



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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August 18, 2009

IN LIMITED CIRCUMSTANCES, EXTRINSIC EVIDENCE CAN BE CONSIDERED IN DETERMINING AN INSURER'S DUTY TO DEFEND

On August 12, 2009, the Fifth Circuit confirmed that in limited circumstances the court can consider extrinsic evidence beyond the eight corners of the policy and the petition in determining whether the insurer has a duty to defend. In *Ooida Risk Retention Group, Inc. v. Derrick Shamoyne Williams*, ___ F.3d ___, 2009, WL 2461850 (5th Cir. (Tex.) 2009), Moses, the sole proprietor of a commercial motor carrier, was asleep in a tractor-trailer rig while Williams was driving. Williams lost control of the rig and Moses was killed. Moses' family filed suit. Ooida, Moses' insurer, filed this separate lawsuit seeking a declaration that it did not have a duty to defend Williams in the lawsuit filed by Moses' family. The policy at issue contained a fellow employee exclusion. Williams was working for Moses at the time of the accident, but the petition did not allege that fact. In Texas, an insurer's duty to defend is governed by the "eight corners rule." The duty to defend is determined solely from terms of the policy and the facts alleged in the petition. The trial court held there was a duty to defend because it could not determine from the pleading that the fellow employee exclusion applied.

The Fifth Circuit reversed and rendered finding that the fellow employee exclusion applied. The court considered the eight corners and some extrinsic evidence – Williams' testimony. In 2006, the Texas Supreme Court recognized an exception to the eight corners rule. See *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 308 – 9 (Tex. 2006). A court can consider extrinsic evidence if it is initially impossible to discern whether coverage is potentially implicated and when the evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case. *Id.* Williams' testimony made it clear the fellow employee exclusion applied and his testimony did not contradict the allegations in the pleading. Therefore, the Fifth Circuit used extrinsic evidence to hold the insurer did not have a duty to defend.

THE RIGHT TO REMOVE CAN BE WAIVED BY CONTRACT

On August 12, 2009, the Fifth Circuit upheld the remand of a case holding the insurer waived its right to remove. In *EnSCO International Incorporation v. Certain Underwriters at Lloyd's, et al*, ___ F.3d ___, 2009, WL 2450707 (5th Cir (Tex.) 2009), EnSCO lost an offshore drilling rig in Hurricane Katrina and its insurer paid for its replacement, but did not pay for the removal of debris that fell to the sea floor because it argued it was not covered. EnSCO argued the removal of the debris was covered. EnSCO sued in Dallas County consistent with the policy's forum selection clause which provides "The proper and exclusive law of this insurance shall be Texas law. Any disputes arising under or in connection with it shall be subject to the exclusive jurisdiction of the Courts of Dallas County Texas." The insurer removed the case to federal court. EnSCO moved to remand and its motion was granted. The insurer appealed.

“For a contractual clause to prevent a party from exercising its right to removal, the clause must give a clear and unequivocal waiver of that right.” *City of New Orleans v. Mun. Admin, Servs., Inc.*, 367 F.3d 501, 405 (5th Cir. 2004). There are three ways in which a party may clearly and unequivocally waive its removal rights: 1) by explicitly stating that it is doing so, 2) by allowing the other party the right to choose venue, or 3) by establishing an exclusive venue within the contract. *Id.* at 504. The insurer argued that only the first way was applicable to this case and that the policy did not waive its right to remove because the language in the contract was not explicit. The court concluded that although waiver must be clear and unequivocal, it may be implicit where necessary to give effect to all contractual provisions. The court held that the insurer waived its right to remove and affirmed the district court’s remand order.

WHEN A JURY AWARDS MORE MEDICAL EXPENSES THAN IT SHOULD, THE COURT CAN REDUCE THE AWARD THROUGH A REMITTITUR OR REMAND THE CASE FOR A NEW TRIAL

On August 13, 2009, the Eastland Court of Appeals reversed a jury’s verdict because it awarded more past medical expenses than the evidence could support. In *Rentech Steel, L.L.C. v. Teel*, __ S.W.3d __, 2009, WL 2466890 (Tex. App. – Eastland 2009), Teel sued for past medical expenses, among other damages, for serious injuries he sustained at the steel fabrication plant where he was working. The jury awarded Teel \$550,000 in past medical expenses, but the evidence of past medical expenses at trial was only \$381,788. The court found that a remittitur is appropriate in this case because the proper amount of the award is known. The court explained that when the amount was not known, the proper remedy is to remand the case for a new trial.

SOME NEW TEXAS LAWS THAT WILL BE EFFECTIVE SEPTEMBER 1, 2009

Digital Medical Records. If medical records are available electronically and they are requested to be delivered in an electronic format, the retrieval or processing fee for the records may not exceed \$75.00 and the actual cost of delivering the records. House Bill 4029 amends Section 241.151(2) of the Texas Health and Safety Code.

Everyone Must Wear a Seatbelt. It is not just the occupants of the front seat anymore. Everyone must wear a seatbelt if occupying a seat that is equipped with one. House Bill 537 amends Section 545.413 of the Texas Transportation Code.

No Cell Phones or Blackberries in School Zones. You cannot use a wireless communication device in a school zone unless the vehicle is stopped, you use a hands-free device or you are making an emergency call (e.g. doctor, hospital, fire department, police, etc.). Note that municipalities have to post signs at the entrance of the school zone to be able to enforce this law. House Bill 55 amends Section 545.425 of the Texas Transportation Code.

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