The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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September 11, 2006

NORTHERN DISTRICT OF TEXAS' INTERPRETATION AND APPLICATION OF RULES OF CONSTRUCTION, WHAT CONSTITUTES AN AMBIGUITY, AND APPLICATION OF *GUIDEONE'S* EXTRINSIC EVIDENCE RULE

In *B. Hall Contracting Inc. v. Evanston Insurance Company*, 2006 WL 2527679 (Sept. 1, 2006), a Federal District Court in the Northern District of Texas provided its interpretation and application of various rules of insurance policy construction as well as its application of the recent decision from the Texas Supreme Court in *GuideOne Elite Insurance Company* (2006 WL 1791689) regarding the use of extrinsic evidence in making coverage determinations. In its organized and concise analysis, the court examined the pleadings in two separate state court lawsuits which arose from an incident that occurred in October 2003 at the campus of the University of Texas at Arlington when a structure on the campus was destroyed by a fire, causing property damage to UTA (the plaintiff in the property damage action) and personal injuries to two individuals (the two plaintiffs in the personal injury action). The contractor was sued and sought coverage from its liability insurer.

Evanston sought declaratory relief based upon four policy exclusions: (1) the Roofing Endorsement exclusion; (2) the Breach of Contract Exclusion; (3) exclusions j.(5) and (6); and (4) the exclusion contained in the Combination General Endorsement applicable to bodily injury to any employee of an independent contractor or subcontractor. The Court began its analysis of Evanston's motion for summary judgment by reviewing Texas' rules for insurance policy construction and interpretation. Forewarning of its determination, the Court expressly noted that parol evidence is not admissible to render a contract ambiguous, which, on its face, is capable of being given a definite certain legal meaning – only where a contract is ***first*** determined to be ambiguous may the court consider the parties' intention and admit extraneous evidence to determine the true meaning of the instrument. Next, the Court set forth the parties' shifting burdens. Initially, the insured has the burden to show that there is insurance coverage. Next, the carrier bears the burden to show the applicability of any exclusion upon which it relies. Once the carrier shows an exclusion applies, the burden then shifts back to the insured to show that the claim at issue comes within an exception to the exclusion.

Next, the Court reviewed the Roofing Endorsement which unambiguously provided that "coverage under this policy does not apply to . . . any injury, loss or damage arising out of . . . any operations involving any membrane roofing." By establishing through the sworn statement of the president and owner of the insured that at the time of the fire, the insured, through a subcontractor, was engaged in an operation involving membrane roofing, Evanston had carried its burden to establish the applicability of the roofing exclusion. The insured argued that the term "membrane roofing" was ambiguous because such term has more than one meaning in the roofing industry. The Court noted the type of testimony necessary for the proper interpretation and construction of an insurance policy: "Interestingly, neither declarant [the insured's representatives] professes to have any expertise in the interpretation of insurance policies. Neither has been shown to have the qualifications required by Rule 702 of the Federal Rules of Evidence for the giving of an opinion relative to the meaning of the words used in the policy. For the most part, the declarations present nothing more than [the insured's] legal arguments in the guise of opinions of persons who have no apparent knowledge of the insurance business." Continuing its analysis, the Court noted that it was not persuaded that extrinsic evidence can be used to restrict the meaning of

the term "membrane roofing" as it is used in the endorsement: "If it could be, no insurer could rely on the wording of its insurance policies – an insured would be able to rewrite an insurance policy after the fact simply by saying that he understood when he bought the policy that the words meant something different from, or were more restrictive than, their literal meaning."

Then, the Court noted the parties' were not in disagreement that the Breach of Contract Exclusion precluded coverage for claims stating the insured failed to perform its contract to provide indemnity and the insured failed to perform a contractual commitment to provide liability coverage to the general contractor. Thereafter, the Court declined to address Exclusions j. (5) and (6). The Court, however, found fact issues relative to the potentially applicable exclusion in the Combination General Endorsement.

Next, the Court addressed the applicability of the exclusions on Evanston's obligations to pay defense or indemnity. Insofar as the defense payments, the Court noted a significant difference in the Evanston policy and other CGL policies. Specifically, the Evanston policy imposed on it the duty to defend only those suits seeking damages to which the insurance provided by the policy applied. The Evanston policy provided that it would "have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply." The Court found Evanston had no obligation to provide a defense to the state court lawsuits because the insurance provided by the policy did not apply to the damages sought in those lawsuits. The Court found significant that the defense obligation in the Evanston policy omitted the defense obligation language "even if the allegations of the suit are groundless, false, or fraudulent." This significance was also addressed by the *GuideOne* court, which the *B. Hall Contracting* Court relied upon.

