The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
www.mdjwlaw.com
A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.
Principal Office 808 Travis, Suite 1800 Houston, Texas 77002 713.632.1700 FAX 713.222.0101
111 Congress Avenue, Suite 1070 Austin, Texas 78701 512.610.4400 FAX 512.610.4401
900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

May 7, 2007

SNAP-BACK PROVISION VERSUS RULE 192.3(E)(6) DISCOVERABILITY OF DOCUMENTS PROVIDED TO TESTIFYING EXPERT

Recently, the Texas Supreme Court addressed the inherent struggle between the "snap-back" provision and Texas Rule of Civil Procedure 192.3(e)(6)'s mandate that all documents provided to a testifying expert are discoverable. In *In Re Christus Spohn Hospital Kleberg*, 2007 WL 1225351 (April 27, 2007), the Defendant mistakenly sent confidential documents to a testifying expert. Had such documents been mistakenly sent to *counsel* for the other party, the "snap back" rule in Texas allows the party to get those documents back without its accidental production being deemed to be a waiver of any privilege. Here, the Texas Supreme Court held the inadvertent nature of the defendant's production of privileged documents to its own testifying expert preserved the privilege under Rule 193.3(d) and entitled the hospital to recover the documents upon realizing its mistake IF the hospital's designated expert does not testify at trial. To the extent the defendant stands upon its testifying expert designation, then the Court held Rule 192's plain language and purpose (and the policy considerations that surrounded its 1999 amendment) do not allow the documents to be "snapped back." The fact that the testifying expert did not read the documents in question was irrelevant based upon the plain and unambiguous terms of Rule 192.3(e)(6) which require the production of all documents provided to a testifying expert.

UNATTENDED VEHICLE COVERAGE ENDORSEMENT CLEARLY PRECLUDED THEFT CLAIM

A Federal District Court in the Southern District of Texas recently had occasion to interpret the Unattended Vehicle Restricted Theft Coverage Endorsement. In *Great American Insurance Company of New York v. All Brands Cigarettes & Candy, Inc.*, 2007 WL 1239247 (April 27, 2007), the policy included an endorsement entitled "Unattended Vehicle Restricted Theft Coverage" which provided the policy did not cover a loss due to theft unless the vehicle containing the cargo was "attended." The term "attended" was defined in the policy to mean that "someone is . . . in or on the carrying conveyance, whose sole duty is to safeguard the Covered Property."

On two separate occasions, one of the insured's delivery trucks was robbed. On each occasion, there was no individual in or on the delivery truck whose "sole duty" was to safeguard the cargo that was stolen. After denying the insured's claims based on the exclusion for theft from a vehicle that was not "attended" as defined in the policy, the insurer sought declaratory relief that the policy did not provide coverage for the two robberies. The insured filed its counter-claim for contractual and extra-contractual claims. The carrier promptly sought summary judgment based upon the Unattended Vehicle Restricted Theft Coverage endorsement.

In granting summary judgment in favor of the carrier, the Court noted the unambiguous language of the Unattended Vehicle Restricted Theft Coverage endorsement precluded coverage in this case. Noting that to be "attended" under the policy, there must have been someone in or on the truck whose "sole duty" was to safeguard the truck's cargo. Further, the Court observed it was undisputed that, at the time of each theft, there

was no individual in or on the insured's trucks whose "sole duty" was to safeguard the truck's contents. Because the trucks were not "attended," the losses were not covered by the policy and the carrier was granted summary judgment relief.

The insured argued that its insurance binder did not contain the Unattended Vehicle Restricted Theft Coverage endorsement. The Court summarily disposed of such argument in reliance upon established precedent which holds an insurance binder is effective only until the formal insurance policy is issued. Likewise, the Court quickly rejected the insured's argument that it should not be bound by the endorsement because it was not independently informed of the endorsement and allegedly did not know of its existence: "Under Texas law, it is not the insurer's responsibility to explain the Policy to the insured; it is the insured's responsibility to read the policy." Accordingly, the policy did not extend coverage for the two thefts.

