



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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November 24, 2008

TEXAS SUPREME COURT ALLOWS LIABILITY INSURER TO APPEAL ISSUE WHICH INSURED INTENTIONALLY WAIVED

Last Friday, the Texas Supreme Court ruled that an insurer can pursue and win an appellate point that its insured waived in *Sonat Exploration Co. v. Cudd Pressure Control, Inc.*, __ S.W.3d __ (November 21, 2008). A choice-of-law issue existed in the case as to whether Texas or Louisiana law should apply. The insured defendant (Cudd) entered into a Rule 11 agreement in which it agreed not to argue Louisiana law applied in exchange for the plaintiff's (Sonat) non-suit of a separate contract suit. The trial court found the parties' indemnity agreement enforceable under Texas law, and after a jury found a reasonable settlement would have been \$20,719,166.74, the trial court entered judgment in that amount for Sonat and against Cudd. Cudd filed a notice of appeal, and Lumbermens as its liability insurer, posted \$29 million as security on the judgment. Lumbermens intervened in the appeal to pursue the choice-of-law point that Cudd had abandoned. The Texas Supreme Court issued mandamus to allow Lumbermen's to do so after the court of appeals refused to allow the intervention. (*Newsbrief February 6, 2006*).

Ruling for Lumbermens, the court of appeals found that Louisiana law *should* apply. Sonat argued on appeal that Cudd should not be permitted to breach its Rule 11 agreement through Lumbermens' appeal. Describing the case before it as presenting "unique circumstances," the Texas Supreme Court disagreed. Again, basing its decision on the doctrine of "virtual representation," the Court held Lumbermens and Cudd shared an identity of interest. The Court further found the identity of interest was not defeated by Lumbermens and Cudds differing positions on appeal. In response to Sonat's argument that allowing Cudd to "break" the Rule 11 agreement was unfair, the court noted the purpose of the Rule 11 agreement was to shift all liability to Cudd's insurer and that such agreements have been found to unenforceable and against public policy. But, the Court stated that it had no reason to question the Rule 11 agreement here.

PLAINTIFFS ALLOWED TO IGNORE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT IN FAVOR OF STATE LAW WRONGFUL DEATH CLAIM EVEN THOUGH EMPLOYEES WERE EXEMPT FROM WORKERS COMPENSATION COVERAGE

Last Thursday, the Fourteenth Court of Appeals in Houston ruled that wrongful-death plaintiffs could escape the application of the LHWCA by choosing to pursue state-law claims in state court in *In re Shippers Stevedoring Co.*, __ S.W.3d __ (Tex. App.—Houston [14 Dist] November 20, 2008). In this case, Shippers argued the plaintiffs' claims were barred by the LHWCA and the court must dismiss the claims because only the Department of Labor could hear them. The trial court refused to grant relief and Shippers sought mandamus relief from the court of appeals.

The court of appeals agreed the plaintiffs' decedent was covered by the LHWCA. And, because of that coverage, the employee was exempt from Texas' workers compensation laws. The court also noted the plaintiffs' claims against the employer were characterized as "nonsubscriber" claims because Shippers had not purchased state workers compensation insurance because its employees were exempt. After having recognized the outrageous result of allowing the plaintiffs to avoid the LHWCA, the court of appeals refused to grant mandamus relief. Instead, the court of appeals held that Shippers' claim was not one of lack of jurisdiction, but one of an affirmative defense of preemption which the court refused to address.

[Editor's Note: This is only one of a number of opinions that have been issued by Texas courts with respect to the LHWCA and the Texas workers compensation scheme where plaintiffs have sought to pursue state-law claims instead of the benefits mandated by the statutory scheme. This case continues an alarming trend of allowing plaintiffs to pursue these claims despite the creation of administrative remedies available to them. Based on our experience, we expect these types of cases will significantly increase over the next 12 months in light of several recent favorable judicial rulings, including this one.]

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