

RECENT DEVELOPMENTS

After purchasing the townhome, Robertson discovered that the stucco exterior on the townhome was faulty. Further investigation revealed that latent defects in the stucco were causing more water penetration into the townhome, causing further damage. Robertson asserted that the repairs to fix the water damage from the storm were structural in nature and should have been disclosed in the “Seller’s Disclosure Notice.”

Robertson filed suit against Odom alleging that Odom violated the Deceptive Trade Practices Act (“DTPA”) because he acted deceptively in representing that no structural repairs had taken place to the townhome prior to the purchase. Odom moved for directed verdict on some of the claims based on the DTPA, which was granted by the trial judge. On the remaining issues, a jury found Odom did not violate the DTPA by not disclosing the rain damage to the townhome as a “structural” repair. Robertson appealed.

HOLDING: Affirmed.

REASONING: The court stated that Robertson’s issues on appeal turn on whether Odom acted deceptively in failing to disclose previous “structural” repairs in his “Seller’s Disclosure Notice” as a part of the sale of the townhome. The court reasoned that although the townhome underwent substantial repairs to the sheetrock and other components of the home, those repairs were not “structural” in nature as defined by the Texas Property Code.

The court first rejected Robertson’s more expansive

reading of the term “structural” from Webster’s dictionary. In order to determine the definition of “structural” in the context of residential construction, the court looked to the plain and common meaning of the statute’s words. This included looking elsewhere in the property code to ascertain how the word was used in similar contexts. Finding the definition of “structural” to mean the “load-bearing portion of the residence,” the court found the repairs conducted as a result of the rain damage were not structural because they did not affect the load-bearing portion of the home. Since the repairs done to the townhome were not structural, the court reasoned that the repairs were not required to be listed in Odom’s “Seller’s Disclosure Notice.” The court found that the evidence was factually insufficient to find a DTPA violation based on deception regarding “structural” repairs and affirmed the judgment of the trial court.

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INSURANCE

INSURER HAS NO DUTY TO DEFEND AND NO LIABILITY UNDER A POLICY UNLESS AND UNTIL THE INSURED COMPLIES WITH THE NOTICE-OF-SUIT CONDITIONS AND DEMANDS A DEFENSE

Jenkins v. State & County Mut. Fire Ins. Co., ___ S.W.3d ___ (Tex. App.—Forth Worth 2009).

FACTS: Garry Jenkins filed a suit to collect a default judgment under an automobile liability policy. Jenkins sued Mark, Deborah, Richard, and L & G Pipe for negligence. State and County Mutual Fire Insurance Company had issued a business auto policy to Deborah as named insured. The policy’s “loss conditions” provided the insured must immediately send copies of any demand, notice, summons, or legal paper received concerning the claim or suit. All defendants, except Mark, forwarded the suit papers to State and County, and State and County defended them under the policy. Jenkins was unable to effect personal service on Mark. He obtained an order authorizing service on Mark by publication. Mark did not file an answer. Jenkins’ counsel informed State and County and sent them copies of the suit papers. The trial court rendered a default judgment against Mark. A jury found that Mark was 100% responsible, and the trial court rendered a take-nothing judgment against the other defendants. Jenkins then sued State and County, seeking to collect the judgment. The trial court granted summary judgment for State and County. The appellate court reversed and remanded, holding that a genuine issue of material fact as to who owned the truck precluded summary judgment. On remand, the trial

court granted State and County’s summary judgment and denied Jenkins. Jenkins appealed.

HOLDING: Affirmed.

REASONING: The court relied on three Texas Supreme Court opinions: *Weaver v. Hartford Accident & Indem. Co.*, 570 S.W.2d 367 (Tex. 1978); *Nat’l Union Fire Ins. Co. v. Crocker*, 246 S.W.3d 603 (Tex. 2008); *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170 (Tex. 1995).

In *Weaver*, Busch did not forward suit papers to Hartford. The court held that because Busch had never forwarded the suit papers to Hartford or requested a defense, Hartford had no duty to defend him, and it affirmed the court of appeals’ take-nothing judgment in favor of Hartford.

In *Harwell*, Leatherman’s attorney notified State Farm of the suit in writing and discussed the case with State Farm’s attorney, but Harwell never forwarded any suit papers to State Farm nor demanded a defense. The Texas Supreme Court held that until State Farm received notice of suit, it had no duty to undertake Hubbard’s defense. The court also held that the failure to notify an insurer of a default judgment against its insured until after the judgment has become final and nonappealable prejudices the insurer as a matter of law.

In *Crocker*, the supreme court concluded that there is no duty to provide a defense absent a request for coverage. The court concluded that the rule from *Weaver*, *Harwell*, and *Crocker* was clear: an insurer has no duty to defend and no liability under a policy unless and until the insured in question complies with the notice-of-suit conditions and demands a defense. The court stated that this is true even when the insurer knows that the

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insured has been sued and served and when the insurer actually defends other insured in the same litigation, as happened in both *Weaver* and *Crocker*.

