The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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COURT FINDS "GOVERNMENT AUTHORITY" AS USED IN POLLUTION EXCLUSION IS AMBIGUOUS – INSURER HAS DUTY TO DEFEND AND INDEMNIFY

Last Thursday, the Court of Appeals for the First District of Texas affirmed a trial court's ruling that a commercial general liability insurer had a duty to defend and indemnify its insured for claims alleging that groundwater supply systems were contaminated by the insured's products, as asserted by municipal corporations supplying water to customers. In *Dallas National Insurance Company v. Sabic Americas, Inc.*, No. 01-08-00758-CV (Tex.App. – Houston [1st Dist.] March 10, 2011), Sabic was sued by municipal corporations alleging groundwater contamination from products Sabic sold, manufactured or supplied and knew or should have known posed unique dangers to groundwater supplies as early as the 1970's. The insurer denied coverage and filed a declaratory judgment action asserting that the underlying lawsuits failed to assert claims for "property damage" that occurred during the policy period, that the fortuity doctrine barred coverage, that the lawsuits failed to allege an "occurrence" under the policies and, that the pollution exclusion precluded coverage. The trial court disagreed and held that coverage was afforded. This appeal followed.

The insurers argued that even though the underlying lawsuits artfully plead negligence, the pleaded facts allege knowing and intentional conduct and thus, were not "accidental" as required to have a covered "occurrence" under the policy. Nor, did the underlying pleadings allege specific dates that the actual injuries occurred. And, the insurance policies only provided coverage from July 2003 to July 2007. Addressing these arguments the court concluded that with allegations of negligence and intentional acts, the duty to defend was triggered by the negligence allegations and once triggered, the duty is absolute and applied to the entire suit, including the intentional acts. Addressing questions about whether the loss occurred within the policy period, the court found that allegations that the contamination was "continuous, persistent and ongoing" were sufficient to allege new instances occurring during the policy periods. And addressing related fortuity and known-loss doctrine arguments, the court distinguished well known precedent on the basis that those cases "only alleged intentional torts; neither petition alleged negligence on the part of the insured" and found that they did not apply to preclude coverage here.

Lastly, addressing the pollution exclusion, precluding coverage in part for any "claim or suit by or on behalf of a governmental authority for damages … or in any way responding to, or assessing the effects of pollutants" the court observed that the policy did not define "governmental authority" and the parties did not cite nor did the court find any applicable case law analyzing the term. The insurer argued that the municipal corporations were governmental entities and the exclusion applied. The insured asserted that entities were quasi-municipal water sellers, not "governmental authorities" and that the exclusion did not apply or was ambiguous. The court agreed that the term "governmental authority" was ambiguous as

used in the policies and because both parties presented reasonable interpretations, the insured's interpretation favoring coverage would be adopted. The trial court's judgment was affirmed.

INSURER'S RIGHT TO INVOKE APPRAISAL NOT WAIVED BY CLAIM DENIAL

Last Thursday, the Beaumont Court of Appeals concluded that an insurer's denial of a claim based on causation does not waive the right to invoke appraisal to determine the amount of loss or cost of repair. In *In re Southern Insurance Company*, No. 09-11-00022-CV (Tex.App. – Beaumont March 10, 2011), the insurer denied a homeowner's claim seeking coverage for damage allegedly caused by Hurricane Ike. The insurer denied the claim as caused by long term leakage and not Hurricane Ike as claimed by the insured. After suit was filed, the insurer moved to invoke appraisal and the trial court denied the motion. The insurer then filed a petition for writ of mandamus.

The Beaumont Court of Appeals observed that the policy provides that "no provision of this policy may be waived unless the terms of this policy allow the provision to be waived" and that the "appraisal clause did not allow for the forfeiture of that right." The insured argued that the insurer must agree that the loss is covered before it may "fail to agree" on the amount of the loss. But the court analyzed the recent *State Farm Lloyds v. Johnson* case and concluded that appraisal can go forward and the parties can litigate causation after the amount of loss is determined through appraisal. Accordingly, the court conditionally granted the petition for writ of mandamus instructing the trial court to vacate its order denying the insurer's motion to invoke appraisal and to allow the appraisal to go forward.