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NEW TEXAS COVERAGE CASE ALERT – SEPTEMBER 3, 2010

Defense Cost Reimbursement Claims Between Co- Primary Carriers— Texas Court Of Appeals Disagrees With Fifth Circuit; Says Not Allowed

Just a few months ago, we alerted our clients to the decision of the federal Fifth Circuit Court of Appeals in *Trinity Universal Ins. Co. v. Employers Mutual Casualty Co*., 592 F.3d 687 (5th Cir. 2010) wherein the federal appellate court concluded that the 2007 holding by the Texas Supreme Court in *Liberty v. Midcontinent*, barring one liability carrier who has paid a settlement on behalf of an insured from recovering, by subrogation or otherwise, a pro rata portion of the settlement from another recalcitrant co-primary insurer of the same mutual insured under the "other insurance" clause, did not apply to bar recovery of defense costs and only applied to indemnity. While that decision did not solve the insurer v. insurer stalemate (where one insurer refuses to contribute, erroneously believing that it has no coverage, thereby forcing the other insurer(s) to either fund everything with little or no recourse or lose the settlement opportunity), it did at least preserve a reimbursement claim for defense costs. The decision was generally hailed by both policyholders and insurers as at least a partial correction made to otherwise really bad law.

Well, we apparently have not heard the end of that story. **On August 27, 2010, the Austin Court of Appeals in *Truck Ins. Co. v. Midcontinent Cas. Co*., ___S.W.3d ___, 2010 WL 3370517 (Tex. App.—Austin 2010) concluded that the Fifth Circuit got its prediction of Texas law wrong in *Trinity v. Employers* and that, in fact, the Texas Supreme Court's recovery bar embodied in *Liberty v. Midcontinent'* applies not only to settlements/indemnity payments, but also to defense costs, as well.** The Court flatly states that it disagrees with the Fifth Circuit's analysis of *Liberty v. Midcontinent* scope in *Trinity v. Employers.* According to the Court, the reasoning of the Texas Supreme Court in *Liberty v. Midcontinent* as applied to settlement reimbursement claims between insurers applies equally to and cannot be squared with a different treatment of defense cost reimbursement claims.

Thus, to the extent that we thought that defense cost reimbursement claims in the insurer v. insurer context were not going to be affected by *Liberty v. Midcontinent* in light of *Trinity v. Employers*, there is now **renewed uncertainty**. It may be that the Austin Court of Appeals decided to disagree with the Fifth Circuit so as to make it more likely that the Texas Supreme Court will now be forced to decide the issue in a future case. But until the Texas Supreme Court does, if it does, carriers in inter-insurer fights over defense cost reimbursement will now each have a case that they can cite in support of their competing positions that recovery is allowed/recovery is not allowed.

If you would like a copy of the decision or to discuss these issues further or as applied to a specific actual claim, do not hesitate to contact Schubert & Evans, P.C. at 214-744-4400.