

The Defense Chronicles

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Highlights

*New Developments in
Insurance Law..... 2*

Internet Updates

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for the most recent
significant changes in
the law that affect
you.

"Late Notice" Defense: Is Prejudice Required?

*Travelers Indemnity Co. of Connecticut v. Presbyterian Healthcare Resources,
(N.D. Dallas, Feb. 25, 2004).*

Presbyterian Healthcare made a claim for coverage under its general liability policy with Travelers after a physician sued the hospital and peer review committee for defamation. Travelers denied a defense and indemnity under the late notice provision of the insurance policy. Travelers filed a declaratory judgment action seeking a ruling that it had no duty to defend or indemnify because the company was not notified of the claim for 18 months. The federal district court in Dallas ruled in favor of the hospital, noting that the insurance company must show that it has been prejudiced by the insured's failure to provide timely notice of the claim before denying a defense and indemnity.

The late notice defense has been a source of controversy for 30 years. In 1973, the Texas State Board of Insurance issued *Order 23080*, requiring prejudice in late notice defense cases involving bodily injury or property damage. However, *Order No. 23080* did not specify claims involving advertising injuries. In fact, a 1998 unpublished, per curiam opinion out of the Fifth Circuit, *Gemmy Industries Corp. v. Alliance General Insurance Co.*, upheld a district court finding which concluded that the failure to give timely notice precluded coverage of the alleged advertising injury claim, without regard to whether the insurance company was prejudiced by untimely notice. The Fifth Circuit will have another opportunity to address the issue as a similar case from the U.S. District Court for the Southern District-Houston, *New Era of Networks, Inc. v. Great Northern Ins. Co. et al.*, is currently on appeal. 

- Mary M. Strauss

Head-On Collision Results in Heartache After Denial of UIM Benefits

Trinity Universal Ins. Co. v. Lilith Brainard, et al., Amarillo Court of Appeals, No. 07-03-0170-CV (2004).

Trinity issued an automobile liability policy to Brainard Cattle Company. Edward Brainard, II, an insured under the policy, sustained fatal injuries in a head-on collision with a motorized rig owned and operated by another company, Premier. After the Brainards commenced a wrongful death action against Premier and its employee, it was discovered that Premier's limits of liability did not exceed \$1 million. The Brainards made a written claim for UIM benefits to Trinity. Ultimately, the Brainards joined Trinity in the lawsuit with Premier, alleging claims under *Art. 21.21* and *21.55* of the Texas Insurance Code, as well as allegations of breach of duty of good faith and fair dealing/unfair settlement practices, and violations of the DTPA. Without admitting liability, Premier's insurer paid its policy limits of \$1 million. Subsequently, the jury awarded actual damages in the amount of \$1,010,000.00 and \$100,000.00 in attorney's fees.

On appeal, the court of appeals agreed with Trinity that the trial court erred in awarding \$100,000.00 in attorney's fees because there had been no determination of Premier's liability on the damages incurred by the Plaintiff Brainard prior to the rendition of the judgment. The Brainards had to show fault on the part of the uninsured motorist and the extent of resulting damages prior to action on the UIM provision. The court of appeals noted that where a promise to pay is made subject to a condition precedent, no breach occurs until the condition occurs. The


appellate court further found that the trial court erred in awarding prejudgment interest on the \$1,010,000.00 in damages before offsets. Applying *Art. 5.06-1* of the *Texas Insurance Code*, the court of appeals observed that underinsured motorist coverage provides for payment to the insureds because of bodily injury or property damage as reduced by the amount recovered or recoverable from the insurer of the underinsured motor vehicle. The payment provided for in *Art. 5.06-1(5)* is subtracted from the amount of actual damages incurred as a result of the negligence of the underinsured motorist. Accordingly, after allowing the offset and disallowing the \$100,000.00 in attorney's fees, the Brainards were entitled to recover only \$5,000.00 from Trinity. 📖

Thirty-five Mile Road Trip to Saginaw Was a Material Deviation

Old American County Mutual Fire Ins. Co. v. Michael D. Renfrow, et al., No. 02-1087 (Tex.2004).

