



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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COURT FINDS NO COVERAGE FOR PRODUCT DAMAGE UNDER “YOUR WORK” AND “CARE, CUSTODY & CONTROL” EXCLUSIONS

Recently, in *Frito-Lay, Inc. v. Trinity Universal Insurance Company*, 2010 WL 4705526, the Dallas Court of Appeals upheld a trial court’s decision in favor of an insurance company based on exclusionary language in an insurance policy. Frito-Lay retained Adampac to repackage a Frito-Lay food product for consumer testing. But, during the repackaging, the product became contaminated or adulterated with a foreign substance from a different product. Frito-Lay filed suit against Adampac for negligence and breach of contract, and the trial court entered judgment against Adampac for both causes of action. Frito-Lay attempted to collect on the judgment from Adampac’s primary insurer, Trinity Lloyd’s Insurance Company (“Lloyds”). Lloyds filed a motion for summary judgment arguing that the loss was excluded under the policy, and the trial court granted summary judgment in favor of Lloyd’s without specifying the grounds. Frito-Lay appealed.

In its motion for summary judgment, Lloyds argued that the loss was excluded based on an exclusion for damages to property in the “care, custody, or control” of the insured. Frito-Lay asserted this exclusion did not apply because the negligence that caused the damages related to work performed on another product, relying on several cases which held that if property damage is “merely incidental” to the property on which the work was performed by the insured, the property that is not being worked on is not considered in the “care, custody, or control” of the insured. But the Court held that these cases have no application when all the property at issue was in the sole and exclusive actual physical possession of the insured at all relevant times, and thus the exclusion applied.

In addition, in its motion, Lloyds argued that the loss was excluded based on a policy exclusion for “that particular part of any property that must be restored, repaired or replaced because your work was incorrectly performed on it.” Frito-Lay asserted that the exclusion did not apply because Adampac did not perform work incorrectly on the Frito-Lay product but on another product which incidentally caused damage to the Frito-Lay product. The Court disagreed, explaining that, based on the stipulations entered into between the parties in the underlying case, Adampac violated its standard of care related to the Frito-Lay product, not the other product. Specifically, the parties stipulated that an entity involved in the repackaging of food products must exercise ordinary care to prohibit the food product from being contaminated while the product is within the company’s control. In addition, the Court pointed out that none of the underlying findings or stipulations concerned mishandling of a product other than the Frito-Lay product. Therefore, the Court affirmed the trial court’s judgment in favor of Lloyds.

FIFTH CIRCUIT REJECTS BAD FAITH CLAIM BASED ON CLAIM FOR WORKERS’ COMPENSATION BENEFITS

Last Thursday, in *Bullock v. Gottfried Corporation*, 2010 WL 5023224, the Fifth Circuit upheld a district court's decision to deny a claim for bad faith based on denial of workers' compensation insurance coverage. Bullock was a sheet metal subcontractor working for Gottfried when he was injured on the job. He did not have his own workers' compensation insurance coverage, so he filed a claim under Gottfried's policy. Gottfried disputed Bullock's coverage under its policy and Gottfried's insurance company denied Bullock's claim. Bullock filed a petition with the Workers' Compensation Commission to contest the denial of coverage. The Commission determined that Bullock was entitled to workers' compensation coverage and Gottfried's insurance company paid accordingly.

Bullock filed a tort action in state court claiming that Gottfried acted in bad faith by refusing to provide him workers' compensation benefits, and the claim was removed to federal court based on diversity of citizenship where the district court granted Gottfried's motion for summary judgment. Under the state law in question, the liability of an employer to pay workers compensation benefits is an employee's exclusive remedy against his employer, but the independent tort of bad faith refusal to pay is an exception to this provision. The Fifth Circuit held that Gottfried had an arguable basis for disputing Bullock's workers' compensation claim based partly on a written contract entered into between Bullock and Gottfried which stated Bullock was required to maintain his own workers' compensation coverage, a certificate of insurance provided by Bullock to Gottfried indicating that he maintained his own coverage during the time of the injury, and the fact that Bullock never provided Gottfried with a written cancellation notice of the coverage. Thus, the Fifth Circuit affirmed the district court's decision to grant Gottfried's motion for summary judgment.

MDJW CONGRATULATIONS

Congratulations to the following attorneys who have been elected into the Partnership of Martin, Disiere, Jefferson & Wisdom: Barrie Beer, Ethan Carlyle, Diana Perez Gomez, Patrick Kemp, and Wayne Pickering. Each of these Senior Counsel was elected into the Partnership by the unanimous vote of the Partnership last week, but the announcements were not made until the Firm's Christmas party last Saturday evening. Barrie, Patrick, and Wayne each work in the Firm's Insurance Coverage & Litigation Group. Diana works in the Firm's Labor & Employment Group. Ethan works in both the Insurance and Employment Groups. We congratulate each of them for the recognition they deserve for their exceptional team work, diligence, integrity, history of success, and high client service over many years of practice. We are a better firm because of each of their talents, values, and contributions demonstrated weekly to us and our clients.

If you wish to discuss legal principles mentioned herein, reply to this e-mail or contact any of our lawyers at Martin, Disiere, Jefferson & Wisdom, L.L.P.
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