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NEW TEXAS COVERAGE CASE ALERT – February 25, 2011

New Decision From Texas Supreme Court, Applying *DR Horton v. Markel*, Holds That Insurer May Have a Duty to Indemnify Even if There Was No Duty to Defend

In its 2009 landmark opinion in *DR Horton v. Markel*, the Texas Supreme Court, for the first time, held expressly that since the duty to defend is governed by the "complaint allegation" (a/k/a "8 corners") rule but the duty to indemnify turns on the actual, not just the pleaded, facts, there can be situations where an insurer has no duty to defend under the allegations but may still have coverage for any judgment or settlement. The duty to defend had always been stated to be broader than the duty to indemnify such that if there was no duty to defend, a court in a declaratory judgment action could also go ahead and rule that there was no duty to indemnify either, even if the underlying suit against the insured was still pending. *DR Horton v. Markel* established that such is not always the case.

In its opinion delivered on February 25, 2011 in *Burlington Northern v. Nat. Union Fire Ins. Co*., No. 10-0064 (Tex. 2011), the Texas Supreme Court has now, for the first time, applied *DR Horton v. Markel* in a new case to hold that the trial court and court of appeals erred in granting summary judgment to an insurer on the duty to indemnify where evidence and facts beyond the suit allegations raised a fact issue on whether the insurer might have coverage for the insured's liability even though it had no duty to defend.

The railroad had contracted with a contractor, Mobley, to keep its right-of-way clear of vegetation under a contract that ran from 1994 to 1996. The railroad was an additional insured on Mobley's CGL policy as required by the contract. On August 25, 1995, a train collided with a car at a crossing resulting in two deaths and one serious injury. The death/injury suit pleadings alleged that Mobley, as the railroad's contractor, had failed to control the vegetation at the crossing thereby obstructing the vehicle driver's view. The insurer denied both defense and indemnity to the railroad based on a "completed operations exclusion" endorsement on the policy that, in usual fashion, excluded coverage for bodily injury that occurred away from Mobley's premises and arising out of Mobley's completed work. The railroad filed a declaratory judgment action and the trial court granted the insurer's motion for summary judgment finding no duty to defend and no duty to indemnify. While the declaratory action was pending, the railroad settled the injury and death claims. The court of appeals affirmed.

Assuming, without deciding, that the lower courts were correct in finding no duty to defend based on the allegations and the exclusion, the Texas Supreme Court reversed on the duty to indemnify. As it had in *DR Horton v. Markel*, the court pointed out that while there are some situations where a finding of no duty to defend also means no duty to indemnify, those are situations where the allegations of the suit leave no room for any set of facts to be proven that would bring the claim within coverage. The court cited, as an example, its 1997 decision in *Farmers v. Griffin* where the court held that as a matter of law a drive-by shooting scenario could never be an auto accident. By contrast, here, the "completed operations" exclusion depended on whether Mobley's work was complete or not and there was evidence (*i.e.*, that Mobley's contract ran to 1996) raising a fact issue on that.

PRACTICE POINTERS: Some coverage defenses are broad, all encompassing "kill shots" that will apply no matter what factual details are proven in the underlying suit (*i.e.*, the CGL's auto exclusion in a car

wreck case, the fact that the defendant sued is not an insured on the policy, etc.). In such cases, the insurer can simply deny defense and coverage and/or get a relatively quick and favorable coverage ruling on both. Other coverage defenses, however, may turn on certain facts that may be missing from or even different than those pleaded (*i.e.*, was there P/D within the policy period, was work complete or not, were subs used, etc.). In those situations, even if the allegations, because of what they lack or affirmatively allege, would allow the insurer to deny defense under strict "8 corners" analysis, insurers should nevertheless consider the pros and cons of denying defense v. extending a gratuitous defense under reservation, or hiring monitoring counsel. This is especially true if the actual facts to be discovered or proven, but which may be missing from or different from the allegations, could trigger coverage.

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.