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The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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PERMISSIVE USE FOR AFTER-HOURS USE OF COMMERCIAL VEHICLE – SUMMARY JUDGMENT REVERSED

Last Tuesday, the Fifth Circuit Court of Appeals addressed “permissive use” coverage issues under a commercial auto policy arising from an employee’s after hours use of a company vehicle to run a personal errand and the Court held that fact issues required the reversal of a summary judgment granted in favor of the insurer. In *Adams v. Travelers Indemnity Co. of Connecticut*, 2006 WL 2620585 (5th Cir. (Tex.) September 12, 2006), a Goodyear Tire Company employee from a Houston service center, who transferred to another shop in Bryan, Texas, was allowed to use a company truck to make his daily commute. The employee would pick up and drop off tires from one shop to the other one or two days a week during the commute and was considered to be “on the clock” while doing so. With his boss’s knowledge he would also run small personal errands using the truck during the day, such as picking up his lunch.

After returning to Houston one evening and delivering tires to the Houston shop, the employee went to his father’s house around 8:30 p.m. where he ate, consumed “four or five beers” and went to sleep. Sometime between 1:00 and 2:00 a.m. the employee awoke and drove to the store to pick up some cigarettes for his father. While returning, he fell asleep at the wheel and hit another vehicle. Travelers, Goodyear’s insurer, denied coverage to the driver because they found that he did not have permission to use the vehicle as required to trigger coverage, when the accident occurred. The driver filed suit and Travelers moved for summary judgment on the driver’s contractual and extra-contractual claims, which was granted by the trial court. This appeal followed.

The Fifth Circuit initially observed that in Texas permission is “consent to use the vehicle at the time and place in question and in a manner authorized by the owner, either express or implied.” In this case, the court focused on “implied” permission and the driver’s argument “that a pattern of tolerated personal use creates implied permission” and, thus, whether the employee’s use that evening was a minor deviation within his implied permission or a material or gross deviation taking him outside the coverage provided by the omnibus coverage provision, remained a fact issue in the case.

The Court then observed that the purpose of the errand, time and distance traveled and alcohol consumption were factors to be considered. Here, the distance was not significant and a fact issue arose of whether four hours of intervening sleep following the alcohol consumption could have “reinvigorated” the driver’s implied permission. While admitting that the time and place arguments asserted by Travelers put the driver on “shaky ground,” and “the inference that Goodyear’s acquiescence to Adams’s personal use during his lunch hour created implied permission to purchase cigarettes at one or two in the morning is tenuous under Texas law,” the Court determined that fact issues remained on these factors which required a reversal of the summary judgment in Traveler’s favor and a remand to the trial court.

APPELLATE COURT UPHOLDS DENIAL OF SEVERANCE IN BREACH OF CONTRACT / BAD FAITH ACTION - BIFURCATION ORDER SUFFICIENT

In a troubling decision that pushes the boundaries of judicial discretion, last Thursday the Corpus Christi Court of Appeals upheld a trial court's order denying severance of bad faith causes of action against an insurer in a breach of contract action despite settlement offers that were made by the insurer in an effort to resolve the dispute. In *In re Allstate Texas Lloyds*, 2006 WL 2621111 (Tex.App.-Corpus Christi, September 14, 2006), Allstate offered to settle the disputed part of a homeowners claim. The offer was rejected and a lawsuit asserting breach of contract and bad faith causes of action followed. Allstate moved to sever the bad faith causes of action and the court denied the request, instead ordering that "any admissible evidence regarding Plaintiff's extra-contractual claims that is prejudicial to Plaintiff's contract claim will be bifurcated from the other evidence in this case." Allstate filed a petition for writ of mandamus to force the severance.

The Corpus Christi Court of Appeals analyzed Texas law addressing severance in combined breach of contract and bad faith cases and observed that the "burden in on the party seeking severance to show how it will be prejudiced if the claims are tried together and to present evidence to the trial court, in camera if necessary, that forms the basis of its claims." The Court concluded that Allstate failed to carry its burden to show that "a fair trial on the contract claim would be unlikely" and noted that "[g]iven the bifurcation, Allstate has not met its burden." Accordingly, the trial court's ruling denying the severance was upheld.

SEVERANCE REQUIRED WHEN INSURER JOINED AS DEFENDANT IN THIRD-PARTY LIABILITY ACTION

Last Thursday, the Beaumont Court of Appeals granted mandamus relief to a liability insurer who sought to sever causes of action against the insurer in a third-party liability action. *In re American Economy Insurance Company*, 2006 WL 2621891 (Tex.App.-Beaumont, September 14, 2006) involved a personal injury lawsuit for injuries allegedly occurring during the repossession of a truck. After being sued for negligent repossession, the financial services company joined its own liability insurer as a third party defendant. The insurer filed a motion to sever which was denied by the trial court. On mandamus, the Beaumont Court of Appeals observed that Texas rules of procedure "prohibit joinder of an insurer as a third-party defendant unless the insurer is directly liable to the plaintiff in the underlying case." Accordingly, the "trial court abused its discretion" by denying the motion to sever and the writ of mandamus was conditionally granted to allow the trial court the opportunity to vacate the order before the court of appeals ordered it to do so.

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