The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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FIFTH CIRCUIT FINDS COMP CARRIER HAS NO DUTY TO DEFEND ABSENT ALLEGATIONS OF EMPLOYMENT RELATIONSHIP

Last Monday, the Fifth Circuit concluded that a workers compensation/employer liability insurer had no duty to defend and the commercial liability insurer who defended and settled the claim was not entitled to reimbursement. In *BJB Construction LLC v. Atlantic Casualty Ins. Co.*, 2009 WL 2029808 (5th Cir. (Tex.) July 13, 2009), a subcontractor's employee was injured when scaffolding collapsed. He sued the builder and the subcontractor – his employer - but without ever alleging facts that would support the employment relationship. The Fifth Circuit applied a strict eight-corners analysis observing in part that "a court cannot read facts into the pleadings to establish a plausible employment relationship." And because the petition did not allege a claim within the workers compensation/employer liability insurer's policy, they had no duty to defend or indemnify the subcontractor or contribute to the CGL insurer's settlement. The trial court's judgment was affirmed.

USE OF "AND/OR" IN CGL EMPLOYER'S LIABILITY EXCLUSION RESULTS IN DUTY TO DEFEND CLAIMS BY SUBCONTRACTOR

The Amarillo Court of Appeals recently concluded that an injury claim presented by a subcontractor was not excluded under a general and other subcontractor's commercial general liability policy despite an employer's liability exclusion precluding coverage for bodily injury to "an 'employee' of the 'insured' **and/or** any "subcontractor' arising out of and in the course of: (1) Employment by any 'insured". In *Republic-Vanguard Ins. Co. v. Mize*, 2009 WL 1953405 (Tex. App. – Amarillo, July 8, 2009), the court quoted renowned legal writing instructor Bryan Garner's reference to the "and/or" phrase as "A legal and business expression from the mid-19th century" that "has been vilified for most of its life-and rightly so. To avoid ambiguity, don't use it." In the context of the employer's liability exclusion and the facts of this case, however, the court found that the exclusion is unambiguous and it "applies to both employees of the insured and employees of any subcontractor, but not as to subcontractors individually." And even if it were ambiguous, the result would be the same. The trial court's judgment finding a duty to defend was affirmed.

COURT FINDS CGL INSURER HAS NO DUTY TO DEFEND OR INDEMNIFY INSURED IN PATENT INFRINGEMENT LAWSUIT

Last Tuesday, the U.S. District Court for the Northern District of Texas concluded that a CGL insured failed to meet their initial burden of establishing that a lawsuit against them alleging patent infringement was covered under the policy. In *Everest Indemnity Insurance Co. v. Allied International Emergency, LLC*, 2009 WL 2030421 (N.D.Tex., July 14, 2009), the court observed that the insured failed to argue that

coverage exists under the policy's provisions for "infringement upon another's copyright, trade dress or slogan" and so the argument was waived. The court also examined the policy's personal-injury and advertising-injury provisions, the causal relationship required and the insured's "contrived reading of the contract" in concluding that all that the underlying suit alleges is infringement of the patent, "not the manner in which it was advertised." And because the court found that the insured failed to meet their burden to establish coverage under the policy, they did not reach the knowing-violation exclusion presented by allegations that the insured "intentionally and personally directed or knowingly caused others" to infringe the patent. Accordingly, summary judgment was granted to the insurer finding no duty to defend or indemnify.