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A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.
Principal Office 808 Travis, Suite 1800 Houston, Texas 77002 713.632.1700 FAX 713.222.0101
111 Congress Avenue, Suite 1070 Austin, Texas 78701 512.610.4400 FAX 512.610.4401
900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

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FEDERAL COURT DENIES CARRIER'S SUMMARY JUDGMENT ON DUTY TO DEFEND AND SUA SPONTE MOVES FOR SUMMARY JUDGMENT ON BEHALF OF CONTRACTOR AND SUBCONTRACTOR WORKER

Recently, a federal court denied a carrier's summary judgment on a duty to defend question and dismissed without prejudice the carrier's claim for a declaratory judgment on its duty to indemnify. Going further, the court ***sua sponte*** acted in summary judgment on behalf of the contractor and subcontractor worker on the duty to defend question. In *Wellington Specialty Ins. Co. v. Ling*, 2009 WL 2136399 (S.D. Tex. July 17, 2006), Wellington issued a CGL policy to a contractor, Ranger, who was sued by a subcontractor "employee," Martinez for injuries he sustained while performing work at a hotel construction site. Wellington filed a declaratory judgment action to determine its duty to defend and indemnify Ranger. Ranger failed to appear and the court entered a default judgment that Wellington owed no duty to defend or indemnify Ranger in Martinez' lawsuit.

Martinez then amended his petition to change his status from an employee of Ranger's subcontractor to an "independent contractor" working under the control and supervision of Ranger's subcontractor. In response, Wellington filed this action seeking a declaratory judgment to determine whether it had a duty to defend and indemnify Ranger against claims raised in the amended petition.

Wellington moved for summary judgment and argued because Martinez' injuries arose out of his employment with Ranger (regardless of whether he was an employee or independent contractor), the Employers Liability exclusion applied, and there was no coverage under the CGL policy. Wellington also argued there was no duty to indemnify since there was no duty to defend. In this case, the court noted the relevant portions of the Employer's Liability exclusion precluded coverage for (i) independent contractors of James Ling and his wife [principal for Ranger] and (ii) employees of any [such] independent contractor. Therefore, coverage for all independent contractors was not excluded. Given this language, the court held Martinez was not an employee of an independent contractor; rather, he was the independent contractor of an independent contractor. And, Wellington was not entitled to a declaratory judgment on the duty to defend question.

Because Ranger and Martinez did not move for summary judgment on the duty to defend, the court *sua sponte* acted in summary judgment on this issue. The court reasoned there was no basis for Wellington to recover, and therefore "no reason to unnecessarily expend judicial resources trying this claim." Under the law, the court allowed Wellington ten days to provide a response to its motion and present any additional applicable law in opposition to summary judgment. The court also indicated neither Ranger nor Martinez was required to file a response unless directed by the court.

Lastly, the court held it lacked subject matter jurisdiction over the duty to indemnify question since it was not justiciable.

Editor's note: While the court is entitled to *sua sponte* act in summary judgment, this is a rare occasion; and, under the explanation of conserving judicial resources, the court essentially acted on behalf of Ranger and Martinez in an advocacy role. Given the court's authority and *use* of this procedure, this type of decision should be used to support an equitable argument for relief on the basis of fairness and to preserve judicial resources. This decision marks the second federal opinion in two weeks dealing with an Employer's Liability exclusion combined with a Plaintiff's artful use of pleading to trigger the duty to defend under a CGL policy. *See* In *BJB Construction LLC v. Atlantic Casualty Ins. Co.,* 2009 WL 2029808 (5th Cir. (Tex.) July 13, 2009)(MDJW Newsbrief dated July 21, 2009).

