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FYI Spring 2008

WE ARE PLEASED TO ANNOUNCE THAT JANET COLANERI HAS BECOME LICENSED IN THE STATE OF LOUISIANA!

Welcome to our Spring 2008 FYI Letter. Please forgive our absence - we've undergone some re-tooling of our website over the past few months and look forward to again being in touch with you with monthly updates.

Use of In-House Counsel/Captive Firms by Insurance Companies Upheld as Not Being the Unauthorized Practice of Law. *Unauthorized Practice of Law Committee v. American Home Assurance Co., Inc. et al.*

A majority of the Texas Supreme Court held that liability insurers use of staff attorneys and "captive law firms" is not the unauthorized practice of law. Liability insurers may use staff counsel or "captive law firms" to defend their insureds as long as the interests of the insurer and the insured are congruent. "Congruent" means that the interests of the insurer and insured are aligned to defeat the claim and there is no conflict of interest between them. The staff attorney or captive law firm must disclose their affiliation with the insurer to the client/insured.

The majority of the Court held that a corporation practices law only when it hires

an attorney to represent the unrelated interests of third parties. It does not practice law when it retains counsel solely to perform its contractual duty to defend others, provided the interests of the insurers and the insured are congruent. Insurance defense counsel is not prohibited from dual representation of the interests of the insured/client and the insurer, but counsel has a duty to protect the rights of the insured/client from being compromised by the insurer. The insurer has a contractual right to control the defense as if it were the client where there is no conflict of interest. The possibility of conflict of interest due to reservation of rights, protecting the insured's confidential information, responding to *Stowers* demands, litigation guidelines, etc. should be handled on a case-by-case basis by counsel.

Justice Johnson, joined by Justice Green, dissented, following the reasoning in amicus briefs submitted by TADC and TMA. Under existing precedent, Justice Johnson concluded that hiring a lawyer to represent an insured who is a legally separate person from the corporation *is* the practice of law. Maximizing corporate profits is the chief goal of corporate management, and staff counsel attorneys, by virtue of human nature, are not immune to cost-cutting pressures. In a private firm, the owners are themselves attorneys

who are ultimately bound by professional ethics, unlike corporate management.

It is anticipated that there will be one or more notices for rehearing filed.

Default Judgment Affirmed When Conscious Indifference Shown. *Levine vs. Shackelford, Melton & McKinley, L.L.P.* Three law firms sued the Levines for legal fees. The Levines' attorney knew of the 11/29/2004 deadline for answer in the suit. He agreed to file a general denial by that date, but he did not do so. He again failed to meet an extended deadline. Although he eventually e-mailed a draft denial to the parties, he never attempted to confirm that an answer was filed, despite repeated discussions, emails, and contact with the opposing party, warning him that if he did not file an answer, the law firms would take a default judgment. A default judgment was entered on 12/15/2004. The attorney learned of the default on 12/23/2004 when his client informed him of the default judgment and that the clerk had not received the answer. The Court of Appeals affirmed the trial court's refusal to set aside the default judgment. In applying the *Craddock v. Sunshine Bus Lines, Inc.* test to the case, the Court of Appeals stated that the evidence "showed a pattern of conduct that disregarded deadlines, promises, procedures, and simple steps that a person of reasonable sensibilities would have taken to ensure that the answer was properly and timely filed." On appeal, the finding was affirmed. Though the Court of Appeals articulated the "conscious indifference" requirement of the *Craddock* test incorrectly, it properly applied the test. The *Craddock* standard is one of intentional or conscious indifference—that the defendant knew it was sued, but did not care. Still, the facts of this case show conscious indifference that was more than mere negligence.

Insurance Adjuster's Guide Could Not Change the Lack Of Coverage From the Policy. *Justice v State Farm Lloyds Insurance Co.* A tree fell on Plaintiffs' house in 2000. They made a claim under their State Farm homeowners' insurance policy and State Farm paid the claim. In 2001, Plaintiffs discovered mold in the walls of their house and reported the claim to State Farm. State Farm sent Plaintiffs a Reservation of Rights letter, hired FTI/SEA Consulting (FTI) to conduct an industrial hygiene evaluation and eventually paid Plaintiffs over \$137,000 for remediation of their home, alternative living expenses and cleaning costs on this claim. Plaintiffs subsequently filed suit against State Farm & FTI for additional mold damage. Both Defendants filed Motions for Summary Judgment, which the trial court granted. On appeal Plaintiff unsuccessfully argued that the mold exclusion in their policy was somehow overcome by a provision of the State Farm Adjuster's Guide, purportedly stating that if the original claim is covered, such as the damage from a wind blown tree, then any loss that proximately results from that loss is covered. Concerning FTI, Plaintiffs alleged that it negligently failed to detect some areas containing mold, but the trial court held that Plaintiffs failed to establish that FTI breached any duty it owed to Plaintiffs. Court of Appeals affirmed the trial court's rulings with regard to each Defendant's motion for summary judgment.

