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FT. WORTH COURT APPLIES FORTUITY DOCTRINE TO CLAIMS-MADE POLICIES

Last week, the Fort Worth Court of Appeals, in *Warrantech Corporation v. Steadfast Insurance Company*, 2006 WL 3438033 (Nov. 30, 2006), addressed the Fortuity Doctrine and its application to claims-made liability policies. The Court provided a concise discussion of what constitutes the Fortuity Doctrine. Noting that the Fortuity Doctrine included both the "loss-in-progress" and "known loss" theories, the Court clarified that the "loss" at issue did not mean "judgment" ultimately rendered against the insured. Relying upon that Texas precedent which applied the Fortuity Doctrine in cases where the insured's liability had not yet been fixed by judgment, the Court rejected Warrantech's argument that "loss" meant "judgment."

Warrantech argued that the Fortuity Doctrine did not apply to claims-made policies. According to Warrantech, the very nature of a claims-made policy anticipates the possibility of losses occurring before the policy's inception date, and to apply the Fortuity Doctrine to a claims-made policy would allegedly render the contract of insurance illusory because there would never be coverage for losses occurring before the inception date. The Fort Worth Court rejected Warrantech's argument, and, instead, concentrated on what constitutes the "known loss" or "loss-in-progress" theories – that the loss must be known or the insured must know or should know of the ongoing loss at the time the insurance policy was issued. Application of the Fortuity Doctrine to a claims-made policy would preclude coverage for losses of which the insured knows but will not preclude coverage for losses of which the insured is ignorant at the policy's inception. Thus, the Fortuity Doctrine does not render a claims-made policy illusory but merely restricts coverage to unknown losses.

The Fort Worth Court of Appeals also noted, in dictum, that "implicit in a dishonest, fraudulent, or criminal act is knowledge that the act is wrongful." It continued: "Application of the fortuity doctrine does not hinge on whether the insured knew a particular act was wrongful. Rather, it hinges on whether the insured knew before the inception of coverage that an act – knowingly wrongful or otherwise – resulted in a loss."

TEXAS SUPREME COURT REFUSES TO HEAR PROMPT PAYMENT OF CLAIMS CASE DEALING WITH THE STATUTORY REQUIREMENT OF "WRITTEN NOTICE OF THE CLAIM"

Last Friday, the Texas Supreme Court declined to hear the appeal in *State Farm Lloyds v. McMillin*, Case No. 06-0039. Among several diverse issues in *McMillin* was whether an insured's first notice of claim had to be in writing to trigger damages under former Tex. Insur. Code Art. 21.55 (now found at Ch. 542 of the Texas Insurance Code). McMillin did not provided written notice of their claim to their insurer and State Farm Lloyds accordingly challenged the McMillins' claim for Art. 21.55 damages. The Austin Court of Appeals held that Art. 21.55 required notice of claim be in writing and that the McMillins did not satisfy this requirement. Thus, the McMillins' Art. 21.55 claims were denied by the intermediate appellate court.

By refusing to hear this appeal, the Austin Court of Appeals' opinion stands as good law, and joins a handful of Texas cases addressing Art. 21.55's requirement that notice of the claim must be in writing to trigger the penalty provisions of the Prompt Payment of Claims statute. Unfortunately, the high court's refusal to hear *McMillin* does leave several other issues unresolved.

HOUSTON COURT ADDRESSES EMPLOYMENT PRACTICES EXCLUSION

One of the Houston Courts of Appeals, in *Shipside Crating Company, Inc. v. Trinity Universal Insurance Company*, 2006 WL 3360499 (Nov. 21, 2006), addressed and interpreted the ISO-standard CGL Employment-Related Practices Exclusion and what may constitute an "employment related practice." John Michael Baker, a truck driver, sued his former employer, Shipside, for libel, slander, negligence, intentional infliction of emotional distress, tortuous interference with contract, and tortuous interference with prospective contracts. In his complaint, Baker alleged that Shipside filed a false report to DAC Services, an organization that maintains an online database of drug and alcohol test results, in response to a request by Baker's employer, Quality Carriers, Inc. The report allegedly stated that Baker had refused a drug test while working for Shipside. Baker further complained that, as a result of the false report, he lost his job with Quality Carriers and was no longer employable as a driver with any major trucking company.

Shipside placed its carrier, Trinity, on notice of Baker's claim. Trinity initially responded with a reservation of rights. Thereafter, Trinity denied having a duty to defend or indemnify Shipside in Baker's litigation. After settling the underlying Baker lawsuit, Shipside sued Trinity for failure to defend and indemnify it. Trinity filed its motion for summary judgment which was ultimately granted by the trial court. Shipside then appealed to the Houston Court of Appeals.

The Court's analysis centered on the construction of the Employment Related Practices Exclusion. The parties and the Court focused on whether Shipside's alleged submission of Baker's drug test results to DAC was an "employment related" practice as that phrase was meant to be understood under the terms of the policy. Although the policy did not define "employment-related," other courts have previously interpreted similar, if not identical, exclusionary clauses in the context of an insurer's duty to defend a former employee's lawsuit against an insured. The Court relied upon *Pennsylvania National Mutual Insurance Company v. Kitty Hawk Airways*, 1990 WL 757369 (N.D. Tex. Sep. 4, 1990), *Altivia Corp. v. Greenwich Insurance Company*, 161 S.W.3d 52 (Tex. App. – Houston [14th Dist.] 2004, no pet.), and *Adams v. Pro Sources, Inc.* 231 F.Supp.2d 499 (M.D. La. 2002) in determining that the Court must evaluate the content of the statements alleged in the underlying lawsuit and the context in which they were made to determine if the statements were "employment related," and whether the Employment Related Practices Exclusion would apply. Further, the Court paid particular attention to *Altivia*'s holding that, to the extent any statements alleged were made "in response to routine employment inquiries" by prospective employers, the statements *were* employment related.

Noting the report submitted by Shipside to DAC allegedly stated that Baker had refused a drug test while working for Shipside, and because the results of Baker's drug tests were clearly related to his employment with Shipside and a likely condition for continued employment, the Court concluded that such statements were clearly "employment related." Also, the Court found that the context of Shipside's report to the DAC was employment related because it was in response to a request by Baker's new employer, Quality Carriers. Accordingly, the Houston Court of Appeals held the Employment Related Practices Exclusion precluded coverage to Shipside of Baker's employment-related claims.