The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TEXAS SUPREME COURT FINDS AN EMPLOYEE'S TRAVEL FROM ONE WORKPLACE TO ANOTHER ON THE WAY HOME MAY BE WITHIN THE COURSE AND SCOPE OF EMPLOYMENT

Last Friday, the Texas Supreme Court examined the history of the Texas Workers' Compensation Act and held the "dual purpose" rule – generally providing that an employee traveling for both business and personal reasons is in the course and scope of employment only if the business purpose is both a necessary and sufficient cause for the travel - does not apply to "coming and going" travel to and from a workplace. In *Leordeanu v. Am. Protection Ins. Co.*, -- S.W.3d --, 2010 WL 4910905 (Tex. December 3, 2010), Liana Leordeanu, a pharmaceutical sales representative officing out of her apartment, drove her company car to a restaurant for dinner with clients. Her route home took her past a company-provided self-storage unit, adjacent to her apartment complex, where she intended to stop on the way home and empty her car of business supplies. She was injured in an accident on the highway before she reached the storage unit. American Protection Insurance Company ("APIC") denied her claim and the Texas Department of Insurance Workers' Compensation Commission Division upheld that decision, concluding Leordeanu was not in the course and scope of employment at the time of her accident. She appealed and obtained a favorable jury verdict and judgment. A divided court of appeals reversed and rendered judgment for APIC.

In reversing the judgment of the court of appeals, the Texas Supreme Court interpreted the Act's definition of "course and scope of employment," which has two general exclusions, each with exceptions. The first exclusion, which is the codification of the "coming and going" rule, addresses travel to and from the place of employment. An exception to this exclusion applies when the transportation is furnished by the employer. The second exclusion is the codification of the "dual purpose" rule; *i.e.* – travel in furtherance of both business and personal affairs. But this exclusion does not apply if the travel would not have been made had there been no business matters furthered by the travel. In other words, work-required travel is not excluded merely because the travel also furthers the employee's personal interests that would not, alone, have caused the employee to make the trip. The court of appeals concluded the latter "dual purpose" rule applied and that the exception to the exclusion for travel that would not have otherwise been made did not apply because Leordeanu would have nevertheless gone home.

The Texas Supreme Court held that only the "coming and going" exclusion for travel to and from the place of employment applies when travel is to and from a workplace and, the exclusion for "dual purposes" only applies to other dual purpose travel. Because Leordeanu was driving a car provided by her employer at the time of her accident, an exception to the "coming and going" rule applied. Accordingly, the Court reversed the judgment of the court of appeals and affirmed the judgment of the trial court.

TEXAS SUPREME COURT REVERSES JUDGMENT IN FAVOR OF INSURER THAT FOUND CHURCH LACKED CAPACITY TO SUE IN ITS ASSUMED NAME

Also last Friday, the Texas Supreme Court reversed a judgment dismissing claims against an insurer brought by an unincorporated religious association, finding there was no evidence the church lacked capacity to sue. In *Christi Bay Temple v. GuideOne Specialty Mut. Ins. Co.*, -- S.W.3d --, 2010 WL 4913711 (Tex. December 3, 2010), Christi Bay Temple brought a lawsuit against its insurer, GuideOne, following the adjustment of a water damage claim made by the church in 2001. At the trial court level, GuideOne filed a verified plea in abatement challenging the church's capacity to sue. In this plea, GuideOne averred that the church was, in fact, a non-profit corporation that had forfeited its charter years earlier and thus lacked capacity to sue. GuideOne presented proof in the form of articles of incorporation that created the non-profit corporation in 1980 with a similar name to and same religious affiliation as the church. The trial court granted the plea in abatement and several months later dismissed the lawsuit for want of prosecution after the church failed to cure the problem and the court of appeals subsequently affirmed.

Before the Texas Supreme Court, the church argued the lawsuit belonged to it rather than to a similarly-named, nonprofit corporation. The church argued that the corporation had no connection to the insured property and that it brought the lawsuit as an unincorporated religious association because that is how it has always operated. The Court noted that an unincorporated association organized for nonbusiness purposes generally has the legal capacity to sue or be sued in its assumed name and that as the party challenging capacity, GuideOne, bore the burden of proof. The Court found no evidence that the church transferred any property or assets to the non-profit or conducted any activity or ministry as a non-profit corporation. The record reflected only that the church and corporation had similar names. Finding no evidence that the church lacked capacity, the court reversed the court of appeals' judgment and remanded the case to the trial court.

FIFTH CIRCUIT UTILIZES EXTRINSIC EVIDENCE TO DETERMINE LIABILITY INSURER HAS NO DUTY TO DEFEND OR INDEMNIFY

Recently, the Fifth Circuit determined a liability insurer did not have a duty to defend or indemnify its insured after considering undisputed extrinsic evidence, including the testimony of a subcontractor, to conclude the injured claimant was an "employee" under the broad definition in the policy exclusion. In *Atlantic Cas. Ins. Co. v. Gonzalez*, 2010 WL 4813666 (5th Cir. November 24, 2010), Horatio Gonzalez appealed a summary judgment entered against him in a declaratory judgment action brought by Atlantic Casualty Insurance Company regarding coverage for a lawsuit filed by Gonzalez against PV Roofing Corp. for injuries he sustained while on a residential roofing job site. In his original petition, Gonzalez alleged he was injured while working as an employee of PV Roofing. Subsequent petitions contained no reference to the injury occurring while working and specifically alleged Gonzalez was not an employee of PV Roofing or of an independent contractor or subcontractor of PV Roofing.

While the underlying pleadings alleged Gonzalez was not an employee or contractor for PV Roofing, the court found those allegations to be conclusory. And because Gonzalez alleged insufficient facts to determine whether the exclusions were applicable, the court stated it was appropriate to consider extrinsic evidence to determine whether Atlantic had a duty to defend PV Roofing. The uncontroverted evidence showed that PV Roofing engaged a personal friend of Gonzalez, Bernardo Mejia, as an independent contractor to complete a residential roofing job for PV Roofing. Although Gonzalez was not paid for his services, Gonzalez accompanied Mejia on the job site and he was electrocuted while moving a ladder at

Mejia's request. Under the relevant policy, a person is an "employee" if he is "volunteering for the purpose of providing services to or on or behalf of any insured." The court found that when Gonzalez moved the ladder to assist Mejia, Gonzalez was a volunteer performing a service on behalf of PV Roofing and was thus an "employee" under the exclusion in the policy. Because the policy provided no possibility of coverage to PV Roofing for Gonzalez's injury, the court held Atlantic had no duty to defend or indemnify.