Finally, the Court noted there was no allegation of fact in the personal injury lawsuit indicating the damages sought in that lawsuit were outside the scope of the insurance coverage. Accordingly, the court found unless the personal injury lawsuit came within an exception to the eight corners rule, Evanston would have an obligation to defend that lawsuit. The *B. Hall Contracting* Court again relied upon *GuideOne* and its exception to the eight corners rule. Relying upon *GuideOne*, the Court noted that the Texas Supreme Court had endorsed an exception to the eight corners rule which would permit the use of extrinsic evidence "when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim." Where the extrinsic evidence does not contradict any allegation in the underlying pleading, and instead, merely points out that there simply is no insurance coverage for the claims asserted by those allegations, extrinsic evidence may be introduced.

WHAT CONSTITUTES "OCCUPYING" A VEHICLE IN THE UM/UIM CONTEXT

Goudeau v. United States Fidelity & Guaranty Company, 2006 WL 2506958 (Aug. 31, 2006), addressed what constituted "occupying" a vehicle in the UM/UIM context. The insured was not inside the covered vehicle and was walking on the shoulder of the freeway when struck. USF&G argued that the insured was not "occupying" the covered vehicle at the time of the collision.

The court began its analysis by noting that when an injury has occurred outside of a covered vehicle, Texas courts look at whether there is a causal connection between the incident that caused the injury and the covered vehicle. In assessing the existence of a causal relationship between the vehicle and the injury, Texas courts have considered such indicia as: (1) the physical proximity between the injured person and the vehicle; (2) the amount of time during which the inured person was outside the vehicle; (3) the purpose for his being outside the vehicle; and (4) whether an impact with the covered vehicle caused the injuries. The court then examined a number of previous cases addressing what constitutes "occupying" a vehicle when the insured is not physically inside the vehicle at the time of the loss.

Evidence established that the insured had stopped on the shoulder of the freeway to aid a motorist and was walking between the covered vehicle, the stranded motorist's vehicle, and the retaining wall at the time of the

collision. The insured was pinned between the covered vehicle, the stranded motorist's vehicle, and the retaining wall. The court found that such evidence was sufficient to find that the insured was indeed "occupying" the covered vehicle.

TEXAS SUPREME COURT DENIES REVIEW OF SIGNIFICANT MOLD COVERAGE CASE WHICH IMPACTS PERSONAL PROPERTY AND EXTRA CONTRACTUAL CLAIMS BEYOND *FIESS*

On September 1, 2006, the Texas Supreme Court denied review of the Houston (Fourteenth) Court of Appeals' opinion issued in *Lundstrom v. United Services Automobile Association*, No. 14-04-00357-CV Tex. App.--Houston [14th Dist.] Jan. 26, 2006, review denied.). In *Lundstrom*, the Fourteenth Court considered whether USAA had properly denied coverage for the insured's claim for mold damage to their dwelling and personal property after a loss that resulted from a May 2000 rainstorm. The insureds argued that their claim was covered under the "Accidental Discharge, Leakage or Overflow of Water or Steam" peril and that the policy's mold exclusion did not apply because of the "ensuing loss" clause. As the Court framed it, "The question is whether the alleged mold damage in the present case is covered under the ensuing loss exception to the mold exclusion."

The Houston (Fourteenth) Court of Appeals held that it was not. *Lundstrom* remains significant because the Supreme Court's opinion in *Fiess* did not address paragraph 9 (Accidental Discharge, Leakage or Overflow of Water or Steam) of the HO-B policy because the insureds failed to appeal that issue. *Lundstrom* is important because it helps demonstrate why *Fiess* applies to personal property claims.

Lundstrom also remains important because after holding that the Lundstroms' breach-of-contract claim failed for lack of coverage, the Fourteenth Court of Appeals went on to consider and reject all of the Lundstroms' extra-contractual claims.

Note: Our firm had the privilege of representing USAA in this case before the trial court, the Fourteenth Court of Appeals and the Texas Supreme Court.