Trial Court Did Not Abuse Its Discretion By Excluding Evidence Of Medical Bill Discounts. *Gore vs. Faye.* In an auto accident case in which Plaintiff claimed bodily injuries, Defendant answered and pled that pursuant to Texas Civil Practice and Remedies Code §41.0105, Plaintiff's recovery for medical expenses was limited to the

amounts of reasonable and necessary medical expenses “which were paid and accepted rather than the total of the charged medical expenses.” At trial, with no objection from Defendant, Plaintiff presented evidence of the amounts charged by four healthcare providers for treatment of her injuries. Defendant offered unredacted copies of previously admitted affidavits of services and charges of two healthcare providers, showing discounts. The trial court excluded evidence of the discounts from the jury but agreed to consider it post-verdict. The trial court ultimately determined it was not feasible to offset the past medical charges according to Defendant’s evidence because the jury awarded an amount less than the total amount of charges presented by Plaintiff’s affidavits. The court signed a judgment awarding Plaintiff the full amount of past medical expenses found by the jury, reduced by the percentage of fault the jury attributed to Plaintiff. The Court of Appeals affirmed the trial court’s findings. The correctness of D’s position that the trial court was required to admit her §41.0105 evidence before the jury is not apparent from the language of §41.0105; thus, the trial court did not abuse its discretion by excluding the evidence.

Untimely Notice of Claim or Suit Does Not Defeat Coverage Unless the Insurer is Prejudiced. *PAJ, Inc. vs. Hanover Ins. Co.* PAJ, Inc., a jewelry manufacturer and distributor, purchased a occurrence based commercial general liability (“CGL”) policy from Hanover Insurance Company that covered liability for advertising injury. The policy required PAJ to notify Hanover of any claim or suit brought against PAJ “as soon as practicable.” In 1998, Yurman Designs sued PAJ for copyright infringement. PAJ did not notify Hanover of the suit until four to six months after litigation commenced. PAJ

brought this suit against Hanover, seeking a declaration that Hanover was contractually obligated to defend and indemnify PAJ in the copyright suit. The trial court held that Hanover was not required to demonstrate prejudice to avoid coverage under the policy. The Court of Appeals affirmed. The Supreme Court reversed and rendered that the insurer could not deny coverage, because of untimely notice. An insured’s failure to timely notify its insurer of a claim or suit, does not defeat coverage under the policy if the insurer was not prejudiced by the delay. An immaterial breach does not deprive the insured of the benefit of the bargain and cannot relieve the insurer of the contractual coverage obligation.

DOES THAT CAPTION SAY “JP” or “SC”? No Appeal from County Court at Law’s Judgment in a Small Claims Court Appeal. *Lister v Walters.* Suit brought by Plaintiff landowner for Defendant’s failure to timely perform clearing work. The justice court awarded Plaintiff \$1,400 and Defendant appealed to the county court at law. County court at law found that no oral contract had been formed. Plaintiff appealed to the Court of Appeals which dismissed for lack of jurisdiction. The Court of Appeals is without jurisdiction to review a county court at law’s judgment in the appeal of a small claims case. A small claims court has concurrent jurisdiction with the justice court and the justice of the peace sits as the judge of the small claims court. Although several of the documents contained the seal of the justice court, the caption of Plaintiff’s petition provided, “In Small Claims Court Precinct 2” and the petition complied with the form for actions in small claims courts.

DON’T MESS WITH A MAN’S CATTLE IN TEXAS! Big Punitive Damages Award Upheld Against Cattle Thieves. *Bennett vs.*

Reynolds. In this case regarding the sale of 13 stolen cattle, the jury awarded \$5,327.11 in actual damages against the two Defendants plus punitive damages of \$250,000 from the individual Defendant (ratio of 49 to 1) and \$1 million from corporate Defendant (ratio of 187.7 to 1). The trial court entered judgment in accordance with the verdict. The Court of Appeals affirmed the verdict, finding sufficient evidence to support the jury's findings on liability, malice and damages. The Court of Appeals rejected the Defendants' constitutional challenge to the punitive damage award, noting that the Defendants did not complain that the jury was instructed to consider, among other things, the net worth of each Defendant. It also noted that the Defendants acted intentionally in converting and committing theft of cattle owned by Plaintiff and that each Defendant attempted to cover-up the wrongdoing by numerous unlawful means extending to acts endangering the liberty and safety of Plaintiff and others.

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SEE YOU NEXT MONTH!