The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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FIFTH CIRCUIT HOLDS "VARIOUS LAWS" EXCLUSION INAPPLICABLE AND CONCLUDES CARRIER OWED DUTY TO DEFEND AND INDEMNIFY NONSUBSCRIBER FOR JUDGMENT ENTERED ON CLAIMS FOR NEGLIGENCE AND NEGLIGENCE PER SE

Last week, the Fifth Circuit concluded negligence and negligence per se claims against a non-subscribing employer were not "obligations" under "any workers' compensation law" such that liability coverage was triggered for an underlying suit. In *Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel, L.L.C.*, 2010 WL 3633054 (5th Cir., September 21, 2010), AISLIC sought a declaration that it did not owe defense and indemnity under an umbrella policy issued to Rentech Boiler Systems for injuries sustained by an employee who was awarded a verdict of $12,470,000 in actual damages in an underlying suit.

The primary issue in the declaration action was whether an employee's negligence action against an employer that does not subscribe to the Texas Workers' compensation system was an "obligation" under the Texas Worker's Compensation Act (TWCA) and thereby excluded under the AISLIC policy "Various Laws" exclusion. The exclusion read, "This insurance does not apply to any obligation of the Insured under any of the following: any workers' compensation, disability benefits or unemployment compensation law, or any similar law." AISLIC argued that Texas Labor Code § 406.033(b) and (c) deprives nonsubscribing employers of certain defenses available at common law and sets out an employee's burden of proof in negligence cases and therefore creates an "obligation" for non-subscribing employers. In making an *Erie* guess, the court reviewed many related Texas and Fifth circuit opinions and concluded that the "Various Laws" exclusion was not ambiguous and that negligence and negligence per se were not "obligations" under the TWCA. The net result was AISLIC was required to provide coverage to Rentech for the judgment entered in the underlying suit.

MADAMUS CONDITIONALLY GRANTED TO REVERSE DECISION INVOLVING WAIVER OF APPRAISAL IN COMMERCIAL PROPERTY DAMAGE CLAIM ARISING FROM HURRICANE IKE

Last Thursday, an appellate court revisited the appraisal issue by conditionally granting a writ of mandamus to vacate a decision finding Continental waived its right to appraisal under an insurance policy. *In re Continental Cas. Co.*, 2010 WL 3703664 (Tex. App.—Houston [14th Dist.] September 23, 2010), involved a commercial property damage claim for 14 properties owned by Zoya Enterprises, Ltd. and related to Hurricane Ike. Zoya claimed Continental waived its right to appraisal by waiting too long after the claim was made to demand it. The court, citing its previous decision in *Slavonic*, stated, "The date of disagreement, or impasse, is the point of reference to determine whether a demand for an appraisal is made within a reasonable time." (*See* MDJW Newsbrief dated April 12, 2010).

Shortly after Hurricane Ike Zoya reported damage to 14 locations insured by Continental. In late 2008, Continental tendered payment on claims submitted for most of those locations. With regard to the locations on which Continental did not tender payment, it was understood that the parties agreed with regard to the amount of loss. Five months later, in May 2009, Zoya notified Continental it was represented by attorneys and requested damage valuations for the properties. Thereafter, Continental sent a letter to Zoya listing coinsurance valuations for 5 of the remaining damaged locations. Zoya filed suit in November 2009, alleging Continental mishandled the claims for the 14 original locations and eight additional locations. Continental answered the suit and initiated further investigation.

After multiple Inspections Continental communicated its evaluation of the amount of loss to Zoya on February 19, 2010. That same day, Zoya sent a letter rejecting Continental's valuation. On February 24, 2010 Continental invoked its right to appraisal stating Zoya's February 19, 2010 letter made it apparent the parties disagreed on the 'amount of loss'. On March 5, 2010, Continental filed the motion to compel appraisal and to stay proceedings pending appraisal.

The district court denied the original motion to compel appraisal and stay proceedings. On appeal, the court stated that the date of the suit is the date on which Continental was first put on notice that there was a dispute as to the amount of loss. Continental began inspecting all the locations included in Zoya's suit and did not conclude its investigation until January 2010. On February 19, 2010, Continental communicated its findings based on its investigation. Zoya rejected those findings, at which time, an impasse was reached. Continental then demanded appraisal five days later. The court found there was no evidence that Continental denied liability or that it would refuse to pay the amount of loss that would be determined by appraisal. The court further held that it was an abuse of discretion to deny Continental's motion to compel appraisal.