The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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SPECIAL REPORT: TEXAS WILDFIRES RAISE QUESTIONS CONCERNING APPLICATION OF TEXAS VALUED POLICY LAW

More than 180 fires broke out last week in Texas, in the midst of one of the worst droughts in history, leading to mandatory evacuations of thousands of people and destroying many homes. Since December 21, 2010, nearly 1,100 homes and more than 2,300 other buildings and structures have been damaged or destroyed by fire in Texas. Insurers were quick to respond to the outbreak of fires by setting up special hotlines or deploying mobile catastrophe units to devastated areas to assist insureds who wish to report claims. As insurers and adjusters begin to assess damages, some have questions concerning application of the Texas valued policy law.

Texas is one of 20 states that have valued policy laws, which generally require insurance companies to pay the full amount of insurance in case of total loss regardless of the actual value of the property at the time of loss. The valued policy statute in Texas, which has changed very little since it was enacted in 1879, is limited to fire losses to real property. It reads:

> FIRE INSURANCE: TOTAL LOSS OF REAL PROPERTY.
>
> A fire insurance policy, in case of a total loss by fire of property insured, shall be held and considered to be a liquidated demand against the company for the full amount of such policy. This subsection does not apply to personal property.

Tex. Ins. Code § 862.053.

The language of the statute is incorporated into most property policies issued in Texas. While the statute and concept are relatively simple, application of the statute to fire claims can often be difficult because there is no bright-line rule for determining whether a fire-damaged building constitutes a "total loss by fire."

The test for "total loss by fire" was first announced in 1896 by the Texas Supreme Court in *Royal Ins. Co. v. McIntyre*, 37 S.W. 1068, 1074 (Tex. 1896), which stated:

> [W]e are of the opinion that there can be no total loss of a building so long as the remnant of the structure standing is reasonably adapted for use as a basis upon which to restore the building to the condition in which it was before the injury; that whether it is so adapted depends upon the question whether a reasonably prudent owner, uninsured, desiring such a structure as the one in question was before injury, would, in proceeding to restore the building to its original condition, utilize such remnant as such basis….

The Texas Supreme Court more cogently stated the McIntyre rule in 1965 when it stated:

> Whether a building is an actual total loss by fire depends upon whether a reasonably prudent owner, uninsured, desiring to rebuild, would have used the remnant for restoring the building.

Glen Falls Insurance Company v. Peters, 386 S.W.2d 529, 531 (Tex. 1965).

Thus, when assessing whether a damaged building is a "total loss by fire," insurers and adjusters may find it necessary to put themselves in the shoes of "a reasonably prudent owner, uninsured, desiring to rebuild," and then ask whether that owner "would have used the remnant for restoring the building." This may not be a difficult task if, for example, the fire-damaged building being assessed was a 1950s farm house with a pier and beam foundation and the only remnants are part of the brick piers and the front steps. If, however, the destroyed building was relatively recent construction in a desirable residential neighborhood and the slab and driveway are largely undamaged while the remainder of the house has been destroyed, perhaps a reasonably prudent uninsured owner desiring to rebuild would do so even if there is little else left of the original building. It is easy to imagine many other close-call scenarios.

Even a fire-damaged building that has less damage may nevertheless arguably be a "constructive" total loss. For example, a building may be repairable but subject to condemnation in accordance with city or county ordinances requiring razing of buildings damaged beyond a certain percentage of the building. If, however, no condemnation action is taken by local government and the building is repairable, the building may arguably not be a constructive total loss despite the existence of a condemnation ordinance that may apply. The law in Texas on the applicability of the valued policy law to a constructive total loss is unsettled.

There are a host of other issues that face insurers that could be affected by the valued policy law, including the application of appraisal provisions commonly found in insurance policies when the insurer and insured disagree on the amount of loss, and coverage for and limitations of additional living expenses in homeowners policies and business income losses in commercial property policies when the insurer and insured disagree on the applicability of the valued policy law.

We will track any litigation that arises from the recent wildfires and will report on any trends. Insurers or CAT adjusters needing more information should contact any of our lawyers.

FIFTH CIRCUIT AFFIRMS DISMISSAL OF PROPOSED CLASS ACTION LAWSUIT ALLEGING DISCRIMINATION AGAINST NUMEROUS INSURERS ISSUING AUTOMOBILE POLICIES IN TEXAS

Also last week, in *Hollinger v. Home State Mut. Ins. Co.*, --- F.3d ----, 2011 WL 3890833 (5th Cir. Sept. 6, 2011), the Fifth Circuit Court of Appeals affirmed a district court's order dismissing a proposed class action against numerous automobile insurers in Texas. The plaintiffs, Toni Hollinger and others as class representatives (collectively "the Insureds"), filed a class action case alleging insurance discrimination in the non-standard insurance market, which serves lower income individuals and those drivers with less than ideal driving records. The Insureds alleged, among other things, that the named defendants (collectively the "Insurance Companies") violated the anti-discrimination provisions of the Texas Insurance Code by charging certain consumers higher policy fees on their automobile insurance than they charged other consumers, when those consumers were of the same class and hazard.

The jurisdictional basis for the district court's original jurisdiction was diversity of citizenship pursuant to the Class Action Fairness Act ("CAFA"). CAFA grants the federal courts original jurisdiction to hear interstate class actions where: (1) the proposed class contains more than 100 members; (2) minimal diversity exists between the parties (*i.e.*, at least one plaintiff and one defendant are from different states); (3) the amount in controversy exceeds $5,000,000; and (4) the primary defendants are not states, state officials, or other governmental entities. However, CAFA requires federal courts to decline jurisdiction over a proposed class action if the local controversy or home state exceptions apply. In general, these exceptions apply when, among other things, it is shown that greater than two-thirds of the members of the proposed class are citizens of the state in which the litigation is filed.

Taking into account United States census data and other statistical data offered by the Insurance Companies, the Fifth Circuit held the district court correctly concluded that two-thirds or more of the Insured's proposed class of insurance policy holders were citizens of Texas with both residency and the intention to remain in Texas, such that the local controversy and home state exceptions to CAFA applied. Thus, the judgment dismissing the case was affirmed.