2015 YEAR IN REVIEW

INSURANCE LAW

By Jennifer Kelley

INSURANCE-RELATED LAWS PASSED IN 2015:[1]

BILL	LAW	EFFECTIVE DATE
SB 188 & SB 189	Intended to address underwriting and rating decisions relating to coverage. (Extension of SB 736 passed in last session of legislation.). These laws add more types of insurance to the prohibition against using a consumer's inquiry about policy coverage against the consumer in setting rates, premiums, or deductibles. A "consumer inquiry" has the same meaning as "customer inquiry" under section 551.113 of the Texas Insurance Code. Both mean: "[A] telephone call or other communication made to an insurer that does not result in an investigation or claim and that is in regard to the general terms or conditions of or coverage offered under an insurance policy. The term includes a question concerning the process for filing a claim, and whether a policy will cover a loss, unless the question concerns specific damage that has occurred and that results in an investigation or claim." SB 188 clarifies that the law applies to standard fire, homeowners, or farm and ranch owners insurance policies, including those issued by (1) a farm mutual insurance company; (2) a county mutual insurance company; (3) a Lloyd's plan; and (4) a reciprocal or interinsurance exchange. SB 189 adds personal automobile insurance policies, including a policy written by a county mutual insurance company.	September 1, 2015
SB 498	Indefinitely extends the windstorm inspection waiver program, which waives the requirement that residential structures built, altered, or repaired before June 19, 2009, have a windstorm inspection certificate (WPI-8) to be	Immediately

[1] The list includes a few of the insurance-related bills passed during the 84th Legislature. Additional insurance-related bills can be researched and read on the Texas Legislature Online website, www.capitol.state.tx.us.

	eligible for TWIA coverage. It retains the two exceptions for structures missing one or more WPI-8s.	
SB 653	Increases the burial benefit cap under worker's compensation insurance from $6,000 to $10,000.	Applies to a claim for benefits based on a compensable injury that occurs on or after September 1, 2015.
SB 784	Reduces insurer reporting requirements from quarterly to annually for changes in losses, premiums, and market share. The new law eliminates insurer reporting requirements for closed claim reports, and claims information for residential property and personal auto insurance. It also removes a rate filing requirement that commercial lines insurers show evidence that rate computations do not include disallowed expenses.	September 1, 2015 (Applies to annual reporting by insurers on or after January 1, 2016. For the elimination of closed claim reports, applies to claims closed on or after January 1, 2016.)
SB 876	Changes the licensing period for agents and adjusters to two years for every licensee and ties the renewal date to the individual licensee's birth date. It also combines renewals for those holding multiple licenses so that only one renewal will have to be made per license period. The new law also (1) changes the continuing education requirement from 15 hours to 24 hours per license period; and (2) precludes renewal of a license for failure to timely complete CE hours unless deficiency is cured within 90 days of expiration and individual pays a $500 fine. The new law adds requirements for out-of-state licensees obtaining a Texas license, and it authorizes the TDI Commissioner to make special rules for issuance of temporary licenses.	September 1, 2015
SB 900	Changes the Texas Windstorm Insurance Association funding structure, adds a depopulation program, grants TWIA authority to issue binders, changes the composition of TWIA's board of directors, and provides for changes in the use of the catastrophe reserve trust fund. The new law also allows the commissioner to contract with an administrator to manage TWIA and administer the plan of operation.	September 1, 2015

