Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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FEDERAL COURT STRIKES EXPERT TESTIMONY, DISMISSES CLAIMS FOR PHANTOM WILDFIRE DAMAGE

A Federal District Court Judge in Fort Worth recently granted summary judgment for State Farm Lloyds in a suit alleging smoke/soot damage resulting from the 2011 wildfires in north Texas. In *Allen v. State Farm Lloyds*, No. 4:12-CV-614-Y (N.D. Tex. Mar. 10, 2014), the court struck the homeowners' expert testimony, and in the absence of any other evidence supporting their claims, granted summary judgment for State Farm. The homeowners alleged extensive smoke, soot, and ash damage to the exterior and interior of their home resulting from the 2011 wildfires, and submitted $145,000 in claimed repair costs. State Farm hired two companies to prepare independent comparative estimates to repair the home. Neither found any evidence of smoke, soot or ash. The only damage State Farm adjusters or consultants identified was water damage caused when the power went off and the freezer defrosted.

The homeowners relied solely on their public adjuster, Sonny Spoon of Insurance Busters, who testified he took samples from three locations inside the house which showed soot inside the house. He did not have any of the samples tested, and admitted that they could have also collected ordinary dust and dirt. He also claimed the metal roof required full replacement due to alleged char marks and soot stains which had chemically compromised the roof's finish. However, he could not produce any photographic evidence of the marks, nor could he cite to any studies supporting his claims of chemical compromise.

State Farm challenged both Spoon's qualifications and the reliability of his testimony. Although the court noted that that Spoon's only formal education was a G.E.D., and strongly suggested it was not inclined to agree he was qualified to give expert testimony on smoke/soot damage, it chose to strike his testimony on reliability grounds instead. Because the homeowners had no other evidence supporting their alleged repair costs, the court then granted summary judgment in favor of State Farm on all claims, including contractual and extra-contractual claims.

FIFTH CIRCUIT ENFORCES EWING BUT STILL FINDS NO DUTY TO DEFEND

Last Tuesday, the Fifth Circuit found occasion to apply the Texas Supreme Court's recent holding in *Ewing Const. Co., Inc. v. Amerisure Ins. Co.* However, the court still found several reasons why the CGL insurer did not owe a duty to defend its insured in a suit alleging breach of contract and negligent work.

In *Blanton v. Cont'l Ins. Co.*, 2014 WL 1679014 (5th Cir. Apr. 29, 2014), the insured faced allegations that it negligently repaired a boat engine resulting in extra repair costs and resulting loss of use of the boat. Following *Ewing*, the court noted that the alleged breach of the contract to repair the boat engine did not trigger the Contractual Liability exclusion because it was not an "assumption of liability." Nevertheless, the court held the boat, which was not itself damaged, constituted "impaired property" and any damage to the engine was damage to the insured's own "work" or "product." In short, even under *Ewing* and its limitations on the use of the Contractual Liability exclusion, claims alleging poor work by the insured and resulting loss of use are still likely to be excluded.

HOUSTON COURT OF APPEALS CONSTRUES VACANCY CLAUSE IN FAVOR OF INSURED

Last week, Houston's Fourteenth Court of Appeals examined a commercial property policy's vacancy clause and construed it in favor of coverage. In *ACGS Marine Ins. Co. v. Spring Ctr., Inc.*, 2014 WL 1713938 (Tex. App.—Houston [14th Dist.] Apr. 29, 2014), ACGS Marine insured a business park consisting of eleven buildings inside a single fenced property. One of the buildings was broken into and stripped of wiring and suffered other damage associated with the break-in and the removal of the wiring. ACGS denied the claim after it learned the building had been vacant for four months. The insured sued ACGS Marine, with the chief issue being the question of whether the policy's vacancy clause applied to each of the eleven buildings individually, or only to the entire property collectively.

The vacancy clause used both the phrase "the building or structure" and the phrase "covered location." The term "covered location" was defined by the policy's Location Schedule as the single street address encompassing all eleven buildings. The court also noted that at least one other portion of the policy used the phrase "***each*** building or structure," while the vacancy clause did not. Therefore, applying Texas law, the court found the insured's construction was not unreasonable and, because the property as a whole was not vacant, ACGS had incorrectly denied the claim.

This result provides an important underwriting lesson that care should be taken when writing coverage for properties with multiple buildings and the carrier should always be clear as to whether it is insuring one location with several structures or multiple locations at the same street address.