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PREMISES OWNER QUALIFIED FOR WORKERS' COMPENSATION EXCLUSIVE REMEDY DEFENSE

The Texas Supreme Court recently held a premises owner that "undertakes to procure" work falls within the Labor Code's definition of a general contractor and, in turn, qualified for the workers' compensation exclusive-remedy defense. In *Entergy Gulf State, Inc. v. Summers*, 2007 WL 2458027 (Tex. August 31, 2007), an employee of a construction and maintenance company, hired as an independent contractor, was injured while on Entergy's premises. As part of the contract, Entergy agreed to provide workers' compensation insurance to its contractor's employees. The injured employee received benefits and then sued Entergy.

The Texas Labor code defines a "general contractor" as "a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors." Evidence established that Entergy hired its subcontractor to perform work. Accordingly, the Court observed that the governing Labor Code definition of general contractor and subcontractor do not forbid a premises owner from also being a general contractor. Reversing the Beaumont Court of Appeals decision, the Texas Supreme Court held that Entergy satisfied the plain and ordinary meaning of a general contractor and, therefore, was entitled to the Labor Code's exclusive–remedy defense.

FEDERAL COURT ALLOWS EXTRINSIC EVIDENCE RELATED TO CONTRACT TO ESTABLISH WHETHER LIABILITY AROSE OUT OF SUBCONTRACTOR'S WORK

Last week, a Federal District Court in Houston recently determined the type of extrinsic evidence now allowed under Texas law to determine certain coverage issues under a liability policy. This insurance-coverage dispute arises from a construction project to make improvements at a pump station in Beaumont, Texas. In *Roberts, Taylor & Sensabaugh, Inc. v. Lexington Ins. Co*., No. H-06-2197 (S.D. Tex. September 5, 2007), the General Contractor ("GC") contracted construction work with an engineering company who then subcontracted some of the assigned work. During construction, a subcontractor employee was allegedly injured by one of the GC's employees. The injured employee sued the GC and, as an additional insured under the engineering company's CGL policy, the GC sought declaratory relief that the carrier owed it a duty to defend and indemnify against the underlying lawsuit.

Given current Texas law on the extrinsic evidence issue (*See GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305 (Tex. 2006)), the GC and carrier agreed that extrinsic evidence *was admissible* to show whether the GC was an additional insured under the policy. The parties disagreed, however, as to what evidence was admissible and for what purpose. The carrier argued that extrinsic evidence was not allowed to show the GC's liability "arises out of" the subcontractor's work under its contract with the engineering

company. Rejecting this argument, the court recognized and applied the limited extrinsic-evidence exception to determine coverage, because it did not affect the merits or controvert the allegations in the underlying suit.

HURRICANE KATRINA LOSS ENTITLES COMPANY TO RECOVER EXTRA EXPENSE BENEFITS BUT NOT BUSINESS INCOME OR ADDITIONAL EXPENSES

A federal judge from Houston recently addressed whether a company who profited from an increase in business after Hurricane Katrina could still make a claim for business income loss and extra expense benefits under its commercial property policy. In this case, Hartford issued an insurance policy to Rimkus providing coverage for losses, including extra expenses, due to business interruption. In August 2005, Hurricane Katrina struck New Orleans and Rimkus' office there was damaged and forced to close. Rimkus, however, continued to provide services. In fact, as a result of the devastation caused by Katrina, Rimkus experienced a substantial increase in revenues in the months following the storm. In order to continue providing services, Rimkus relocated its operation to temporary offices in Jackson, Mississippi and Lafayette, Louisiana. To staff these offices Rimkus rented out hotel rooms and apartments in Jackson and Lafayette for its employees. By the end of 2005, Rimkus moved back to New Orleans in a new permanent office space, but was required to pay higher rent as well as other additional expenses.

To recover its costs, Rimkus filed several claims with Hartford. Hartford accepted and paid some claims, but denied claims for 1) loss of business income due to business interruption; 2) temporary additional living expenses of employees in order for it to resume business at a temporary location; and 3) additional rent to resume business at its new, permanent location. Rimkus filed this lawsuit to try to recover its remaining losses.

In *Rimkus Consulting Group, Inc. v. Hartford Cas. Ins. Co.*, H-07-176 (S.D. Tex. August 30, 2007), Hartford argued Rimkus suffered no loss of business income, but rather experienced an *increase* in business income after the storm. Second, Hartford argued it properly denied Rimkus' temporary employee living expenses because Rimkus was not required to pay those expenses, but rather volunteered to pay them. Finally, Hartford contended it properly denied Rimkus' claim for other expenses to secure a new business location because those expenses were incurred outside the period of restoration. Rimkus, on the other hand, alleged it lost revenues from its regular, "pre-storm" clientele, suffered losses to resume its business operations in temporary locations, and incurred expenses to secure a new business location during the period of restoration.

The Federal District Court in Houston rejected Rimkus' distinction between pre- and post-storm business and, instead, held that Rimkus suffered no actual business income loss as defined by the policy. The court further observed even if such coverage was triggered, the amount of "pre-storm" business income loss was properly offset by the increased income generated by "post-storm" business operations, which exceeded any loss of "pre-storm" business income. Next, the court held that temporary offices were established so Rimkus could resume its business operations, not because of the damage to the employees' homes. Therefore, the court held that Rimkus *was* entitled to theses expenses and could also recover attorneys' fees plus interest as to that smaller aspect of the claim. Finally, the court concluded the new lease was not related to temporary expenses, but rather constituted a portion of a permanent expense. As such, Hartford was not liable for the increased rent costs for Rimkus' new office space