The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TEXAS SUPREME COURT HOLDS GENERAL WORKPLACE INSURANCE PLAN PROVIDES BROAD WORKERS COMPENSATION INSURANCE PROTECTION

On Friday, the Texas Supreme Court examined a worker's compensation insurance plan which was part of an owner controlled insurance program (OCIP) that covered the work site, and determined that the written agreement between a general contractor and the owner and subcontractors, "provides workers compensation insurance coverage to its subcontractors and the subcontractors employees." In *HCBeck, LTD. v. Rice*, 2009 WL 886160 (Tex. April 3, 2009), the Texas Supreme Court examined features of the contract that required its workers compensation plan to be incorporated into all contracts entered into by the contractor and subcontractors. All complied and received confirmation of coverage under the OCIP. A subcontractor's employee was injured and the trial court ruled that HCBeck was protected by the plan. But the appellate court ruled that the contract with the subcontractor which incorporated the OCIP was "insufficient to constitute "providing" workers' compensation coverage insurance" to the subcontractor so as to trigger the exclusive remedy provisions of the Texas Workers Compensation Act.

The Texas Supreme Court examined the workers' compensation act, the contract and the arrangements between the parties and concluded:

> A general insurance workplace insurance plan that binds a general contractor to provide workers compensation insurance for its subcontractors and its subcontractors' employees achieves the Legislature's objective to insure that the subcontractors' employees receive the benefit of workers compensation insurance.

The court found that the OCIP "provided" the coverage required under the Act, that HCBeck was the injured subcontractor's statutory employer and accordingly, found that the exclusive remedy provisions of the workers' compensation act applied.

COURT REJECTS "UNCONSTITUTIONALLY VAGUE" CHALLENGES TO TEXAS PROMPT PAYMENT OF CLAIMS ACT

Last Tuesday, the U.S. District Court for the Southern District of Texas denied an insurer's "unconstitutionally vague" challenge to Texas Prompt Payment of Claims Act as applied to third-party defense costs. In *Nautilus Insurance Company v. International House of Pancakes*, CA No. H-03-2182 (S.D.Tex. March 31, 2009), the court abated the insured's lawsuit seeking 18% penalty interest and attorneys' fees in relation to defense costs incurred in defending a third-party lawsuit, while the issue was pending before the Texas Supreme Court. After the Texas Supreme Court ruled that third-party defense

costs were subject to the Prompt Payment of Claims Act penalties in *Lamar Homes Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1 (Tex. 2007), the parties in this case filed cross motions for summary judgment to address the constitutional issues, that were not addressed in the Lamar Homes opinion.

The insurer challenged the Prompt Payment of Claims Act liberal construction provision arguing that as a penal statute, it must be strictly construed. The court agreed that the statute is penal in nature but found that as a civil, not a criminal statute, the Prompt Payment Statute required a less strict construction. The court examined arguments that that the statute was unconstitutional on its face, and as applied to the insurer in this case, based in part on the split in authority in the appellate courts until the Texas Supreme Court resolved the issue in *Lamar Homes*. And despite the split in authority until the *Lamar Homes* ruling, the court found that the penalty provision provided sufficient notice that it covered the conduct at issue here. The court found that Texas Insurance Code Article 21.55 (now Chapter 542) is neither facially invalid nor unconstitutional as applied to the insured's claims for third-party defense costs, denied summary judgment to the insurer and granted summary judgment in favor of the insured.

COURT HOLDS "USE OF VEHICLE AS A VEHICLE" IS REQUIRED TO TRIGGER COVERAGE UNDER COMMERCIAL AUTO AND UMBRELLA POLICIES

Last Wednesday, the U.S. District court for the Northern District of Texas held that an individual who leased a food preparation truck that caught fire and injured an employee while grease was being cleaned form the floors, was not entitled to coverage under the vehicle owner's CGL, commercial auto and umbrella policies. In *Employers Mutual Casualty Company v. Bonilla,* 2009 WL 875060 (N.D.Tex. April 1, 2009), after completing their route for the day, the food preparation truck was returned to the owner's lot. An employee for Bonilla, the individual who leased the truck, was cleaning grease from the floor using gasoline when a pilot light came on and the truck burst into flames injuring the employee. A judgment was taken against Bonilla in state court. This federal declaratory judgment action followed.

The court examined the Commercial General Liability policy and determined that Bonilla was not the named insured, nor an officer, director, stockholder or employee of the vehicle owner and named insured and lessor - Jolly Chef – so as to qualify for coverage under the CGL policy. No coverage was afforded to Bonilla under that policy. The court then examined the commercial auto policy to determine whether the fire arose out of the "use" or "maintenance" of the vehicle. After discussing Texas cases addressing similar issues, the court determined that the "use" or "maintenance" must bear some relationship to the vehicle's transportive function. And here, they found the use only related to the vehicle's food preparation function and therefore held that they were not "using" the vehicle as needed to trigger coverage. And applying similar reasoning to efforts to secure coverage under an omnibus clause, as a matter of first impression under Texas law, the court concluded that no coverage was afforded under the commercial auto and umbrella policies because the "vehicle was not being used as a vehicle" when the accident occurred. Summary judgment was granted in favor of the insurer.

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