



The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF



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April 14, 2008

REFUSAL TO ADMIT TRADE-USAGE EVIDENCE CREATES REVERSIBLE ERROR

Last Tuesday, the Fifth Circuit held that a trial court's failure to allow trade-usage evidence in determining the meaning of an undefined term used in an exclusion was reversible error and remanded the case for further proceedings. In *B. Hall Contracting, Inc. v. Evanston Ins. Co.*, 2008 WL 942937 (5th Cir. (Tex.) April 8, 2008), the insured contractor's CGL policy excluded property damage "operations involving any hot tar, wand, open flame, torch or heat applications, or membrane roofing." While installing a type of membrane roofing that used a "cold" application of roofing material, sparks from demolition work being performed by another nearby contractor fell on the roof and ignited a fire. The insurer denied coverage based on the exclusionary language and the trial court granted summary judgment in favor of the insurer.

On appeal to the Fifth Circuit, the court considered but rejected the insured's arguments that the exclusion precluded coverage for only "hot" applications of "membrane roofing." The court also observed, however, that the term "membrane roofing" was not defined in the policy and the arguments of counsel as well as the Court's own attempts to fully understand the term without evidence of trade-usage and industry meaning were insufficient. "As such, this term "membrane roofing" cannot be properly interpreted without some understanding of how it is used in the roofing industry." Because the district court failed to admit trade-usage evidence, the case was remanded to allow the parties to present expert testimony to enable the court to properly decide the coverage question and meaning of membrane roofing.

FORUM SELECTION CLAUSE WAIVES RIGHT TO REMOVAL

Last Tuesday, the U.S. District Court for the Northern District of Texas rejected arguments that the forum selection clause in the policy was not "clear and unequivocal" in waiving the insurer's right to remove the lawsuit to federal court. In *Ensco International Inc. v. Certain Underwriters at Lloyds*, 2008 WL 958205 (N.D.Tex. April 8, 2008), an insurance dispute arose and the insurer removed the case to federal court. The insured filed a motion to remand based on the policy's "Choice of Law & Jurisdiction" provision which stated: "The proper and exclusive law of this insurance shall be Texas Law. Any dispute arising under or in connection with it shall be subject to the exclusive jurisdiction of the Courts of Dallas County, Texas."

Considering the language quoted above, the court rejected the insurer's argument that it failed to meet the "clear and unequivocal" standard in waiving the insurer's right to remove. To the contrary, the court observed that when a form selection clause "refers to venue in a particular county, such language limits jurisdiction in the state courts of that county." Accordingly, the court held that state courts of Dallas County, Texas have exclusive jurisdiction over the claims asserted and remanded the case to the state district court.

MDJ&W UNDERWRITES UNIVERSITY OF HOUSTON LAW FOUNDATION'S ADVANCED INSURANCE AND TORT CLAIMS SEMINAR

Martin, Disiere, Jefferson & Wisdom is sponsoring this years Advanced Insurance & Tort Claims seminar to be held live in Houston this Thursday and Friday, April 17-18. It will also be held by video in Austin on May 29-30, 2008. The two day seminar provides 12 hours CE credit, including 2 hours consumer protection, for adjusters.

The University of Houston is offering insurance professionals attending as our guests a significant discount off of the registration fee. **It's not too late to sign up** and join many other insurance professionals at this outstanding seminar. To make arrangements to attend as our guest, e-mail us at uhlawsseminar@mdjwlaw.com with your contact information and let us know the city where you would like to attend. We will then get back with you with more information. For more information, the course brochure may be viewed at www.mdjwlaw.com/docs/advins08.pdf. We hope to see you there!

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