A PROVISION IN AN INSURANCE CONTRACT THAT ESTABLISHES A LIMITATIONS PERIOD SHORTER THAN TWO YEARS IS VOID

Spicewood Summit Office Condos. Ass'n Inc., v. Am. First Lloyd's Ins. Co., ___ S.W.3d ___ (Tex. App.—Austin 2009).

FACTS: Commercial property owned by Spicewood Summit Office Condominiums Association, Inc. was damaged in a hailstorm. The property was insured by America First Lloyd's Insurance Company. Spicewood reported the damage to America First. After America First's initial assessment of the loss, Spicewood obtained an independent assessment that estimated a significantly higher cost of repair. American First addressed Spicewood's concerns with additional inspections and supplemental payments. Dissatisfied with the amounts paid by America First, Spicewood filed suit against America First. The district court granted America First's motions for summary judgment, ruling that (1) Spicewood's claims for breach of contract, prompt-payment penalties, and related attorneys' fees were precluded based on the contractual limitations period provided in the insurance policy, and (2) Spicewood's extra-contractual claims were precluded because there was, at most, a *bona fide* dispute regarding the extent of damage and valuation of Plaintiff's loss. Spicewood appealed the judgment.

HOLDING: Reversed.

REASONING: The court began by looking at section 16.070(a) of the Texas Civil Practice and Remedies Code. Section 16.070(a) states, "...A stipulation, contract, or agreement that establishes a limitation period that is shorter than two years is void in this state." The court concluded under the plain language of section 16.070(a), the "time in which to bring suit" cannot be shorter than two years. The court then addressed the issue of when the "time in which to bring suit" begins. The court held that the limitation period begins to run upon the accrual of the cause of action. The court determined that a contractual limitations period, to comply with section 16.070(a), cannot end until after two years after the day the cause of action for breach of the agreement has accrued. The court then examined the insurance contract between America First and Spicewood. The court examined provision (a) and (b) of the contract. Provision (a) stated that in order to bring legal action against America First under the policy, the insured was required to comply fully with all terms. Provision (b) provided that the actions must be "brought within 2 years and one day after the date on which the direct physical loss or damaged occurred." Spicewood was required to meet the requirements of provision (a) before bringing a suit against America First. The court concluded that a trigger date for a two-year contractual limitations provision that precedes the date the cause of action accrues will result in a "time in which to bring suit" that is shorter than two years in violation of section 16.070(a) of the civil practice and remedies code. Therefore, the court held the contractual limitations provision void.

DEBT COLLECTION

BANKRUPTCY TRUSTEE CAN PURSUE CLAIMS THAT THE DEBTOR WOULD HAVE BEEN JUDICIALLY ESTOPPED FROM PURSUING HERSELF

Bailey v. Barnhart Interest, Inc., ___ S.W.3d ___ (Tex. App.—Houston [14th Dist.] 2009).

FACTS: Sheryl English sued the Barnharts in state district court, alleging that she sustained personal injuries attributable to mold exposure while working in a building managed by the Barnharts. English also filed for Chapter 7 bankruptcy. She filed her bankruptcy schedules and statement of financial affairs on the same day. English failed to list her pending state court suit against the Barnharts in these filings as an asset of the bankruptcy estate. English died while her suit against the Barnharts and her bankruptcy were pending. Chapter 7 trustee Joseph M. Hill filed a no-asset report and the estate was closed. However, upon learning of English's state court suit against the Barnharts from the attorney handling that suit, Hill filed a motion to withdraw his no-asset report and to reopen the bankruptcy estate. The bankruptcy court signed an order granting Hill's motion and ordered the case reopened. The bankruptcy court then granted Hill's motion authorizing the employment of an attorney to represent him as trustee and to pursue the suit against the Barnharts; Bailey was added as a plaintiff in a supplemental state

court petition. The trial court signed an amended order granting the Barnharts' summary judgment motion on judicial estoppel. Appellants filed a motion for new trial. The trial court signed an order denying the motion for new trial. Appellants timely filed their notice of appeal.

HOLDING: Reversed.

REASONING: The court began its analysis by describing the role of a Chapter 7 Trustee. The trustee is the real party in interest and the only party with standing to prosecute causes of action belonging to the estate. If a debtor fails to schedule an asset and the trustee later discovers the omission, the trustee may reopen the bankruptcy case to administer the asset on behalf of the creditors.

The court then addressed the issue of judicial estoppel. A party is judicially estopped when (1) its position is clearly inconsistent with a previous one; (2) the court accepted the previous position; and (3) the non-disclosure was not inadvertent. The court then proceeded to apply judicial estoppel to the Chapter 7 Bankruptcy Trustee.

The court analyzed the issue of whether English's failure to list her suit against the Barnharts in her asset report resulted in Hill being prevented from pursuing the suit on the grounds of judicial estoppel. The Barnharts, relying on *In re Superior Crewboats, Inc.*, argued that it did. The court reasoned that *In re Superior Crewboats* had been limited by the Fifth Circuit's decision