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CARE CUSTODY & CONTROL EXCLUSION PRECLUDES COVERAGE

Last Friday, in *Ohio Casualty Insurance Company v. Lloyd Technologies Inc.*, No. A-09-CA-633-LY (W.D.Tex. September 30, 2011), a Federal District Court Judge in the Austin Division of the Western District of Texas concluded that commercial general liability exclusion j(4), excluding coverage for property damage to "personal property in the care custody or control of the insured," precluded coverage for damage to a sensitive photo equipment dropped by the insured while moving it with a forklift. Lloyd Technologies was hired to move a 15,000 pound piece of delicate photo equipment using a forklift and dropped the equipment during the move which resulted in alleged damages of over $2.6 million to the equipment. The insured was sued in an underlying action and their insurer brought this declaratory judgment lawsuit to determine coverage for the loss.

Applying Texas law, the court noted that "possessory" control of the damaged property is the proper focus of the inquiry under exclusion j(4). And, to find that the insured had care, custody or control, the damaged property must be the object of the work, or "totally and physically manipulated by the insured or both." Even though the forklift used by Lloyd Technologies was owned by the customer and their representatives and supervisors were present during the move, Lloyd's employees alone physically moved the equipment and operated the forklift that moved and lowered the equipment. Further, the court found that the equipment being moved was not merely incidental to Lloyd's work, but it was in fact, Lloyd's work – it was hired to move it and it was under their immediate supervision when damaged. Accordingly, the court found that the "care custody or control exclusion" applied to preclude coverage.

The court also examined the "your work" exclusion and agreed with the insured that the exclusion contemplates "the use of warranties and representations and the use of materials, parts, or equipment." The court observed that Lloyd was not repairing of constructing the equipment, but was moving it and concluded that the "your work" exclusion did not apply. Lastly, the court considered arguments that the customer, Samsung, was an additional insured under the policy. The court found that because the service agreement with the customer, Samsung, expired before the policy period, and the additional insured endorsement required that the agreement be in effect during the policy, Samsung was not entitled to additional insured status.

WORKERS COMPENSATION EXCLUSIVE REMEDY PROVISION ALSO APPLIES TO CONTRACT BASED CLAIMS

Last Monday, the Amarillo Court of Appeals, as a matter of first impression for Texas courts, considered whether the exclusive remedy provision of Texas Workers Compensation statute also served to preclude contract based claims against the employer arising under uninsured and underinsured motorist coverage, and concluded that it does. In *Smith v. City of Lubbock and St. Paul Fire and Marine Insurance*

Company, 2011 WL 4478067 (Tex. App. – Amarillo, September 26, 2011), a city employee was injured when occupying a city owned vehicle that was struck by another vehicle owned and operated by a underinsured drunk driver. The city subscribed to workers compensation and also purchased uninsured / underinsured motorist (UM/UIM) coverage. But the city had a $500,000 self-insured retention or deductible under the UM/UIM coverage. The employee received workers' compensation benefits and then made a claim under the UM/UIM policy with St. Paul. The claim was denied and this lawsuit followed. Summary judgment was rendered in favor of the City and St. Paul, and this appeal followed.

On appeal, St. Paul conceded that it had coverage under the UM/UIM policy to the extent that required reversal. The court thus reversed and remanded that issue to the trial court. The court then turned its attention to the exclusive remedy provision as applied to the city and the UM/UIM claim. Plaintiff argued that the workers' compensation exclusive remedy provision applied only to tort claims and not those arising under contract with a third party insurer. After reviewing case law from other states applying the exclusive remedy provision, the court concluded:

> Simply put, if an employee suffers work related injuries and seeks their redress from an employer that subscribes to a workers compensation program, there is only one way to obtain them. It is through that compensation program. It does not matter if the employer provides those benefits from its own pocket or via a contract with a third party insurer;…" To rule otherwise would provide the employee a backdoor way of recovering more from his employer than the exclusive workers' compensation remedy …." Especially when a portion of that recovery "would come out of that employer's pocket."

The court limited its decision to the facts presented and offered several fact patterns to which its finding could be distinguished, but then affirmed summary judgment denying further recovery against the City.
Editor's Note: We will continue to monitor this decision and report on further significant developments as they arise.