The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TWO FEDERAL JUDGES GRANT ABATEMENT BASED ON INSUFFICIENT NOTICE UNDER THE TEXAS INSURANCE CODE

Recently, in *Little v. Allstate Texas Lloyd's*, 2010 WL 2612639 (S.D. Tex. June 29, 2010) and *Corona v. Nationwide Property and Casualty Company*, 2010 WL 2636119 (S.D. Tex. June 29, 2010), the Southern District of Texas, Houston Division, granted pleas in abatement filed by insurance companies based on insufficient notice under section 541.154 of the Texas Insurance Code.

Section 541.154 of the Texas Insurance Code provides that a person seeking damages under this chapter must provide written notice to the potential defendant not later than the 61st day before the action is filed. Furthermore, the notice must advise of the "specific complaint" and the amount of damages and expenses, including attorneys' fees reasonably incurred in asserting the claim.

In *Little*, the plaintiff filed suit under an insurance policy issued to Little by Allstate on January 21, 2010 and did not sent the required notice letter to defendants until March 3, 2010. Judge Lee Rosenthal held that the notice letter did not satisfy the notice requirement under the insurance code, because it was sent after the lawsuit was filed. In addition, Judge Rosenthal held that the notice letter did not satisfy the notice requirement, because its content was insufficient to trigger the sixty day abatement period, stating that "[t]he notice letter contained no factual information about the cause of action." The case was abated and stayed until sixty days after the plaintiff provided proper notice pursuant to the Texas Insurance Code.

In *Corona*, the plaintiff filed suit under an insurance policy issued to Nationwide on April 6, 2010 and sent the required notice letter to defendants on the same day. Judge Ewing Werlein, Jr. held that the notice was "deficient in substance," stating that "[t]his highly subjective, conclusory allegation does not furnish the *factual* detail that meets the Texas Insurance Code's requirement of a 'specific complaint.'" Although Judge Werlien did not specifically address the fact that the suit was filed the same day the notice letter was sent, he strongly indicated that the notice would be considered untimely as well. The case was abated and stayed until sixty days after the plaintiff provided proper notice pursuant to the Texas Insurance Code.

NO DUTY TO DEFEND BASED ON NO "PROPERTY DAMAGE" AS DEFINED UNDER THE POLICY

Recently, in *Cook v. Admiral Insurance Company*, 2010 WL 2605256 (N.D. Tex. June 29, 2010), the Northern District of Texas, Amarillo Division, held that Admiral had no duty to defend or indemnity the plaintiff because no property damage was alleged in the underlying lawsuit. In the underlying case, the plaintiff was hired to deliver and oversee the running of casing on an oil well. The plaintiff removed too much casing from the site which caused the well to be completed at a depth shallower than specified, and

the well had to be reworked at an additional cost. Admiral sought a declaratory judgment that it had no duty to defend, because the underlying plaintiff's claims were not within the scope of coverage. The applicable insurance policy provided that Admiral would "pay those sums that the insured becomes legally obligated to pay because of . . . 'property damage' to which this insurance applies."

Applying an eight-corners analysis, the court held that there was no duty to defend.
The court explained that the inquiry into an insurer's duty to defend focuses on the facts pled in the suit, not legal theories and stated that "[i]f the pleadings do not allege facts within coverage, the insurer has no duty to defend." The court further explained that there was no "property damage as loss of use of tangible property"—as plaintiff alleged—because the policy did not cover damages for the loss of use of something that had not yet been created. The court further explained that "[d]amages for repairs or the cost of getting what one desired, but did not receive, are not the same thing as damages for loss of use of the thing desired." The court further held that the same reasons which negated Admiral's duty to defend also negated its duty to indemnify.

APPRAISAL CLAUSE UPHELD WHERE FORMALLY DEMANDED AFTER SUIT FILED

Recently, in *Tran v. American Economy Insurance Company*, 2010 WL 2680616 (S.D. Tex. July 2, 2010), the Southern District of Texas, Houston Division, granted American's motion to compel appraisal under the applicable insurance policy. The plaintiff, a shopping center, sued American for failure to pay a sufficient amount for Hurricane Ike damages under a commercial property insurance policy. American sent its written demand for appraisal to plaintiff three months after suit was filed. Plaintiff declined to participate in appraisal, asserting that the appraisal process had been waived by American due to delay.

The court explained that "[w]hen a policy is silent as to the time for invoking the right to appraisal, the law will require that the demand for appraisal be made within a reasonable amount of time." The court further stated that the proper point of reference for determining waiver as a result of delay is when the parties reached an impasse. The court held that, because the parties continued to deal with each other after the plaintiff requested his claim be re-opened and American re-inspected the property and issued additional funds to plaintiff without objection from the plaintiff, until the lawsuit was filed it was reasonable for American to assume that the matter was satisfactorily resolved. And, upon service, American reserved its right to appraisal under the policy. Therefore, the court held that, at most, the interval between impasse and American's demand for appraisal was three months, which period of time was insufficient to support a finding of waiver. The court further declined, however, to abate the case, stating that "[w]hile the Texas Supreme Court has held appraisal to be a condition precedent to suit, in this case the appraisal request was not made until after suit was filed."