



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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December 19, 2011

FIFTH CIRCUIT FINDS “INSURED CONTRACT” DESPITE UNENFORCEABLE INDEMNITY PROVISION

As a matter of first impression for Texas Courts, last Monday the Fifth Circuit concluded that even if an indemnity provision between a contractor and a subcontractor fails to satisfy the express negligence doctrine and is unenforceable, the agreement to assume liability for the tort liability of another still qualifies as an “insured contract” under the policy so as to extend coverage to an additional insured. In *Gilbane Building Company v. Admiral Insurance Company*, 2011 WL 6153370 (5th Cir. (Tex.), December 12, 2011), a subcontractor’s employee was injured on the job and sued the contractor who sought coverage as an additional insured under the subcontractor’s CGL policy with Admiral. The trial court found that the insurer had a duty to defend and indemnify the contractor and this appeal followed.

As a matter of first impression for Texas courts, the Fifth Circuit found that even if an indemnity agreement between a subcontractor and contractor failed to meet the express negligence rule, it may still qualify as an insured contract so as to trigger additional insured status under related insurance policy provisions. The court then observed that the facts alleged in the petition failed to implicate the subcontractor’s or employee’s negligence so as to trigger a duty to defend the additional insured. But the actual facts revealed some negligence on the employee and therefore, triggered the insurer’s duty to indemnify the contractor for the cost of settlement with the injured employee. Accordingly, the trial court’s finding that the insurer had a duty to defend the contractor was reversed and the finding that the insurer had a duty to indemnify the contractor was affirmed.

Editor’s Note: This is one of the very rare cases in which the generally broader duty to defend can be negated while a duty to indemnify is still found.

INSURED WAIVES PRIVACY AND SELF INCRIMINATION OBJECTIONS TO WRITTEN DISCOVERY – DEATH PENALTY SANCTIONS UPHOLD

Last Wednesday, the San Antonio Court of Appeals upheld death penalty sanctions dismissing the insured’s claims against his insurer after finding that the insured waived objections including Fifth Amendment and privacy objections that were untimely asserted. In *Valdez v. Progressive County Mutual Insurance Company*, 2011 WL 6288702 (Tex.App. – San Antonio, December 14, 2011), Progressive denied the insured’s claim for the theft of his truck based on evidence showing that the vehicle was driven into Mexico by his associates and was being held as collateral for a drug trafficking transaction. In the bad faith lawsuit that followed, Progressive sent written discovery seeking the insured’s tax returns and Valdez neither complied nor objected. After several motions to compel, orders to produce, and failures to comply, the court granted Progressive’s motion for death penalty sanctions dismissing Valdez’s claims.

On appeal, the court observed that even though Valdez later asserted objections based on privacy and invoked his constitutional rights against self-incrimination under the Fifth Amendment, his failure to do so timely waived those objections. And having failed to produce the documents as ordered by the trial court, the San Antonio Court of Appeals held that a death penalty sanction dismissing his claims was not an abuse of the court's discretion, and the trial court's judgment was affirmed.

INSURER PREJUDICED AS A MATTER OF LAW BY INSURED'S VIOLATION OF CONSENT TO SETTLEMENT PROVISION - COURT UPHOLDS SUMMARY JUDGMENT

Last Tuesday, the Amarillo Court of Appeals upheld summary judgment in favor of the insurer after finding that the insured's settlement of negligent construction claims before providing notice to the insurer prejudiced the insurer's right to settle or defend under a commercial general liability policy. In *Allen Butler Construction Company v. American Economy Insurance Company*, 2011 WL 6183575 (Tex.App. – Amarillo, December 13, 2011), a subcontractor sought coverage as an additional insured for damages it had to pay to the City of Lubbock to replace defective work caused by the insured subcontractor. The trial court granted summary judgment to the insurer and an appeal followed.

The court of appeals observed that the policy provided the insurer with the right to settle or defend any "claim or 'suit'" and the additional insured settled the claim with the city before notifying the insurer. And, the policy contained a consent-to-settlement provision providing that no insured would settle or assume any obligation without the insurer's written consent. Here, the additional insured presented no evidence that the insurer's consent was requested prior to settlement and the court found that their failure request it, prejudiced the insurer as a matter of law. Accordingly, summary judgment in favor of the insurer was affirmed.

NEWSBRIEF TO RESUME JANUARY 9, 2012 MDJ&W WISHES ALL A VERY MERRY CHRISTMAS AND A HAPPY NEW YEAR!

Our offices will be closed Friday, December 23rd, through Monday December 26th for the Christmas Holiday, as well as Monday, January 2, 2012 for the New Year's Holiday. Our Texas Insurance Law Newsbrief research and writing staff will also be taking those days off to spend time with family and friends. The Newsbrief will resume publication January 9, 2012 and will continue weekly as we have for the past 12 years. Until then, we want to offer our special thanks to our clients and friends in the insurance industry with whom we have shared many triumphs this past year. And, we look forward to many more successes in 2012. Until then, we wish all of our readers a very Merry Christmas and a Happy and Prosperous New Year!

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