The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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August 11, 2008

FIFTH CIRCUIT APPLIES EIGHT CORNERS RULE AND HOLDS CARRIER OWED DUTY TO DEFEND IN UNDERLYING LIABILITY LAWSUIT

The Fifth Circuit recently concluded an underlying liability case asserted a claim that could fall within coverage and was not clearly excluded by the policy provisions. In *Gore Design Completions, Ltd. v. Hartford Fire Ins. Co.*, 2008 WL 2955568 (5th Cir. August 4, 2008), the Fifth Circuit reversed summary judgment and remanded the case finding a duty to defend in an arbitration action. Gore entered into an agreement with Orient to perform work on a Boeing 737 Business Jet. Gore alleged it subcontracted the installation and engineering of an in-flight entertainment/cabin management system to BaySys which, in turn, subcontracted the work to AeroTask.

Hartford issued a commercial general liability policy to BaySys which named Gore as an additional insured. Orient sued Gore and AeroTask, but not BaySys, and the case went to arbitration. In Orient's first amended statement of the claim, the paragraph defining Gore stated: "At all times, AeroTask and BaySys were agents, partner[s], joint venturer[s], or otherwise acting on behalf of Gore, and their actions can be imputed to Gore." The Statement of Claim describes the allegedly negligent conduct: "In addition to improperly joining the AC and DC electrical systems, Defendants failed to properly supervise and inspect the work performed on the Aircraft's electrical system."

Gore tendered defense of the arbitration action to Hartford and Hartford declined to defend, alleging the Statement of Claim did not set forth a claim within coverage. Gore then filed a declaratory judgment action and Hartford moved for summary judgment. The district court granted Hartford's summary judgment and this appeal followed.

While "not a model of clarity," the court noted the Statement of Claim clearly referenced BaySys, contended that BaySys was Gore's agent and sought to hold Gore responsible for its alleged negligence in hiring the wrong people for the job. Under the policy, Gore was an additional insured with respect to BaySys' "operations" or "work." After discussing the current state of insurance law related to the eight corner's rule, the court applied the law finding unless an exclusion applies under the policy, Hartford has a duty to defend.

The court next evaluated three separate exclusions 1) "Care, Custody or Control," 2) "Your Work," and 3) "Professional Services" to determine Hartford's obligation for providing a defense in the underlying lawsuit. The court concluded no exclusion applied and, thus, Hartford owed a duty to defend Gore. The Fifth Circuit also reversed the district court's rendition of judgment in favor of Hartford on the Insurance Code Chapter 541 and 542 claims.

FEDERAL COURT HOLDS PASSENGER DENIED RECOVERY FOR DRIVER'S FATHER'S UNINSURED MOTORIST COVERAGE

Last week a Houston federal judge ruled a passenger was not entitled to the driver's father's uninsured motorist coverage. In *Upson v. Allstate Indemnity Co*., 2008 WL 3020880 (S.D. Tex. August 5, 2008)(slip op.) the Plaintiff was a passenger in a truck when the driver crashed into a fence. Allstate paid the liability coverage limit on the policy, but denied coverage for uninsured motorists. Plaintiff alleged he was a third-party beneficiary of the policy and sued for uninsured motorists coverage. The court granted Allstate Indemnity Company's motion for summary judgment.

Under the policy, Allstate contracted to "pay damages which a covered person is legally entitled to recover from the owner or the operator of an uninsured motor vehicle because of bodily injury sustained by a covered person." The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the *uninsured motor vehicle*. The court first noted vehicles owned by the insured cannot be underinsured. Even if the policy covering a vehicle is insufficient to pay a full loss, it is not an underinsured vehicle to a third-party claimant.

The court concluded to allow a plaintiff to recover both liability and underinsured proceeds from the policy at issue would convert the coverage for uninsureds who are hurt by a third-party into a second layer of liability insurance for third-parties.

FEDERAL MAGISTRATE ORDERS PRODUCTION OF INCIDENT REPORT PREPARED BY NONPARTY INSURANCE BROKER

A Corpus Christi federal magistrate recently ordered production of an incident report prepared by J. Gallagher Strategic Risk Management Services, Inc., a nonparty insurance broker. In *Texas Molecular Ltd Partnership v. Am. Int'l Specialty Lines Ins. Co.*, 2008 WL 2965993 (S.D. Tex. July 31, 2008)(slip op.), Gallagher submitted a report in response to a discovery subpoena served by Plaintiffs and Defendants. Gallagher prepared this fill-in-the-blank form on a monthly basis and submitted it to the Corporate Errors and Omissions Committee. Three months after its production, Gallagher's counsel notified Defendants it had recently learned the report had been inadvertently submitted in response to the subpoena. Gallagher requested the document be returned under FED. R. CIV. P. 26(b)(5)(B) asserting the document was protected pursuant to the attorney-client privilege and work product doctrine.

After reviewing the applicable law for the two asserted privileges, the court first analyzed the work-product doctrine issue. Regarding the first prong of the test, the court held it was not clear from the face of the document an attorney-client relationship existed. Although the report referenced the underlying lawsuit, it did not appear to be expressly prepared for Gallagher's legal department, but rather for the Corporate Errors and Omissions Committee. Under the second prong of the test, the court noted the work product doctrine does not shield all materials prepared by or for a lawyer. For example, the court cited the advisory committee notes to Rule 26(b)(3): materials "assembled in the ordinary course of business, or pursuant to the public requirements unrelated to litigation" are excluded from work product materials. The report at issue did not offer any indication it was prepared in anticipation of litigation and it was not sent to or from the legal department at Gallagher.

Lastly, the court found even if a privilege applied to the document, Gallagher waived the privilege. The court held Gallagher did not take reasonable precautions to mark the protected document and it was not otherwise apparent for the face of the document. Also, the time taken to rectify the error was "substantial" — three months from the time the document was tendered to Defendants until Gallagher realized the error and attempted to retrieve the document.