The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
www.mdjwlaw.com
A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.
Principal Office 808 Travis, Suite 1800 Houston, Texas 77002 713.632.1700 FAX 713.222.0101
111 Congress Avenue, Suite 1070 Austin, Texas 78701 512.610.4400 FAX 512.610.4401
900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

August 23, 2010

COURT FINDS INSURER NOT LIABLE FOR INSURED'S DEBT TO SERVICE PROVIDER BASED ON ORAL PROMISE TO PAY

Last Friday, the Dallas Court of Appeals reversed a judgment against a homeowners' insurer after finding no evidence of direct consideration in support of an oral promise to pay the insured's debt to a service provider. In *Chubb Lloyds Insurance Co. of Texas v. Andrew's Restoration, Inc.* 2010 WL 3278234 (Tex.App. – Dallas, August 20, 2010), the insured presented a claim for water and mold damage in early 2001. The restoration company, working on a verbal authorization, removed and "bio-cleaned" the contents of the insured's house. Questions arose over whether the house was a total loss or repairable and during this time the mold and water damage got progressively worse. The insured signed an agreement with the restoration company promising to pay $6,300 a day for dehumidification and monitoring services which were provided for about a year. The insurer paid the provider directly for the services, at least for a time, but once the house was declared a total loss, the payments stopped. The insured had the house demolished. Seeking payment for services provided, the restoration company filed suit against the insurer and the insured and was awarded $705,548 in damages jointly and severally against them. This appeal followed.

The insurer challenged the award against them under the statute of frauds asserting that a promise to pay the debt of another is generally unenforceable unless it is in writing. The court examined an exception, under the "main-purpose doctrine" that provides that if "the promise is made for the promisor's own benefit and not at all for the benefit of the third person," the statute of frauds defense fails. And one element of the defense involves whether there is consideration for the promise. Addressing this issue at the trial court level, the jury found that Chubb did receive consideration. But the appellate court disagreed finding that any benefit received by Chubb was "remote and indirect." In doing so, the court noted:

> The principal and direct benefit to be gained by controlling the humidity in Cruz's house was to improve the physical condition of that house by making it a less hospitable environment for mold. Cruz was the primary beneficiary of this service, both because it was his property that was being improved and because the service tended to satisfy his contractual obligation under the insurance policy to "protect the property from further damage."

Accordingly, the court reversed the judgment as against Chubb and rendered that the plaintiff service provider take nothing against them. The judgment against the insured, however, was for the most part affirmed.

HURRICANE UPDATE: FIFTH CIRCUIT INTERPRETS "CHARGES AND EXPENSES" FOR CALCULATION OF BUSINESS INTERRUPTION COVERAGE

Last Tuesday, the Fifth Circuit interpreted the meaning of "charges and expenses" as applied to a business interruption claim under a commercial-property policy. In *Consolidated Companies, Inc. v. Lexington Insurance Company*, 2010 WL 3223137 (5th Cir. (La.) August 17, 2010), the insured's warehouse was damaged by Hurricane Katrina but the insured was able to resume partial operations within ten days. It took fifteen months, however, before restoration of operations were complete. During that time, the insured generated a small profit, incurring $205,840,849 in revenues and incurring $205,561,483 in expenses. The insurer calculated the insured's business interruption loss at $3,247,070 and presented a check for $247,070 after taking a credit for a $3,000,000 advance. The insured refused, seeking instead $7,071,120 in lost profits and $12,308,522 for "charges and expenses" - the meaning of which was central to the dispute and the court's decision in this appeal. The jury awarded the full amount sought by the insured plus statutory penalties and damages available under Louisiana law. This appeal followed.

The court noted that the central disagreement between the parties turned on whether the $12,308,522 should be paid in full or reduced to the extent the "charges and expenses" were offset by income during the 15-month period of restoration. Applying the rules of policy interpretation, the court found no ambiguity in the terms or the manner in which the policy addresses the effect of resumed operations: "if the insured could reduce the *loss* resulting from this interruption of business … by a complete or partial resumption of operations … such reduction will be taken into account in arriving at the amount of loss." Because the $12 million in expenses were included in the roughly $205 million in expenses incurred during the resumed operations, the expenses were not a "loss" to be compensated under the policy and no part of the $12 million could be recovered from the insurer. Accordingly, the court vacated the "charges and expenses" portion of the award and remanded the case to address issues related to statutory damages and penalties.

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.
If you would like to add additional recipients or would like to unsubscribe , please reply to this e-mail with your request
For past copies of the *Newsbrief* go to www.mdjwlaw.com and click on our Texas Insurance News page.