



The Weekly Update of Texas Insurance News  
**TEXAS INSURANCE LAW NEWSBRIEF**



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## **QUESTION ADDRESSING PREJUDICE REQUIRMENT UNDER CLAIMS-MADE POLICY CERTIFIED TO TEXAS SUPREME COURT**

In *XL Specialty Insurance Company v. Financial Industries Corporation*, 2007 WL 4461190 (5<sup>th</sup> Cir (Tex.) December 17, 2007), the Fifth Circuit examined the prompt notice question under a claims-made liability policy which arose when the insured waited seven months after suit had been filed to notify the insurer. The trial court granted summary judgment in favor of the insurer finding that “an insurer need not demonstrate prejudice from late notice to avoid coverage under a claims-made policy” even though the claim was reported within the policy period.

On appeal, the Fifth Circuit recognized that Texas Courts of Appeals have taken apparently different positions on whether an insurer must show prejudice in order to deny coverage under claims-made policies. They also noted that four related cases are currently pending before the Texas Supreme Court. In an effort to address this unresolved question in Texas insurance law, the Fifth Circuit certified the following question to the Texas Supreme Court:

Must an insurer show prejudice to deny payment on a claims-made policy, when the denial is based upon the insured’s breach of the policy’s prompt notice provision, but the notice is nevertheless given within the policy’s coverage period?

**Editors Note:** We will continue to monitor this case along with the other pending notice cases as we await the Texas Supreme Court’s ruling on this important issue.

## **SUCCESSFUL ASSERTION OF GOVERNMENTAL TORT CLAIMS IMMUNITY ELIMINATES EXCEPTION TO CONTRACTUALLY ASSUMED LIABILITY EXCLUSION**

The Dallas Court of Appeals recently examined insurance coverage for a contractor’s liability for damage to a third-party’s property while performing work for a governmental entity. In *Underwriters at Lloyd’s of London v. Gilbert Texas Construction L.P.*, 2007 WL 4415636 (Tex.App.- Dallas, December 19,2007), the insured’s contract with the Dallas Area Rapid Transit Authority (DART) required the insured to keep the work area free of debris and repair damage to adjacent third-party property that resulted from their failure to comply. The insured allegedly failed to keep the work area clear and adjacent property was flooded and damaged due to heavy rains and blocked drains. The third- party sought recovery in an underlying liability suit seeking recovery of damages under a tort theory and also as a third-party

beneficiary to the contract. The insured successfully asserted governmental tort claims immunity and the trial court dismissed all claims with the exception of the breach of contract claim. In the coverage case, the insured and the liability insurer then submitted the coverage issues to the court on cross motions for summary judgment. The trial court in the coverage case concluded that coverage existed and this appeal followed.

On appeal of the coverage case, the Dallas Court of Appeals examined the contractually assumed liability exclusion and its exception for liability that the insured would have in the absence of the contract or agreement. The court observed that the exception would normally apply under the facts; however, because the insured had successfully asserted the tort immunity defense, its *only* liability arose by virtue of the liability assumed under the contract. Consequently, the exception did not apply and the contractually assumed liability exclusion precluded coverage.

### **COURT FINDS “ILLEGAL USE OF ALCOHOL” EXCLUSION PRECLUDES COVERAGE FOR ERISA PLAN BENEFICIARY’S DEATH IN SINGLE CAR ACCIDENT**

A Federal District Court Judge from the Western District of Texas recently examined accidental death benefits under a health benefit plan that provided in relevant part that “[a] loss is not covered if it results from... [w]hile operating a motor vehicle, the person’s illegal use of: (1) alcohol...”(sic). In *Pando v. Prudential Insurance Company of America*, 2007 WL 4482179 (W.D. Tex., December 21, 2007), the insured died when his vehicle hit a tree and it was determined that his blood alcohol exceeded the legal limit at the time of the accident. The insurer denied benefits to the insured’s spouse and children and an administrative ruling under the ERISA plan upheld the insurer’s denial of coverage.

On appeal, the court found that the policy language was ambiguous but also noted that the rule of *contra preferentum*, which requires courts to interpret ambiguities in insurance policies in favor of coverage, does not apply when the insurer has discretion to interpret the Plan. Under the ERISA Plan, the administrator had discretion to do so. As a result, the standard of review examined whether there was an abuse of discretion. Under the policy language and facts presented, the court concluded that the insurer’s interpretation was both reasonable and legally correct and, as a result, it was not an abuse of discretion to deny coverage.

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