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NEW TEXAS COVERAGE CASE ALERT – May 31, 2011

Houston Court of Appeals 2-1 Decision: Extrinsic Evidence of True Facts, Even Contrary to the Allegation Merits, Properly Considered to Determine if Party Seeking Defense is an Insured on the Policy; "Complete Stranger" to the Policy Not Entitled to Benefit from False Allegations Under "8 Corners" Rule

The "8 Corners" a/k/a "Complaint Allegation" Rule, applied by Texas courts for decades, requires that the liability insurer determine whether it is obligated to defend its insured based on the facts alleged regardless of whether those facts are true or not. While case law has raised the possibility that there may be some limited exceptions where evidence outside of the allegations ("extrinsic evidence") can be considered on fundamental coverage issues, Texas courts have consistently rejected consideration of extrinsic evidence that overlaps the alleged liability facts or that contradicts any of the Plaintiff's allegations against the insured. But should false or mistaken allegations by the Plaintiff control on the threshold question of whether someone qualifies as an insured on the policy in the first instance or should the courts, instead, only apply the "Complaint Allegation" Rule to claims made against someone that is, in fact, an actual insured on the policy?

With one Justice dissenting, the majority in *Weingarten Realty Management Co. v. Liberty Mut. Ins. Co*., No. 14-09-00860-CV (Tex. App.—Houston [14th Dist.], May 26, 2011), held that on the threshold issue of whether someone is an additional insured on someone else's insurance policy, the actual, known and undisputed facts showing that they are not control over the Plaintiff's allegations *even if such extrinsic evidence contravenes the merits of the Plaintiff's suit against them*. The Plaintiff mistakenly sued one Weingarten entity alleging that they were the owner/landlord of property where an assault had occurred on the tenant's premises, when, in fact, a different Weingarten entity was the actual owner/landlord on the property. The tenant's Liberty policy extended blanket additional insured status to the tenant's landlords, but Liberty denied defense on the grounds that no matter what the Plaintiff alleged, the Weingarten entity that had been sued was not the actual landlord and thus was not an A/I on the policy. After the mistakenly sued entity and its own carrier prevailed at trial, they brought suit against Liberty for their defense costs.

With one justice dissenting on the ground that allowing extrinsic evidence to contradict the Plaintiff's allegations was improper under prior Texas Supreme Court precedents, the majority held that the purpose of the "8 Corners" Rule is to force insurers to defend suits against their insureds even if the suits have no merit and the rule exists only for the benefit of one who is, in fact, an insured. According to the majority, "A stranger to the policy neither needs nor should expect this benefit." Accordingly, the majority crafted another exception to the "8 Corners" Rule: "The exception applies only when an insurer establishes by extrinsic evidence that a party seeking a defense is a stranger to the policy and could not be entitled to a defense under any set of facts. " Although the majority acknowledged that extrinsic evidence that the entity sued was not, in fact, the landlord, did also negate, and thus contradict, the merits of the underlying Plaintiff's claims against it, the court held that within the narrow confines of this set of facts, this additional exception did not violate the spirit at least of prior cases such as *Guide One.* According to the majority, this was so because Liberty did not seek to contradict the

merits of the claims in order to prove exclusion or other coverage defense as to an insured, but instead simply to show that the party seeking defense was a complete stranger. The majority made clear that the usual prohibitions against extrinsic evidence when it overlaps the merits or contradicts the Plaintiff's allegations will continue to apply as between the insurer and actual insureds and those that clearly have some connection with the policy and that its newly recognized exception is confined to the "total stranger" scenario.

PRACTICE POINTERS: This decision is a prime candidate for a further appeal to the Texas Supreme Court. In fact, the issue of whether the "Complaint Allegation" Rule even applied at all in determining whether someone qualified as an additional insured was raised at the Texas Supreme Court in *D.R. Horton v. Markel,* but the court in that case ultimately refused to address the issue because it concluded that the point had not been adequately preserved in the courts below. What few courts ever mention, but the Houston Court in this case apparently does get, is that the "Complaint Allegation" Rule grew out of the old standard liability insurance policy language stating that the insurer would defend suits seeking covered damages "even if the allegations are groundless, false or fraudulent." Thus, the rule grew out of the express terms of insurance policy, *i.e.*, the contract between the parties, at least originally. If one is not a party to the contract, why should they get the benefit of the rule? Conversely, if they are in fact an additional insured under the actual known facts, should false allegations by the Plaintiff be able to defeat that status? Is it a two-way street?

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