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NEW TEXAS COVERAGE CASE ALERT – SEPTEMBER 22, 2010

Fifth Circuit predicts that Texas Supreme Court would hold that employee's claim against nonsubscriber employer is not an "obligation of the insured under . . . any workers' compensation law;" standard exclusion not applicable

The United States Court of Appeals for the 5th Circuit has decided an issue that the Texas Supreme Court has never resolved: Does an injured employee's suit against his Texas nonsubscriber employer fall within the fairly standard exclusion contained in both employer liability and CGL policies stating that coverage does not apply to any "obligation of the Insured under… any workers' compensation, disability benefits, or unemployment compensation law, or similar law." Noting that the Texas Supreme Court has not ever squarely addressed the issue, the court in *American Int'l. Spec. Lines Ins. Co. v. Rentech Steel,* 2010 WL 3633054 (Sept. 21, 2010, 5th Cir.) held that even though injury actions against nonsubscribers are "governed by" Section 406.033 of the Texas Labor Code in that the statute spells out the burden of proof and deprives the nonsubscriber of certain common law defenses, that does not mean that the claim is an "obligation" under the workers' compensation laws.

The Court held instead that while the workers' compensation statutes govern the suit against a nonsubscriber in those limited respects, the injured employee's claim against his employer is one that is under common law that existed before enactment of the workers' compensation act in 1913. The Court held that to the extent that the workers' compensation act affects the defenses that the employer can raise, it is no different than statutes of limitation restricting how long someone can wait to sue.

In so holding, the Court rejected certain intermediate Texas Courts of Appeals' holdings to the contrary. It also concluded that Federal decisions addressing the same issue in the context of whether suits against nonsubscribers can be removed to Federal court by the defendant (or instead fall within the scope of the statute barring removal of workers' comp cases) did not control the result when the issue is coverage under a policy.

The policy at issue in this case did not contain any "employee injury" exclusion as it was an umbrella policy that afforded employer's liability coverage. This decision will not affect coverage under a policy, such as a standard CGL policy, that separately contains employee injury exclusion, as that exclusion will independently operate to bar coverage for nonsubscriber suits. But, as to other types of policies that do not contain an employee injury exclusion and only contain the "workers' comp obligation" exclusion, this decision will have impact. Of course, it remains to be seen whether the Texas Supreme Court will agree or disagree with the 5th Circuit's prediction of how it will decide the issue.

If you would like a copy of the opinion or 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.