SB 901	Amends the Texas Labor Code to raise from $8.50 an hour to $10 an hour the maximum wage threshold under which an injured employee is entitled to a temporary income benefit under the Texas Workers' Compensation Act for the first 26 weeks after the injury, in an amount equal to 75 percent of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's average weekly wage.	September 1, 2015
SB 956	Adds a new chapter (Chapter 525) to the Texas Insurance Code addressing deadlines for delivery of insurance policies. The new chapter applies to companies writing personal auto and residential property insurance, as well as to TWIA, FAIR Plan Association, and Texas Automobile Insurance Plan Association policies. The new law provides that an insurer must deliver the policy to the insured, or deliver the policy to the agent for delivery to the insured, by certain deadlines based on the type of policy: for policies longer than 30 days, not later than the 30th day after the effective date; for policies 10-31 days long, not later than the 10th day after the effective date; and for policies less than 10 days long, within the policy period. As for renewals of policies, the insurer only needs to provide a copy within 15 days of receipt of an insured's written request for a copy of the policy.	Applies to policies delivered, issued for deliver, or renewed after September 1, 2015.
SB 978	Provides that the confidentiality protections in Government Code Chapter 552 apply to workers' compensation rate filings. TDI is required to annually make available to the public information on its general process and methodology for rate review of workers' compensation filings, including factors that contribute to the disapproval of a rate.	September 1, 2015
SB 1081	Requires principals to provide information to people entering into a consolidated insurance program (CIP), including criteria for CIP eligibility, description of the project site, and a summary of insurance coverage. A person is not required to enroll in a CIP if the principal does not timely provide the information. People who do not enroll in a CIP must obtain insurance coverage for their project work, and the principal must compensate them for the cost of that coverage.	January 1, 2016

SB 1060	Requires public insurance adjusters to be licensed ("PIA") by the Texas Department of Insurance. It prohibits PIAs from (1) accepting money from or having any financial interest in any firm providing repairs for property damage; (2) participating in any repairs; (3) soliciting claimants and signing them with particular attorneys; (4) advancing money to claimants; (5) paying referral fees to non-PIAs for claimant referrals; and (6) accepting any money from any attorney, appraiser, contractor, or others in exchange from a referral.	September 1, 2015
SB 1554	Repeals the standard rate index for personal auto insurance.	September 1, 2015
HB 1094	Amends the Texas Labor Code to provide that a remarried former spouse of a first responder is entitled to receive death benefits for life if the first responder died in the course and scope of employment or while providing services as a volunteer.	Applies to a claim for benefits based on a compensable injury that occurs on or after September 1, 2015.
HB 1733	Addresses gaps in auto policy coverage for "transportation networking companies" ("TNC"), such as Uber and Lyft. Requires TNC drivers to carry primary auto insurance covering use of the vehicle while transporting TNC passengers for compensation. The insurance must be active while the TNC driver is logged on to the TNC's digital network and while transporting passengers. The driver, the TNC, or a combination of the two could subscribe to the policy as long as the driver is covered. Under the new law, the required coverage minimums for TNC's are: (a) while the TNC driver is logged on to the TNC network, $50,000 for injury or death coverage for each person in an incident, $100,000 for injury or death coverage per incident, and $25,000 for property damage coverage per incident; and (b) while the TNC driver is carrying a passenger, minimum total aggregate limit of liability of $1 million for death, bodily injury, and property damage per incident. If the TNC driver's coverage lapses or is insufficient, the TNC is required to provide the coverage. The new law requires the TNCs to keep detailed records of when drivers log into and out of the network, for use in the claims investigation process.	January 1, 2016

HB 2439	Creates two ways to certify that a structure complies with the applicable windstorm building code, which the Insurance Code requires for insurability through the Texas Windstorm Insurance Association (TWIA). Completed structures shall be certified when a Texas-licensed professional engineer sends either a signed and sealed design or a post-construction evaluation report to TWIA. Structures with ongoing construction may be certified by having a qualified inspector submit to TDI a form affirming that the structure either complies with the applicable windstorm building code or is built to a design sealed by a Texas-licensed professional engineer and complies with the applicable windstorm building code. HB 2439 removes statutory language giving TDI authority to require qualified inspectors who are Texas-licensed professional engineers to seal inspection forms. HB 2439 repeals the requirement for the Texas Board of Professional Engineers to maintain a roster of engineers licensed to conduct windstorm inspections.	Applies only to a TWIA policy delivered, issued for delivery, or renewed on or after January 1, 2017.
HB 2466	Creates a safety reimbursement program for employees who have less than 50 employees and participate in the Texas workers' compensation system. Reimbursement of employer expenses related to the facilitation of a safe and health workplace may not exceed $5,000 per calendar year. Eligible expenses include: physical modifications and safety equipment, devices, and tools. Insurance carriers *must* notify eligible employers of the availability of the program.	Applies only to costs incurred on or after January 1, 2016.
HB 2776	Allows insurers to file rating programs based on claim or loss experience for residential property insurance. The current statute allows insurers to discount premiums for their policyholders who have been insured with them and claim free for three years.	Applies only to an insurance policy delivered, issued for delivery, or renewed on or after January 1, 2016.

