finding that the indemnity clause at issue was not sufficiently conspicuous, and obviating any contractual indemnity obligation: (1) evidence that the indemnitor read the contract before signing it, (2) evidence that, even after reading the contract, the indemnitor did not understand that it could be liable to the indemnitee for the indemnitee's actions, (3) evidence that at no point did the indemnitee inform or advise the indemnitor of any indemnity provision in the contract, and (4) evidence that the indemnitor never intended that the contract would subject the indemnitor to liability for the negligence of the indemnitee.