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TEXAS INSURANCE LAW NEWSBRIEF

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WOOD DESTROYING INSECT EXCLUSIONS PRECLUDE COVERAGE – CERTIFICATE OF INSURANCE HAS NO IMPACT

The Dallas Court of Appeals on Wednesday affirmed the summary judgment in favor of the insurer based on the wood destroying insect inspection exclusions in the policy. In *Simon v. Tudor Ins. Co*., No. 05-12-00443-CV, 2014 WL 473239 (Tex. App. – Dallas Feb. 5, 2014), the insured performed wood destroying insect ("WDI") inspections as part of the business of structural pest control.

In December 2007, the insurer issued a commercial liability policy to the insured with a WDI exclusion contained in two separate endorsements. The renewal policy in 2008 also contained these endorsements. Further, all the relevant applications of insurance signed by the insurer and provided to the insurance agent, Hines, stated that WDI was excluded. During the renewal process in November 2008, Hines, as the insurer's authorized representative, signed a certificate of insurance for insured that was submitted to the Structural Pest Control Service of the Texas Department of Agriculture. The certificate failed to list any excluded categories of pest control work excluded from coverage.

The insured performed a WDI inspection report for a homeowner, who subsequently sued the insured for performing an improper WDI inspection. The insured reported the claim, which was denied by the insurer on the grounds that the policy excluded coverage for that type of claim. The trial court agreed with the insurer and granted summary judgment in its favor.

The insured's sole argument on appeal is that the trial court erred in concluding that it could not have reasonably relied on the representations made by the insurer and its agent in the certificate of insurance submitted to the Department of Agriculture, which did not identify any exclusions to coverage. The Court stated that the evidence established that the insured expressly acknowledged in all applications of insurance that the insurance for which the insured applied did not include coverage for liability arising from WDI inspections. The Court further stated that the plain language of both the original and renewal policies clearly exclude coverage for such inspection services in the applicable endorsements. Therefore, the insured could not have reasonably relied on the language in the insurance certificates.

The Court also noted that the certificates of insurance specifically stated (1) that the certificate neither affirmatively nor negatively amends, extends or alters the coverage afforded by the polices scheduled herein; and (2) that the certificate is furnished for information only, confers no rights on the holder and is issued with the understanding that the rights and liabilities of the parties will be governed by the original policies as they may be lawfully amended from time to time. Accordingly, summary judgment in favor of the insurer was affirmed.

FIFTH CIRCUIT AFFIRMS SUMMARY JUDGMENT IN FAVOR OF INSURER BASED ON NON-PAYMENT OF PREMIUMS – CANCELLATION NOT AFFECTED BY FAILURE TO PROVIDE NOTICE TO MORTGAGEE

On Friday, the Fifth Circuit Court of Appeals affirmed a trial court's decision to grant summary judgment in favor of the insurer in *Molly Properties v. Cincinnati Insurance Co.*, 2014 WL 486521 (5th Cir. Feb. 7, 2014). The insured filed suit against the insurer for breach of contract after the insurer denied the insured's fire claim for nonpayment of premiums.

The insured did not dispute that the insurer notified the insured that its policy would be cancelled for non-payment of premiums. However, the insurer argued that the policy was not cancelled at the time of the fire because the insurer failed to give notice of the cancellation to the mortgagee on the property. The Fifth Circuit stated that unless the terms of the policy provide otherwise, a policy cancellation is not affected by the failure of the insurer to give notice of cancellation to the mortgagee. The policy at issue did not condition the cancellation of coverage on notification to the mortgagee that the insured's policy would be cancelled. Thus, the Court stated that whether or not the insurer gave notice to the mortgagee is irrelevant as to the insured's loss of coverage.

The Court further held that the insured cannot recover as a third-party beneficiary to an agreement between the insurer and the mortgagee. The Court stated that any promise by the insurer to provide a cancellation notice to the mortgagee was made for the benefit of the mortgagee, not the insured.

NORTHERN DISTRICT DISMISSES INSURANCE ADJUSTER BASED ON IMPROPER JOINDER

Last week, in *Jones v. Allstate Ins. Co.*, 3:13-cv-4027, 2014 WL 415951 (W.D. Tex. Feb. 4, 2014), a Federal District Court Judge dismissed the insurance adjuster after concluding that the insureds had improperly joined him in the lawsuit in an effort to defeat diversity jurisdiction. The case arose from a fire at the insureds' place of business on September 10, 2011, and the insureds filed a timely claim with Allstate for the resulting damages. Allstate denied the insureds' claims on the grounds that the damages were excluded from the insurance policy.

Originally, the insureds filed suit against only Allstate in Dallas County Court at Law No. 4 based on Allstate's withholding of policy benefits following the fire. Allstate, a resident of Illinois, removed the case to federal court on the basis of diversity of citizenship. The insureds then voluntarily dismissed the initial suit.

Approximately two months after filing their initial lawsuit, the insureds filed suit in the 14th Judicial District Court of Dallas County, Texas. In addition to Allstate, the insureds named insurance adjuster, Byron Rachal ("Rachal") as a defendant in the second lawsuit. The insurer timely filed a Notice of Removal, asserting that removal was proper because Rachal "had been fraudulently and/or improperly joined in this action to defeat diversity jurisdiction." The insureds never filed a Motion to Remand; however, the Court ordered all parties to submit briefs explaining the basis for the Court's subject matter jurisdiction given the apparent lack of complete diversity of citizenship between the parties. The insureds filed a two-page brief asserting that Rachal was the claims adjuster who ultimately denied the policy benefits. The insurer filed a reply brief arguing Plaintiffs completely failed to address fraudulent/improper joinder.

The Court noted that Allstate has the heavy burden of demonstrating either actual fraud in the pleading, or the inability of the insureds to establish a cause of action against Rachal in state court. The Court stated that Allstate showed that the insureds failed to provide sufficient information from which one could reasonably infer a cause of action against Rachal under Texas law. The Court further stated that the insureds made no factual allegations as to Rachal in their Petition, other than asserting that he was a resident of Dallas County. The Court determined that there was no statement in the state court Petition upon which the Court could assume that Rachal could be liable, as the insureds allege no facts regarding the relationship between the parties or Rachal's role in the claims process.

Additionally, the Court refused to consider factual allegations made by the insureds in its federal court briefing to support their positions against improper joinder. The Court stated that simply stating that "Defendants" made misrepresentations, failed to comply with the law, or refused to perform a duty under the law is not sufficient. Therefore, the Court dismissed Rachal from the case finding that he was improperly joined.