LEASED-IN WORKER EXCLUSION FOUND UNAMBIGUOUS

In *Yorkshire Insurance Company, Ltd. v. Diatom Drilling Company*, 2007 WL 1287720 (May 2, 2007), the Amarillo Court of Appeals recently interpreted a manuscript Leased-In Worker Exclusion. Because the insured procured the policy through the Lloyd's of London market, the general terms and exclusions of the policy were drafted by the insured and its agent. The cover note of the policy identified the insureds, provided a maximum of $500,000 of coverage for any one bodily injury accident or occurrence, and contained a "condition" for "Excluding Leased-In Employees/Workers." After Lloyd's declined coverage for a fatality claim, a $15,000,000 judgment was entered against the insured. The underlying claimants took an assignment of rights from the insureds and pursued their *Stowers* claim against Lloyd's. Lloyd's then filed its third-party action against the insureds for declaratory relief arguing the policy's "Leased-In Worker Exclusion" precluded coverage for the underlying loss. The Court addressed the coverage issue under competing motions for summary judgment.

First, the insureds argued that the general rule that "declaratory judgments are not available to settle disputes already pending before the Court" barred Lloyd's request for declaratory relief. The Court rejected the insureds' argument and distinguished the general rule by noting that a court may allow a declaratory judgment counterclaim if it is something more than a mere denial of the plaintiff's claim and has greater ramifications than the original suit. Next, the Court examined the specific relief sought by Lloyd's in its counterclaim: the carriers sought a declaration that on the date of decedent's death the operative insurance documents excluded liability for injury or death to "leased-in employees or workers." Finding that Lloyd's was entitled to seek a declaration regarding the policy's coverage independent of the assigned *Stowers* duty, the Court noted the declaration sought requested a construction of the Leased-In Worker Exclusion, an issue which would not necessarily be reached in the *Stowers* action. Accordingly, the Court determined that declaratory relief regarding the construction of the Leased-In Worker Exclusion was indeed available to the carriers.

Next, the Court addressed the construction of this unusual endorsement. The insureds argued that the Leased-In Worker Exclusion was ambiguous because the exclusion could reasonably exclude leased-in workers from being "insureds" under the policy, exclude claims made for damages *caused by* leased-in workers, exclude claims *made by* leased-in workers, and exclude claims *made by families* of leased-in workers. The insureds' position that the Leased-In Worker Exclusion was ambiguous ran contrary to the insureds' alternative argument of coverage for its own claims. The Court noted, as a matter of law, the insureds' position that the exclusion was ambiguous precludes summary judgment because an ambiguity in a contract gives rise to a fact question regarding the proper interpretation of the contract. Because such issue created a material fact question, the insureds failed to expressly present a ground upon which summary judgment could be based in their favor. Because the insureds failed to present any other grounds upon which summary judgment could be granted, the Court concluded the trial court erred in granting the insureds summary judgment in declaratory judgment action.

Finally, the Court looked solely to the language used in the exclusion. Noting that the Leased-In Worker Exclusion was not sufficiently clear to support the carriers' construction as a matter of law, the Court noted: "in

construing a contract, we must consider the circumstances existing at the time that the contract was entered into as an aid in determining the intent of the parties." Thus, the Court relied upon extrinsic evidence to ascertain the parties' "intent" and resolve the alleged "ambiguity" surrounding the construction of the Leased-In Worker Exclusion. Specifically, the Court noted there was ample evidence that one of the primary intents of the insureds in obtaining the policy was to exclude coverage for injury claims made by the insureds' drilling workers. Observing that the insureds or their agents drafted the Leased-In Worker Exclusion to exclude drilling workers leased to one of the insureds but employed by the other insured which provided coverage under an accidental death and injury policy, the Court concluded that the parties clearly and unambiguously intended the policy to exclude from liability for injury or death those claims of workers that were "leased-in" by one insured, including those leased from another insured entity. Thus, the Court reversed the trial court's summary judgment in favor of the insureds and rendered summary judgment declaring that, on the date of decedent's death, the policy excluded liability for injury or death to "leased-in" workers.