



The Weekly Update of Texas Insurance News

# TEXAS INSURANCE LAW NEWSBRIEF



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## LIMITATIONS PRECLUDES SUIT AGAINST INSURED BY CONTRACTOR WHO LACKED REQUESTED COVERAGE AS AN “ADDITIONAL INSURED”

In *Via Net v. TIG Insurance Co.*, 2006 WL 3759389 (Tex. December 22, 2006), an alleged “additional insured” was denied coverage nine months after being assured that it had been added to the insured’s policy as an additional insured and after it received a certificate of insurance. The policy, however, did not provide for additional insured coverage and no endorsement was ever added. After an unsuccessful suit on the policy against the carrier, the alleged “additional insured” sued the named insured claiming breach of contract in failing to provide the additional insured coverage. Even though the suit was filed less than four years after the denial of coverage occurred, the Texas Supreme Court upheld summary judgment in favor of the named insured based on the statute of limitations because suit was filed more than four years after the agreement was breached and the discovery rule did not apply under the circumstances of this case.

## DEC ACTION DEFAULT FAILS TO PRECLUDE THIRD-PARTY LAWSUIT SEEKING INSURANCE BENEFITS

The Houston Court of Appeals recently examined whether an insurer’s default judgment against an insured in a declaratory judgment action precluded a third-party plaintiff’s ability to later sue the insurer seeking recovery on a judgment obtained against the insured in a separate tort lawsuit. In *El Naggat Fine Arts Furniture, Inc. v. Indian Harbor Insurance Co.*, 2007 WL 79474 (Tex.App.-Houston [1<sup>st</sup> Dist.] January 11, 2007), the court examined the insurer’s defenses asserting *res judicata*, stating in part:

Although contractual privity generally supports an insurer’s ability to sue an injured third-party in a declaratory judgment action, it does not follow that it automatically gives a *res judicata* effect to a judgment entered in a prior proceeding against an injured third-party who did not participate in that proceeding.

Accordingly, the court held that the plaintiff in the underlying lawsuit was not in privity with the insured so as to allow the insured’s default in the declaratory action to preclude the third-party plaintiff from filing a separate lawsuit against the insurer seeking to collect on a judgment obtained against the insured.

## VAGUE ALLEGATIONS SUFFICE TO ASSERT “BODILY INJURY” WITHOUT DESTROYING COMMONALITY FOR CLASS ACTION STATUS

In *Trinity Universal Insurance Co. v. Cellular One Group*, 2007 WL 49667 (Tex.App.-Dallas January 9, 2007), the insurer appealed the denial of its request for a declaratory judgment that it had no duty to defend or indemnify Cellular One in three class action lawsuits seeking damages and claiming that plaintiff’s exposure to radio frequency radiation caused an “adverse cellular reaction and/or cellular dysfunction.” The insurer argued that “plaintiffs’ did not allege bodily injury because to do so would destroy the commonality requirement for

brining a class action.” Without addressing this argument, the Dallas Court of Appeals concluded the allegations sufficiently asserted claims for “bodily injury” so as to trigger the insurer’s duty to defend. Similarly, policy defenses based on a lack of an “occurrence” and the business exclusions were not properly before the court and thus not addressed on appeal.

## **SOUTH TEXAS INSURANCE LAW C.L.E. PROGRAM—JANUARY 25-26, 2007**

The South Texas College of Law will hold its annual Texas Insurance Law Symposium this week on January 25<sup>th</sup> & 26<sup>th</sup> in Houston. Chris Martin of our firm is serving as the Chair of this great continuing education program for the 6<sup>th</sup> consecutive year. This program is certified for adjuster CE credits by TDI and attorney CLE credits by the State Bar of Texas. The program will highlight many of the cutting edge insurance issues in auto, homeowners and commercial liability insurance in Texas. It will also cover all of the significant insurance decisions from Texas courts over the past year. It is not too late to register. The seminar will be held at the South Texas College of Law in downtown Houston and will feature many of the state’s leading insurance lawyers. For more information on this CLE program, see <http://www.stcl.edu/cle/TXINS2007schedule.html>.

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