APPELLATE COURT AFFIRMS SUMMARY JUDGMENT FOR CONTRACTUAL PARTY SEEKING DEFENSE AND INDEMNITY FOR UNDERLYING SUIT INVOLVING FATALITY ON CONSTRUCTION SITE

Last Tuesday, a Houston appellate court affirmed summary judgment for a contractual party who sought defense and indemnity pursuant to a commercial general liability and commercial auto policy issued to a subcontractor, Allstates. In *Mid-Continent Cas. Co. v. Global Enercom Management, Inc.*, 2009 WL 2174967 (Tex. App.—Houston [14th Dist.] July 21, 2009), Allstate contracted with Global Enercom Management, Inc. (GEM) to perform repair work on a cellular telephone tower in Arkansas. The contract was signed by Allstates after work began on the project, but remained unexecuted by GEM until after the accident.

In order to repair the tower, the Allstates workers installed a pulley and rope system attached on one end to a heavy weight and the other to a pick-up truck which would serve as the power to raise and lower the weight. During operation of the pulley system, and with three Allstates workers being lifted, the rope broke and all three men fell to their deaths. Two of the three workers' heirs filed suit against GEM in a Mississippi federal court. GEM, in turn, sought defense and indemnity from Mid-Continent pursuant to an indemnity clause found in the subcontract. The carrier denied the request and GEM filed a declaratory judgment action in Texas state court.

The declaratory judgment action issues involved the applicability of two coverage exclusions 1) contractual liability for "bodily injury" which occurred subsequent to the execution of the contract and 2) bodily injury arising out of the ownership, maintenance, use or entrustment to others of any "auto." The same contractual liability exclusion was also included in the auto policy. Both sides filed competing motions for summary judgment and the trial court granted GEM's motion.

On appeal, Mid-Continent raised two questions: First, whether the auto exclusion (Exclusion g) in the CGL policy applied to the accident since the pick-up truck was used to power the pulley system. Second, whether the contractual liability exclusion precluded coverage under both the CGL and auto policy because GEM had not signed the subcontract until the day after the incident. The majority opinion held neither exclusion applied.

The panel opinion addressed the auto exclusion first and concluded the vehicle did not produce the injury, but rather merely contributed to it. Because the workers' deaths did not arise out of the use of a vehicle, the majority held the auto exclusion did not apply. Next, the panel handled the contract exclusion issue. Mid-Continent argued since both parties did not sign the contract prior to the incident, the exclusion precluded coverage. The panel disagreed citing to factually similar appellate cases which held parties performing under a written contract were bound by its terms even though not all parties had executed the

contract. Under this analysis, the panel concluded the subcontract was executed prior to the accident and the contract exclusion did not apply. In a dissenting opinion, Justice Seymore argued the vehicle was used to lift the employees high inside the tower. He argued the tension in the rope created by the power of the truck engine, the weight of the three employees and other factors, caused the rope to break. Given this analysis, Justice Seymore found the auto exclusion would not apply and coverage would extend for this claim.

FEDERAL COURT GRANTS MOTION FOR LEAVE TO DESIGNATE RESPONSIBLE THIRD PARTIES

Last week a Houston federal court granted a Motion for Leave to Designate Responsible Third Parties over an objection filed by Plaintiff. In *Granite State Ins. Co. v. Schneider Electric Engineering Services, LLC*, 2009 WL 2174967 (S.D. Tex. July 21, 2009), a church sustained fire damage which allegedly originated in its mechanical room. Defendants sought to designate the church (based on its failure to perform proper maintenance), the general contractor and the construction superintendent (for its failure to instruct the church fully and properly regarding need for church to perform maintenance on electrical panel), and other contractors (based on their repair of water leak near electrical panel days before the fire occurred).

Plaintiff opposed the motion arguing to designate the church would be "redundant" because the Plaintiff/insurer was suing as the subrogee of the church. And, Defendants were entitled to assert the defense of contributory negligence against the church. Plaintiff also opposed the motion arguing it had not satisfied the requirements of FRCP 8 to plead claims against the parties. After a brief discussion of section 33.004 of the Texas Practice & Remedies Code allowing the designation of responsible third parties, the court granted Defendants' motion as to all parties except the church.