



The Weekly Update of Texas Insurance News

# TEXAS INSURANCE LAW NEWSBRIEF



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## **APPELLATE COURT ISSUES NEW OPINION IN FOUNDATION DAMAGE CASES BASED ON APPLICABLE STATUTE OF LIMITATIONS FOR BREACH OF WARRANTY AND DTPA CLAIMS**

Last Wednesday, an appellate court vacated its earlier judgment in a residential foundation damage case, withdrew its previous opinion and issued a new one to clarify its discussion on the issue of statute of limitations and further held that Plaintiff's common law claim was unsupported by the evidence. In *Southwest Olshan Foundation Repair Co., LLC v. Gonzales*, 2011 WL 149870 (Tex. App.—San Antonio, January 19, 2011), the court held that Gonzales' claim for breach of an implied warranty was precluded by the expiration of the two-year limitations period applicable to DTPA and implied warranty claims. Additionally, her common law fraud claim was not supported by the evidence.

This appeal arose from a jury verdict in favor of Gonzales for damages she alleged emanated from foundation repair work. In 2001, Gonzales began to notice cracks and other problems with the interior and exterior of the house. She filed a claim with her homeowner carrier which determined that plumbing leaks caused foundation movement and related damage and paid Gonzales to make repairs. Olshan was hired to stabilize the foundation and did so utilizing "cable-locked press pilings." Olshan performed the work, but new damage was detected and a new claim was submitted. It was later discovered there were additional plumbing leaks under the house. Olshan dug tunnels under the house to handle repairs for the leaks and re-leveled the house. Several sets of Olshan employees worked at the home over a period of months and Gonzales testified several were critical of the work Olshan had performed. At some point Olshan wanted to fill in the tunnels and Gonzales would not permit them to do so. Eventually Gonzales hired attorneys who, in turn, retained an expert to inspect the house. In May 2006, the expert reported that the "pilings weren't working." Gonzales claimed she was not aware of the problem before the May 2006 report.

Suit was filed June 2006 and Gonzales asserted the discovery rule and fraudulent concealment as defenses to limitations. The jury determined that the accrual date for breach of express warranty, breach of an implied warranty, DTPA violations, and fraud was May 2006 — the date of the expert report. As to the fraudulent concealment issue, the jury held Olshan committed fraud and that it knowingly engaged in conduct to deliberately prevent Gonzales from filing suit.

On appeal, the court agreed with Olshan and concluded the two-year limitations applied to the implied warranty claim citing Texas Supreme Court precedent. Next, the court analyzed the discovery rule and claim of fraudulent concealment. The appellate court concluded that Gonzales' sworn testimony admitted knowledge of facts, conditions, or circumstances regarding the structural problems with her house well before May 2006. Accordingly, it held neither the discovery rule nor the common law doctrine of fraudulent concealment operated to toll or suspend the limitations period for the DTPA and implied

warranty claims. Lastly, the court analyzed the common law fraud claim and concluded the evidence was not legally sufficient.

## **FEDERAL COURT DECLARES DRIVER RESPONSIBLE FOR DOUBLE FATALITY NOT INSURED UNDER PARENTS' PERSONAL LIABILITY UMBRELLA POLICY AS HE DID NOT LIVE AT THE "PRIMARY RESIDENCE"**

Last week a federal court declared a driver involved in a one-vehicle accident resulting in a double fatality was not covered under his parent's personal liability umbrella policy as he did not reside at the "primary residence." In *State Farm Fire and Cas. Co. v. Lange*, 2011 WL 149482 (S.D. Tex. January 18, 2011), the sole issue for determination was whether the driver, Matthew Lange, was insured under his parents policy at the time of the accident triggering State Farm's duty to pay on behalf of and/or indemnify Lange for damages resulting from the accident, and to defend Lange against any lawsuits or claims from the accident. The parties agreed that coverage hinged on the determination of whether Lange resided at his parents' home or at his apartment.

The dispute over Lange's primary residence stems from facts which reveal in the year leading up to the accident, Lange spent the majority of nights at an apartment in Victoria, Texas rather than at his parent's house. The court noted that Texas courts have not construed the term "primary residence" in the context of an insurance policy. As such, the court set out to "make an 'Erie guess' as to how the Texas Supreme Court would apply Texas law." For starters, the court found that "primary residence" is an unambiguous term as a matter of law. In borrowing from sources including the American Heritage Dictionary and other jurisdictions, the court fashioned a list of relevant considerations and concluded a qualitative, totality-of-the-circumstances inquiry was appropriate.

The court then proceeded to apply the factors to the evidence and decided the stronger evidence supported the fact that Lange's primary residence was the Victoria apartment. The court acknowledged that there was a "good deal of evidence" tending to show his parents' address was his primary residence. However, in the end it was not enough to convince the court that Lange was covered under the policy.

**Editor's note:** This case is a tragic reminder of the importance of reading and understanding an insurance policy. It also underscores the difficult positions judges are frequently called upon to interpret and declare decisions on contracts and other matters. The opinion, in this instance, is particularly noteworthy for the acknowledgement that the decision will have on the people and families involved in this tragic life event. The concluding opinion paragraph is found below:

*"The Court recognizes all the many reasons that its decision will strike many as both unfair and wrong. The case began with tragedy, as two lives ended violently and prematurely. That the prospects of recompense for the bereaved families should depend on a Court's determination of primary residence is a procedural anomaly that little comports with any coherent social policy. But, this Court's mission is to apply and enforce the law. The Court has no portfolio-even if it should want one-to invent policy that trumps law. Still, the Court's sympathy is genuine."*

## **WELCOME UH LAW SCHOOL PROPERTY & CASUALTY LAW STUDENTS**

For the past decade, three MDJW partners (Chris Martin, David Disiere, and Jamie Cooper) have taught various insurance law courses at the University of Houston Law School. This year, MDJW Insurance Partners David Disiere and Jamie Cooper welcome their most recent law students from the University of

Houston Law School Property & Casualty Insurance Law class as new subscribers to the Newsbrief - not only a great resource, but also a great teaching tool. The firm wishes them all the best this semester.

Our firm's commitment to remain on the cutting edge of the ever-evolving nature of Texas Insurance Law manifests in many ways including legal scholarship, academic teaching, industry training, legal publishing, and professional development teaching. It is an honor that the University of Houston Law School turns to our partners semester after semester to teach its students what they need to know about different aspects of Texas insurance law and we appreciate the opportunities to do so.

If you wish to discuss legal principles mentioned herein, reply to this e-mail or contact any of our lawyers at Martin, Disiere, Jefferson & Wisdom, L.L.P.  
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