



NEW TEXAS COVERAGE CASE ALERT – November 29, 2010

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Where Plaintiff's Amended Pleadings Against Insured Conspicuously Drop All Previous Allegations Regarding Plaintiff's Status as Either Contractor or Employee of Insured, Extrinsic Evidence Properly Considered to Establish that "Employee Injury" Exclusion Applies; CGL Carrier has No Duty to Defend Insured

As anyone handling more than a few Texas claims knows, Texas courts in recent years have struggled to try and find some consistent rule on whether and when extrinsic evidence outside of the underlying Plaintiff's allegations against the insured can be considered in determining whether the liability insurer has a duty to defend. Notwithstanding multiple cases in the last several years decided by the Texas Supreme Court, beginning with *Guide One*, where the court could have provided a clear answer and resolved the conflict in the lower state court and federal court decisions, the Texas high court has declined to do so. The high court has made clear instead that Texas follows a fairly strict "8 corners" approach such that resort to extrinsic evidence is prohibited but has at least hinted that it might recognize a very narrow exception, recognized by some lower courts and federal courts, if the extrinsic evidence goes solely to a discrete coverage-only fact and does not contradict any of the Plaintiff's liability suit allegations. As a result, in deciding duty to defend issues, Texas coverage practitioners, policyholders and insurers have been left to argue for or against such an exception in coverage litigation, depending on whether the extrinsic evidence helps or hurts them.

In *Atlantic Casualty Ins. Co. v. Gonzalez*, Cause No. 10-20296 (5th Cir. Nov. 24, 2010), the United States Court of Appeals for the Fifth Circuit, following two of its own prior decisions where the court applied the narrow exception that it believes exists, held that the injured Plaintiff could not escape the CGL policy's "employee injury" exclusion by filing an amended pleading in the underlying injury case which deleted all previously included factual allegations about the Plaintiff's employee status and expressly alleging instead that Plaintiff was not an employee, contractor or employee of a contractor at the time of his injury. In so holding, the court pointed to extrinsic evidence from the insured's deposition establishing that Plaintiff was working for the insured at least as a "volunteer" worker" at the time of his injury so as to come within the scope of the very broadly worded exclusion of the policy which defined "employee" as including "volunteer" workers whether paid, contracted or formally hired by the insured or not. According to the insured's deposition, Plaintiff was electrocuted while moving a metal ladder on a job site at the insured's request when the ladder came in contact with overhead power lines during a home roof repair job that the insured had been hired to do. The court held that by deleting all allegations about Plaintiff's relationship with the insured in the amended pleadings, the pleadings were then insufficient factually to determine coverage such that the exception to the "8 corners" rule, otherwise strictly applied by Texas courts, was applicable. As a result, extrinsic evidence was properly considered and the Plaintiff's claims fell squarely within the broadly worded "employee" definition that included "volunteer" workers of the insured.

PRACTICAL POINTERS: This case illustrates that until the Texas Supreme Court resolves the issue in a definitive opinion, coverage counsel for both insureds and insurers should always



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consider the possibility that they may be able to rely on extrinsic evidence beyond the allegations, even as to duty to defend, if such evidence arguably does not contradict any actual allegation made by the Plaintiff in the underlying suit pleadings. This is especially true in cases like *Gonzalez* where it is obvious that pleadings have been specifically manipulated to try and plead around an otherwise obvious and indisputable coverage problem. What even *Gonzalez* does not address, however, is what happens if the coverage-motivated pleading goes beyond just deleting coverage-negating facts and affirmatively alleges false facts that are only relevant to the coverage issue. For example, what if Gonzalez' amended pleadings affirmatively alleged that he was "not a volunteer" worker in addition to the other allegations that he did make about not being an employee or contractor? In that scenario, the extrinsic evidence would have arguably contradicted the allegations such that it might have been inadmissible on the duty to defend.

If you wish to discuss any insurance-related issues or needs, please feel free to contact Schubert & Evans, P.C. at 214.744.4400 or visit our website at www.schubertevans.com.