

The Defense Chronicles

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Highlights

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Insurance Law..... 2*

Internet Updates

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

Physicians Sued in Breast Implant Litigation Were Additional Insureds under "Vendor Endorsements" of Dow Corning's CGL Policies

Texas Medical Liability Trust, et al. v. The Hartford Accident and Indemnity Company, et al., 2004 WL 2567129 (Tex. App. – Waco November 10, 2004).

This case involved an attempt by several physician-insurers to recoup costs they incurred in defending their physician-insureds in lawsuits regarding breast implants manufactured by Dow Corning. Dow Corning's CGL insurers issued policies to Dow Corning, all of which included an additional insured endorsement for "vendors." The endorsement provided, to be an additional insured, the physicians must have distributed or sold Dow products "in the regular course of their business."

The physician-insurers brought this declaratory judgment action – seeking a declaration that Dow-insurers had a duty to defend the physicians in the breast implant litigation because the physicians were "vendors" of Dow's breast implants, and seeking reimbursement of expenses incurred in defending the physicians in that litigation. The trial court in Johnson County, Texas, granted summary judgment to Dow-insurers, concluding that the physicians were not additional insureds under Dow's vendor endorsements. The physician-insurers appealed.

The Waco Court of Appeals reversed. Applying the "eight-corners rule" to determine the duty to defend, and noting the plaintiffs in the underlying breast implant litigation specifically alleged that the physicians were sellers of Dow's breast implants, the appeals court held it was error for the trial court to conclude the physicians were not insureds under the vendor endorsements. Additionally, the appeals court held the physicians were not precluded by collateral estoppel by virtue of the previous decision in *Texas Medical Liability Trust v. Zurich Ins. Co.*, 945 S.W.2d 839 (Tex. App. – Austin 1997, writ denied), in which the Austin appeals court held the physicians not to be additional insureds through Dow's vendor endorsements. In *Zurich*, the Waco Court of Appeals observed the vendor endorsements at issue included as additional insureds persons or organizations shown in a schedule, and none of the physicians who were defendants in those underlying suits were included in the respective schedules. 

- Richard C. Harrist

Pedestrians, Who Were Hit by Underinsured Motorist after They Had Walked Away from Tractor-trailer Rig, Were No Longer "Occupying" Motor Vehicle

McDonald v. Southern County Mutual Insurance Company, 2004 WL 2677151 (Tex. App. – Houston [1st Dist.] November 24, 2004).

This case addresses the issue of what constitutes "occupying" a motor vehicle for purposes of uninsured/underinsured motorist coverage. McDonald drove a tractor pulling a trailer. Accompanying McDonald on the haul was Robinson. While traveling westbound on I-10, approaching Katy, Texas, the tractor's right front tire blew out. McDonald pulled over and parked the rig in the grass on the side of I-10, between I-10 and the service road. McDonald and Robinson tried to telephone for help, but their mobile telephone would not work.

The two men walked away from the rig, and planned to walk until they reached a place where they could seek assistance for repairing the flat tire. The men crossed the I-10, westbound service road and proceeded westward along the north side of the service road, in the direction of, and with their backs to the traffic. Intending to return to the rig later that evening, they left their personal belongings in the tractor, including clothing, a briefcase, a log book, and a notebook.

About five minutes after beginning their journey along the service road, driver Rangel struck McDonald and Robinson from behind, causing injuries to both pedestrians. Robinson and McDonald were unsure of their precise distance from the rig when they were hit by Rangel, but they knew they had walked a "few minutes" and "maybe 50 feet or better."

Rangel's automobile liability policy carried the minimum, 20/40 limits of liability, so McDonald and Robinson filed a claim with Southern County, which had issued a Texas Truckers Policy covering the tractor, for underinsured motorist coverage, alleging that they had exhausted the minimum limits under Rangel's liability policy. Southern County's UIM policy extended coverage to "person[s] occupying a covered auto." The policy defined "occupying" as "in, upon, getting in, on, out or off." McDonald and Robinson claimed they were "persons occupying a covered auto," and, therefore, were eligible to receive underinsured motorist benefits from Southern County. But, after a bench trial, the trial court entered judgment for Southern County. McDonald and Robinson appealed.

The Houston appeals court affirmed the trial court's judgment. Citing evidence in the trial court record that Robinson and McDonald had "crossed the road, and were proceeding away from the vehicle on the other side, with an intent to return to it later, rather than immediately," the appeals court held the evidence sufficient to support the trial court's conclusion that the men were not "occupying" the vehicle under the policy.



Tropical Storm Allison's Flood Waters Did Not Become "Plain Old Generic Water" after Flowing into Downtown Houston Building


Valley Forge Insurance Company v. Hicks Thomas & Lilienstern, L.L.P., 2004 WL 2903521 (Tex. App. – Houston [1st Dist.] December 16, 2004).

