Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

MARCH 30, 2015

FEDERAL DISTRICT COURT APPLIES SHIFTING FACTUAL INFERENCE TO IMPOSE DUTY TO DEFEND ON TWO LIABILITY CARRIERS

Last Tuesday, the Federal District Court for the Eastern District of Texas used fascinating logic to impose the duty to defend on two liability carriers with consecutive policy periods for a single occurrence. In *Corinth Investors Holdings, LLC v. Evanston Ins. Co.*, No. 4:13-CV-682, 2015 WL 1321616 (E.D. Tex. Mar. 24, 2015), the insured, a medical group, had professional liability insurance policies issued by two carriers for two consecutive policy periods. The 2012 calendar year was insured by Evanston (a claims made and reported policy), and the 2013 calendar year was insured by Homeland.

In December of 2012, during Evanston's policy period, the insured was sued. The suit was served on the insured in January of 2013, during Homeland's policy period. Both carriers refused to defend the insured, claiming the suit was outside their respective policy periods. Homeland argued the claim was not first made during its policy period, while Evanston argued the insured did not first receive notice of the claim during its policy period. Significantly, the lawsuit against the insured alleged that the statutory pre-suit notice required for all medical malpractice suits had been provided to the insured, but did not say ***when*** it was delivered.

In a prior opinion, the district court had already ruled that Homeland in fact had a duty to defend the insured because the ambiguity in the pre-suit notice statement allowed a reasonable inference that the insured might have received the pre-suit notice on January 1, 2013, thus putting first notice of the claim in Homeland's period and within the scope of Homeland's coverage.

Here, the district court separately examined the question of whether Evanston had a duty to defend. Evanston argued that it could not possibly have a duty to defend because the court had already ruled that the insured's first notice of the claim was during Homeland's period. However, the court did not agree it was that simple, and pointed out that it had not made a factual finding of the date of first notice, but merely observed that a reasonable inference could (and legally, ***must***) be made in favor of the insured that the first notice ***could have been*** during Homeland's policy period. Now, the court opined that it must examine the question of Evanston's duty to defend in a vacuum, without regard to any prior findings as to Homeland, employing all the same legal rules of construction.

Therefore, the court re-examined the pre-suit notice statement in the underlying petition, and once again construing all ambiguities and making all reasonable inferences in favor of the insured, found that an equally reasonable inference could (and therefore, ***must***) be made in favor of the insured that the first notice also ***could have been*** during Evanston's policy period rather than Homeland's. Therefore, the court held that Evanston also had a duty to defend the insured. From a public policy point of view, this outcome seems poetic justice for two carriers who both denied their insured a defense for a claim that clearly had to be in one or the other of the two policy periods.

Significantly, this case was only about the duty to defend, and thus evidentiary questions concerning the actual date the insured first received notice of the claim were not discussed because the analysis was limited by the eight-corners rule, under which only the allegations (whether true or not) in the petition and the terms of the policy are considered. Although the court's shifting inference in favor of the insured required both carriers to defend, it is important to bear in mind that the same probably cannot be true for indemnity. Ultimately, some evidence of the actual date the insured first received notice would presumably be developed and would place the claim squarely in one policy period or the other.

On a side note, the court also observed in a footnote that the return of service establishing the date the insured was served with the underlying suit, while not physically part of an original petition, is an intrinsic extension of the original petition and thus one of the "pleadings" that a court may consider under the eight-corners rule.

MDJW First Friday Webinar - The Affordable Care Act – A Tool to Reduce Future Medical Claims?

MARK DYER - PRESENTER
APRIL 10, 2015

Because April 3rd is an MDJW holiday, the April presentation will be on April 10, 2015 at noon **Central** time. Mark Dyer, managing partner of MDJW's Dallas office will present "**The Affordable Care Act – A Tool to Reduce Future Medical Claims?**"

This course provides an overview of how the Affordable Care Act may be applied to claims involving future medical expenses. It will address the key provisions of the Affordable Care Act, will discuss the collateral source rule and how the Affordable Care Act may change the applicability of the collateral source rule to claims involving future medical expenses. It will also address how the mandates, requirements and changes of the legislation directly impact settlements, damages, negotiation and trial strategies in personal injury litigation.

Mark Dyer is a board certified trial attorney who has significant experience in representing clients state wide in tort and commercial litigation disputes. His areas of expertise include products liability and personal injury defense, commercial "business tort" defense and construction defect litigation. Mark has been named to the Texas *Super Lawyers* list by *Super Lawyers*®, a Thomson Reuters business, as featured in *Texas Monthly* and *Texas Super Lawyers* magazines, every year from 2003 to 2012 and is AV rated by Martindale-Hubbell. Mark's community involvement gives him unique insight and experience for handling his client's litigation matters. Mark served on the City of Irving's Planning and Zoning Commission from 2002 to 2009. This experience has given Mark a great depth of knowledge in zoning and property development issues. Mark serves on the Board of Trustees for both the Baylor Medical Center of Irving and the Irving Hospital Authority and currently serves as Chairman of both boards since 2008. Recently, Mark served a year on the Baylor Health Care Systems Operating Board. These experiences have been of great benefit to Mark's clients who are involved in healthcare and personal injury litigation matters. See http://www.mdjwlaw.com/professionals-Mark-Dyer.html for more information on Mark Dyer.

We have applied to the Texas Department of Insurance for one hour of Texas CE credit and to the Texas State Bar for one hour of CLE credit. We do not apply for CE or CLE in any other state. However, we can provide a Certificate of Attendance for you to use in applying for credit with other agencies. Please note that we do not guarantee that any other agency will accept the Certificate of Attendance.

Register for this webinar at: https://attendee.gototraining.com/r/4927260514203503618. You will have the option of supplying your Texas Department of Insurance license number and/or Texas State Bar number during the registration process if you will be requesting CE or CLE credit. If you are not requesting credit, you do not need to complete those fields. After registering you will receive a confirmation email containing information about joining the training. We have a limit of 200 participants for the webinar. **Registration will close 30 minutes before the presentation.**

If you have any questions, please send an e-mail to ce@mdjwlaw.com or call Cynthia Glenney at 713-632-1737.

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http://support.citrixonline.com/en_US/gotomeeting/all_files/GTM140010.