



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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DUTY TO INDEMNIFY IS NOT DEPENDENT ON DUTY TO DEFEND

In *D.R. Horton-Texas, Ltd. v. Markel International Insurance Company, Ltd.*, 2009 WL 4728008 (Tex. December 11, 2009), James and Cicely Holmes purchased a home built by D.R. Horton and discovered mold infestation after moving in. Their petition only named D.R. Horton as being responsible for the defects in the home, but D.R. Horton alleged that one of its sub-contractors, Rosendo Ramirez, was responsible for some of the alleged defects. D.R. Horton was named as an additional insured on Ramirez's CGL policy.

Markel refused to defend D.R. Horton, because the underlying petition did not plead facts indicating that Ramirez's work was defective and, therefore, did not invoke coverage under Ramirez's CGL policy for D.R. Horton. So D.R. Horton obtained counsel at its own expense, settled the case, and sued Markel for reimbursement of the settlement payment.

The Supreme Court of Texas held in favor of D.R. Horton, holding that the duty to indemnify is not dependent on the duty to defend and that an insurer may have a duty to indemnify its insured even if the duty to defend never arises. The Court further explained that "[w]hile analysis of the duty to defend has been strictly circumscribed by the eight-corners doctrine, it is well-settled that the 'facts actually established in the underlying suit control the duty to indemnify.'" *citation omitted*.

ADDITIONAL INSURED ENDORSEMENT DOES NOT PRECLUDE COVERAGE WHEN NEGLIGENCE IS ALLEGED AGAINST ADDITIONAL INSURED

In *Burlington Northern and Santa Fe Railway Company v. National Union Fire Insurance Company of Pittsburg*, 2009 WL 4653406 (Tex.App.-El Paso December 9, 2009), Burlington contracted with SSI Mobley for vegetation control along the railroad's right of ways in Texas, and as part of the contract, SSI Mobley also agreed to purchase an insurance policy naming Burlington as an additional insured.

Burlington filed this suit against National Union following its decision to deny Burlington's claims for defense and indemnity for liability arising out of a railroad crossing accident in which two people were killed and a third injured when a Burlington rail car collided with an automobile. The decedents' families sued Burlington, alleging that the collision was caused by the railroad's failure to properly maintain vegetation at the crossing. National Union argued that it had no duty to defend Burlington because the underlying petitions included allegations that Burlington was at fault for the collision, and therefore Burlington was not an additional insured because the additional insured endorsement did not cover an additional insured for its own negligence.

The Court of Appeals held that Burlington qualified as an additional insured under SSI Mobley's policy, and that National Union breached its duty to defend. The Court explained that the fact that the underlying petition contained factual allegations charging that Burlington was at fault for the collision, *in addition to SSI Mobley's negligence*—either because of its delegation of weed control to SSI Mobley or because of its failure to supervise and control SSI Mobley's work—did not change National Union's duty to defend the entire suit.

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