SUPREME COURT OF TEXAS CASES:

EPA MANDATED CLEAN-UP PROCEEDING UNDER CERCLA CONSTITUTES A "SUIT" UNDER CGL POLICY POTENTIALLY TRIGGERING AN INSURERS DUTY TO DEFEND

In *McGinnes Industrial Maintenance Corp. v. Phoenix Ins. Co.*, -- S.W.3d--, No. 14-0465, 2015 WL 4080146 (Tex. 2015), the Supreme Court of Texas answered whether a notice letter from the Environmental Protection Agency ("EPA"), stating that the recipient is a "potentially responsible party," constitutes a "suit" under the terms and conditions of a commercial general liability ("CGL") policy thereby potentially triggering an insurer's duty to defend. Agreeing with the overwhelming majority of jurisdictions to have considered the issue, and stressing the importance of uniformity, the supreme court held that "suit," for purposes of a CGL policy, includes superfund cleanup proceedings conducted by the EPA under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). In reaching its decision, the Texas Supreme Court conceded that the term "suit" commonly refers to a proceeding in court, but it concluded that the administrative process under CERCLA was the substantial equivalent to a judicial action.

THE ANTI-CONCURRENT-CAUSATION EXCLUSION APPLIES UNLESS THE COVERED RISK CAUSES INDEPENDENT INJURY

In *JAW The Pointe, LLC v. Lexington Ins. Co.*, 460 S.W.3d 597 (Tex. 2015), the Supreme Court of Texas for the first time addressed the proper application of the so-called "anti-concurrent-causation" exclusion, and ultimately refused to reinstate a $3.7 million trial verdict against the insurer for property damage losses stemming from Hurricane Ike. In that case, the issue was whether the subject policy's anti-concurrent-causation clause excluded coverage for costs to comply with city ordinances where the necessity of compliance resulted at least in part from flooding, which was expressly excluded from coverage. The Supreme Court of Texas noted that the policy expressly excluded coverage for any "loss or damage caused directly or indirectly by any of the" listed causes, "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." It also found that the policy specifically listed "flood" as an excluded cause, and that the parties agreed the policy did not cover losses caused by flooding. Finally, the supreme court found that even though the policy expressly excludes coverage for any losses that result "directly or indirectly" from "[t]he enforcement of any ordinance or law," there were two endorsements that the parties agreed provided coverage for such losses, despite the exclusion. Relying on opinions from federal courts and lower courts of appeals interpreting and upholding the applicability of virtually identical clauses to the one at issue, the Texas Supreme Court ultimately concluded that because the evidence established that flood damage triggered the enforcement of the city ordinances and thus "directly or indirectly" caused the insured's losses, the policy excluded coverage for such losses "regardless of the fact that wind damage 'contribute[d] concurrently or in any sequence to the loss."

AN UNDERLYING CONTRACT MAY GOVERN THE SCOPE OF ADDITIONAL INSURED COVERAGE

In *In re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015), the Supreme Court of Texas further clarified the analysis for determining the scope of additional insured coverage by

recognizing that the underlying contract may govern the scope of additional insured coverage. At the heart of that case was the question of whether and to what extent a contract between two parties may control the scope of insurance coverage available to one party as an additional insured under a policy purchased by the other party. According to the Texas Supreme Court, the policy language determines the extent to which, if any, courts look to an underlying contract to ascertain the existence and scope of additional-insured coverage. In other words, the general rule remains undisturbed—one must look to the policy to determine coverage. However, if the policy directs one to consult an underlying contract in order to determine coverage, then one not only may do so but *must* do so.

