



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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FIFTH CIRCUIT HOLDS POLLUTION EXCLUSION OVERRIDES INDEMNITY AGREEMENT

Last week, the Fifth Circuit Court of Appeals addressed an additional insured's effort to circumvent a pollution exclusion through a separate indemnity agreement. Because the named insured assumed liability under an indemnity agreement with the additional insured, and obtained a Contractors Limitation Endorsement, the additional insured argued it was entitled to liability coverage irrespective of the pollution exclusion. Last Wednesday, the Fifth Circuit rejected this effort in *United National Insurance Co. v. Hydro Tank, Inc.*, 2007 WL 2319109 (5th Cir. (Tex.) August 15, 2007). In this case, two Hydro Tank workers were overcome by fumes while cleaning a tank and fell face first into toxic sludge. A third worker entered the tank to save them. All three were hospitalized and survived but each suffered injuries from exposure to toxic fumes and chemicals in the tank.

The additional insured attempted to overcome the pollution exclusion by arguing: 1) the properly stored sludge was not a pollutant; and 2) plaintiff's allegations that they were "overcome" and also came into "contact with the sludge" created the possibility that they could have been overcome by heatstroke or some other non-excluded injury. Applying a concurrent causation analysis, the Fifth Circuit rejected these arguments and said because "the injuries were sustained by exposure to excluded pollutants *and* by direct contact with the sludge," the pollution exclusion applied. Next, the Court rejected efforts to circumvent the pollution exclusion by overriding it with the indemnity agreement finding the indemnity agreement could not be used to create coverage that did not otherwise exist. Accordingly, summary judgment in favor of the liability insurer was affirmed.

INTENTIONAL ACTS EXCLUSION PRECLUDES COVERAGE FOR AUTO ACCIDENT DURING POLICE CHASE

Recently, the Eastland Court of Appeals examined an out-of-state auto policy, applied Texas law and determined that an intentional acts exclusion precluded coverage for bodily injuries and property damage caused by the insured while attempting to flee from the police. In *Tanner v. Nationwide Mutual Fire Insurance Co.*, 2007 WL 22774936 (Tex.App.-Eastland August 9, 2007), the insured fled from police resulting in a high speed police chase during which the insured drove on the wrong side of the road at times and disregarded traffic control devices. He struck another vehicle in an intersection injuring its four occupants who presented claims against the insured. The insurer denied coverage and filed a declaratory judgment action asserting that the intentional acts exclusion precluded coverage. The jury found that the insured did not intentionally cause the property damage or bodily injury but the court disregarded the jury finding and entered judgment in favor of the insurer.

On appeal, the Eastland Court of Appeals applied Texas' "inferred intent rule" which considers a result to be intentional when it is the "natural and probable consequence of an intentional act." Despite evidence that the insured driver hit his brakes before striking the other vehicle; the court found that the driver was "willfully and intentionally attempting to evade the police" and his actions "carried with it an undisputed and substantial risk that someone would be injured." As a result, the court found as a matter of law that the conduct fell within the policy's intentional-acts exclusion and the trial court's judgment was upheld.

COURT UPHOLDS "VANDALISM" FINDING IN SPITE OF "COLLISION" WITH OTHER VEHICLE

Last Thursday, the Houston First Court of Appeals upheld a jury finding that a vehicle insured for comprehensive coverage (but not collision) sustained "vandalism" damage after the insured parallel parked his Volkswagon two feet behind a large SUV that had another vehicle in front of it and, when he returned 45 minutes later, he found his vehicle moved back 15 feet, with damage to the front end and hood and the SUV gone. In *USAA County Mutual Ins. Co. v. Cook*, 2007 WL 2332674 (Tex.App.-Houston [1st Dist.] August 16, 2007), the insured did not purchase collision coverage but had comprehensive coverage which included coverage for "vandalism" – an undefined term. The impact to the front end of the car revealed that the damage was the result of a "direct head-on collision." The insurer denied the claim and suit was filed. The jury found the damage resulted from vandalism and, as a result, the insurer breached the contract, committed bad faith and violated the Texas Insurance Code. This appeal followed.

The appellate court noted the real issue was whether the "damage to Cook's car was caused by a deliberate as opposed to a negligent act." Reviewing the evidence, the court noted no one saw the impact and the police reported it as a hit and run. But, "the jury could have reasonably concluded that based on the dimensions of the parking lot, the driver of the SUV parallel parked immediately in front of Cook's car willfully or maliciously caused the damage...by ramming the SUV into the car." And, because the insured's parking brake was on and the vehicle was moved 15 feet, no other conclusion appeared reasonable – "a deliberate act akin to road rage." Accordingly, judgment in favor of the insured was upheld.

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