Michael Renfrow worked for an oil field services business in Bridgeport, Texas. After a full day of work, though his personal pickup truck was parked in the work lot, Renfrow took a company truck home for the evening. Company policy allowed employees to take company vehicles home overnight when they had to return to well sites early the next morning. Renfrow freely admitted he knew employees were not allowed to use company vehicles for personal business. Some time during the evening, Renfrow and his girlfriend decided to go to Saginaw – over 35 miles from his home. Renfrow testified he knew he did not have permission to take the company truck to his

girlfriend's home, let alone to Saginaw. When returning from Saginaw, an intoxicated Renfrow hit an embankment killing his girlfriend. A wrongful death action against Renfrow and his employer resulted. Old American then sued for a declaration that Renfrow was not covered under the omnibus clause of the policy.

Citing Coronado v. Employer's National Ins. Co., 596 S.W.2d 502 (Tex.1980), the Supreme Court noted that a person may deviate from the permitted usage of an insured vehicle and still be covered under an omnibus provision if the use is not a material or gross violation of the terms of the initial permission. The fact finder generally must determine the extent of the deviation in terms of actual distance or time, purpose of the trip, and other factors. However, the Supreme Court observed that a deviation may be material as a matter of law. The high Court then found Renfrow's trip to Saginaw, over 35 miles away, was a material deviation as a matter of law. Judgment was rendered for Old American. 

Immunity Enjoyed at All Levels Per the Exclusive Remedy of the Worker's Compensation Act

Sheldon A. Etie v. Walsh & Albert Co., Ltd. et al., Houston [1st Dist.] No. 01-02-01007-CV (2004).

Clark Construction Group, Inc., the general contractor, and Enron Corp. entered into a contract for the construction of a building. Clark Construction subcontracted part of the work to Way Engineering Co., Inc. Clark Construction exercised an option in its contract with Way Engineering to buy a single worker's compensation insurance policy from Travelers

Property & Casualty Group to cover all subcontractors and employees who worked at the construction site. Way Engineering, in turn, entered into a lower tier subcontract with Walsh & Albert Co., Ltd. Walsh & Albert and its employees were also covered by the worker's compensation insurance obtained by Clark Construction. Etie was employed by Way Engineering and was seriously injured when sheet metal attached to the ceiling by a Walsh & Albert employee fell and struck him. Etie sought and recovered worker's compensation benefits and also filed a third-party negligence suit against Walsh & Albert. Summary judgment was granted for Walsh & Albert.

On appeal, the First Court of Appeals observed that the Worker's Compensation Act authorizes a general contractor to provide insurance coverage for subcontractors and the subcontractor's employees. An agreement to provide such coverage makes the general contractor "the employer of the subcontractor and the subcontractor's employees," for purposes of Texas Worker's Compensation Law. See *Tex.Lab.Code Ann. §406.123(e)*. The Act is silent as to lower tiers of subcontractors. Although Etie argued Walsh & Albert operated as an independent contractor, and he was therefore not an employee as defined in the Act, the First Court of Appeals concluded the provision of the Worker's Compensation Act transforms independent contractors, such as Walsh & Albert, into "deemed employees." Consequently, Walsh & Albert and its employees were also covered by the worker's compensation insurance policy that Clark Construction purchased. The First Court of Appeals further observed that the Act contemplates that independent contractors may, in certain circumstances, be considered "employees" despite not meeting the definition


of an "employee" in §401.012(b)(2). Lower tier subcontractors, who would otherwise be considered independent contractors, are not denied the shift in status from "independent contractor" to "deemed employee" with its concomitant protections. Because all of the employers and employees on site were provided coverage, none of the employers/employees were subject to common law liability.



- Mary M. Strauss

Where Insurer Did Not Pay UIM Benefits Following "Presentment" of the UIM Claim, Award of Attorney's Fees Was Proper

State Farm Mut. Auto. Ins. Co. v. Nickerson, 2004 WL 527932, *Texarkana Court of Appeals* (2004).