THE DIVISION OF WORKERS' COMPENSATION HAS EXCLUSIVE JURISDICTION OVER MISREPRESENTATION CLAIMS MADE WITHIN THE CLAIMS SETTLEMENT CONTEXT

In *In re Crawford & Co., Crawford & Co. Healthcare Mgmt., Inc., Patsy Hogan and Old Republic Ins. Co.*, 458 S.W.3d 920 (Tex. 2015), the Supreme Court of Texas determined that a trial court abused its discretion when it refused to dismiss claims over which the Division of Workers' Compensation had exclusive jurisdiction. In that case, the issue was whether an employee's claims for misrepresentation against the employer's workers' compensation carrier were outside Texas' Workers' Compensation Act and, therefore, not the exclusive jurisdiction of the Workers Compensation Division. The Texas supreme court concluded that the Worker's Compensation Division has exclusive jurisdiction over a claim for "misrepresentation of an insurance policy" when the alleged misrepresentation occurs within the claims-settlement context. Specifically, the Act's comprehensive system for resolving workers' compensation claims encompasses prohibitions against fraud and misrepresentations made within the claims settlement context, and grants the Worker's Compensation Division authority to regulate and sanction any such conduct. The Workers' Compensation Division, therefore, had exclusive jurisdiction to address the employee's misrepresentation claims because the complained of misrepresentations were allegedly made in connection with the carrier's investigation, handling, and settling of the employee's claims for workers' compensation benefits.

FIFTH CIRCUIT COURT OF APPEALS CASES:

DELAY PENALTY UNDER TEXAS' PROMPT PAYMENT OF CLAIMS ACT MAY BEGIN TO ACCRUE UPON VIOLATION OF THE ACT, AND NOT WHEN THE INSURER RECEIVES THE FIRST DEFENSE-FEE INVOICE

In *Cox Operating, LLC v. St. Paul Surplus Lines Insurance Company*, 759 F.3d 496 (5th Cir. 2015), the Fifth Circuit Court of Appeals addressed whether an insurer waives reporting requirements under a policy when it denies coverage, and when the delay penalty under the Texas Prompt Payment of Claims Act ("the Act") begins to accrue. On appeal, the insurer argued that the award of damages should be reduced because it included costs that the insured did not report to the insurer within the one-year requirement under the policy. The Fifth Circuit disagreed, concluding the insurer waived the condition precedent when it denied all coverage before the work at issue was completed. The insurer also argued that the penalty-interest award should be reduced, or eliminated entirely, because the district court calculated the amount of penalty interest based on an incorrect date when penalty interest began to accrue. Recognizing

that the Texas Supreme Court has not yet explained "whether, and when" an insurer's violation triggers the accrual of penalty interest under the Act, the Fifth Circuit, making an *Erie* guess, and rejecting the invoice-by-invoice accrual method, concluded an insurer's violation of the Act begins accrual of the statutory, penalty interest.

THE TERM "EXPENSES" IN SUPPLEMENTARY PAYMENTS PROVISION INCLUDES DEFENSE COSTS, RESULTING IN DEFENSE COSTS ERODING POLICY LIMITS

In *Amerisure Mut. Ins. Co. v. Arch Specialty Ins. Co.*, 784 F.3d 270 (5th Cir. 2015), the Fifth Circuit Court of Appeals addressed whether a supplementary payments endorsement in a policy transformed the policy into an eroding limits policy. The policy at issue before the court contained a Supplementary Payments Provision stating that the insurer would pay "[a]ll expenses we incur" in connection with any covered claim, and that "[t]hese payments will not reduce the limits of insurance." A supplementary payments endorsement, however, amended the Supplementary Payments Provision in the policy as follows: "[supplementary payments] will reduce the limits of insurance." The policy also provided that the insurer's duty to defend ends "when we have used up the applicable limit of insurance in the payment of judgments or settlements." Turning first to the meaning of the term "expenses," the Fifth Circuit, applying the ordinary meaning, concluded that when an insurer pays costs of defense, including attorneys' fees, it is an "expense" to the insurer. Turning then to the question of whether "supplementary payments," which included all "expenses," eroded the limits, the court concluded the endorsement transformed the policy into an "eroding limits" policy and, therefore, the policy limit was eroded by defense costs as well as payment of judgments and settlements.