



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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FACT QUESTIONS EXIST IN BUSINESS AUTO POLICY DISPUTE SEEKING COVERAGE FOR SPREAD OF TUBERCULOSIS ON BUS

Last Wednesday, the San Antonio Court of Appeals concluded that fact issues exist on whether a bus driver's spread of tuberculosis arose from the "use" of the insured vehicle and reversed a summary judgment finding liability coverage for passenger claims under a business auto policy. In *Lancer. Ins. Co. v. Perez*, 2009 WL 3644018 (Tex. App. – San Antonio, November 4, 2009), a bus driver drove a busload of high school band students on a field trip to Six Flags in San Antonio. Students noticed that the bus driver, who was later diagnosed with active tuberculosis, was coughing during the trip. All of the students were then tested and several tested positive for latent tuberculosis. Suit was brought, Lancer Insurance refused to defend, and the plaintiffs took a \$5.25 million dollar judgment against the insured driver and Bus Company. In a subsequent declaratory judgment action, the trial court concluded that the insurer had a duty to indemnify the insureds for the judgment and denied Lancer's competing motion for summary judgment. This appeal followed.

The court examined the three factors to determine "use" of a vehicle as established by the Supreme Court of Texas in *Mid-Century Ins. Co. of Tex. v. Lindsey*, 997 S.W.2d 153 (Tex.1999), and they questioned in particular whether the infection arose out of the "use" of the bus as necessary to trigger coverage under the business auto policy. After reviewing the facts involving passenger contact both on and off the bus, and involving the bus's air conditioning and ventilation system, the court found that the passengers failed to establish as a matter of law that all the *Lindsey* factors were met. Summary judgment finding coverage under the policy was reversed and remanded for further proceedings. Additionally, the court found that another plaintiff, whose claims had not been adjudicated lacked standing to intervene in the declaratory judgment action. Lastly, the court held that the trial court did not err in denying Lancer's motion for summary judgment on the duty to defend because under the circumstances presented, they found that the claims could fall within the coverage provided. The court upheld the trial court's denial of Lancer's summary judgment on that basis.

AUSTIN COURT AFFIRMS INSURANCE CODE VIOLATION CLASS CERTIFICATION ORDER

Last Friday, the Austin Court of Appeals affirmed a trial court's order granting class certification in a lawsuit against Farmers Insurance entities involving allegations of reduced homeowner's coverage and increased policy premiums. In *Lubin v. Farmers. Group, Inc.*, 2009 WL 3682602 (Tex. App. – Austin November 6, 2009), the Texas Attorney General brought a class action lawsuit against Farmers alleging various violations of the Texas Insurance Code. Farmers and the Attorney General eventually reached a settlement agreement with the stated intent of terminating "all of the disputes." Some policyholders objected and challenged the class action. The trial court certified the class. Following appeals to the

Austin Court of Appeals and Supreme Court of Texas, and in a lengthy and detailed analysis on remand, the Austin Court of Appeals affirmed the order of the district court granting the class certification.

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