Nickerson, the insured, brought an action against State Farm to recover underinsured motorists' benefits after she was awarded the \$300,000 UIM/ UIM policy limits and attorney's fees of \$46,000. State Farm promptly paid the UIM limits, but argued the attorney's fees award was not warranted. State Farm asserted it did not breach the contract and was not liable to pay the UIM benefits until the judgment was rendered. The appeals court disagreed, finding §38.002 of the *Texas Civil Practice and Remedies Code* makes the award of attorney's fees in a contract dispute mandatory, where payment is not made 30 days after the "claim is presented." The appeals court stated, "[t]he phrase 'claim is presented' is not equivalent to 'judgment is rendered.'" Further, "[e]ven though State Farm eventually paid after a judicial determination, and even if that payment was timely, State Farm did not pay on the claim made on the contract, and Nickerson was required to enforce her right to payment through the courts. That, in a contract situation, is the context in which attorney's fees are properly recoverable." 

"Eight Corners Rule" Strictly Applied to Find Insurer's Duty to Defend in Case Where Nanny Was Convicted of Felony Injury to a Child

Northfield Ins. Co. v. Loving Home Care, Inc., 2004 WL 547938 (*Fifth Cir.* 2004).

Bianca Barrows was fatally injured at the hands of a nanny placed in the Barrows' home by LHC. After a jury trial, the nanny was convicted of first-degree felony injury to a child and sentenced to seven years in prison. The Barrows sued LHC and its owners for negligence, respondeat superior, and negligent hiring in retention of the nanny - omitting from their pleadings any reference to the nanny's criminal acts or her felony conviction. Northfield Insurance Company ("Northfield") defended LHC under a reservation of rights. Northfield filed a declaratory judgment action and asserted no duty to defend or indemnify LHC because of the policy's "criminal acts" and "physical/sexual abuse" exclusions. The United States District Court for the Southern District of Texas ruled against Northfield on the duty to defend issue, but refused to decide the issue of the insurer's duty to indemnify.

Applying Texas law, the Fifth Circuit Court of Appeals affirmed. Relying on the "eight corners" or "complaint allegation rule" to determine the broad duty to defend, the appeals court noted the Barrows' complaint asserted a claim of negligence within the policy's scope of coverage, triggering the duty to defend. In contrast, the appeals court stated, "the duty to indemnify is not based on the third-party's allegations, but upon the actual facts that underlie the cause of action and result in liability." The appeals court held the duty to indemnify issue was non-justiciable because


Texas law only considers the duty to indemnify question "justiciable," or ripe for consideration, after the underlying suit (the suit against the tortfeasor) is concluded. 

Passenger Who Had Exited Was Not "Occupying" UIM Covered Vehicle When He Was Hit By Another Vehicle

McKiddy v. Trinity Lloyd's Ins. Co., 2004 WL 639639, Dallas Court of Appeals.

McKiddy was a passenger in a vehicle that slid off an icy road. McKiddy and the other occupants exited the disabled vehicle. While McKiddy was outside the vehicle, he was injured when another car, driven by Smith, slid off the icy road and hit him. McKiddy received policy limits from Smith. McKiddy then sought UIM coverage under the policy covering the vehicle in which he had been a passenger. The UIM carrier, Trinity, denied coverage, stating McKiddy was not "occupying" the covered

vehicle. The trial court granted Trinity's motion for summary judgment.

The policy defined "occupying" as "in, upon, getting in, on, out or off." McKiddy argued "getting" does not modify "on," "out," or "off," and therefore, he could have been occupying the vehicle when he was "out" of the vehicle. Affirming the trial court, the appeals court found there was no evidence McKiddy was "occupying" the covered vehicle. Noting, "[w]hen the injury occurs outside of the covered vehicle, [Texas] courts look at whether there is a causal connection between the incident that caused the injury and the covered vehicle." Because McKiddy presented no evidence to show how long he had been out of the covered vehicle, and no evidence showing his injuries were related to any impact with the covered vehicle, the appeals court found "no causal connection between McKiddy's injuries and the covered vehicle." 

- Richard C. Harrist

The contents of this newsletter are presented as general information only and are not intended as legal advice. The reader is invited and advised to consult with an attorney for more specific information regarding the matters and materials addressed herein, or for advice based on the individual circumstances of his or her specific situation.

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