This case arises out of flooding that occurred in June 2001 as a result of heavy rainfall generated by Tropical Storm Allison, which caused Buffalo Bayou to overflow its banks and flood the entire downtown Houston area. Water rushed into the Albert Thomas Convention Center, broke through an interior basement wall of that building, flowed into a downtown parking garage, then into the pedestrian tunnel system, and finally poured into the Bank of America building located at 700 Louisiana Street. The water that poured into the basement of the Bank of America building damaged the electrical equipment that supplied power to the entire building. As a result, the building was closed from June 9, 2001 until July 2, 2001. Along with other occupants of the Bank of America building, the law firm of Hicks Thomas & Lilienstern was forced to conduct its business from an alternate location while the Bank of America building was repaired.

The law firm had purchased a premises insurance policy from Valley Forge that included coverage for up to 30 days' worth of lost business income and extra expenses – if the firm suffered losses from a covered peril. The policy, however, also contained a provision specifically excluding losses due to flood, surface water, overflow of any body of water, or from water under the ground surface.

When Valley Forge denied the law firm's claim for \$373,074.47 in lost business income and \$22,263.07 in extra expenses, the law firm sued its insurer for breach of contract and for breach of the duty of good faith and fair dealing. The law firm argued to the trial court that the flood water exclusion did not apply because, by the time the water entered the Bank of America building,

its character had mutated from flood or surface water to "plain old generic water." The trial court rendered partial summary judgment for the law firm, holding that its losses were covered under the premises policy, and awarded the law firm \$395,537.54 in damages plus interest, along with attorneys' fees of \$150,000.00. Valley Forge appealed.

The appeals court reversed. Disagreeing with the trial court and the law firm, the appeals court found the flood and surface water exclusion unambiguous and applicable, concluding that the law firm's loss was caused by a combination of flood and surface water. The court of appeals stated: "Tropical Storm Allison deluged the area with rain, creating a large amount of surface water and causing Buffalo Bayou to overflow its banks. Once the water entered the convention center, it behaved as strong waters behave – it caved in an interior wall and rushed onward. It did not back up into a sewer line, cause a water main to burst, commingle with other water from an underground swimming pool, or otherwise change or dilute its nature. It simply flowed onward, as flood and surface water is wont to do, obeying the law of gravity and flowing into man-made underground structures." 

Advertising Injury Not Covered under CGL Policy with "Designated Premises" Endorsement, Where Portion of Insured's Property Designated in Policy Was Unrelated to Injury


Founders Commercial, Ltd. d/b/a Westchase Gables v. Trinity Universal Insurance Company, 2004 WL 2677097 (Tex. App. – Houston [1st Dist.] November 24, 2004).

This case concerns the applicability of a "designated premises" endorsement in a CGL policy. Founders bought eight acres of real property in Houston. At the time of the purchase, there were no structures on the property. Trinity issued a CGL policy to Founders covering the entire eight acres. On half of the eight acres, Founders constructed an assisted living facility, while the other four acres remained vacant – without buildings. Subsequently, Trinity issued a renewal CGL policy to Founders containing a designated premises endorsement, providing that coverage was restricted to certain premises designated in the policy declarations. The renewal policy declarations incorporated by reference a liability classification schedule designating the four vacant acres as the covered premises.

Founders began using the trade name "Westchase Gables" in advertising and promotions, and conducted business at the assisted living facility using that name. Gables Residential Trust filed suit in federal court against Founders for trademark infringement and dilution of trade name, asserting it owned exclusive rights to the service mark "Gables," and that Founders infringed on those rights by using the name "Westchase Gables" in connection with its operations.

Founders then called upon Trinity to provide its defense to the trademark suit under its CGL renewal policy. Trinity filed a declaratory judgment action in state court, contending it had no duty to defend or indemnify Founders based on the designated premises endorsement in the policy. Founders counterclaimed against Trinity, asserting the policy provided coverage for "advertising injury" and the trademark infringement lawsuit. The state court granted summary judgment to Trinity, and Founders brought this appeal.

On appeal, Trinity contended that Founders' coverage under the policy was limited by the designated premises endorsement, the policy declarations (which incorporated the liability classification schedule) which only identified "4 acres of vacant land" as the covered premises, and the trademark infringement suit alleging injuries unrelated to the vacant four acres. Founders asserted, applying the eight-corners rule, Trinity owed it coverage because the trademark infringement suit claims constituted "advertising injury" as defined in the CGL policy. Founders also argued the reference in the liability classification schedule to "4 acres of vacant land" simply provided nothing more than a basis for Trinity to calculate premiums chargeable to Founders.

The appeals court affirmed the judgment for Trinity, holding that the only reasonable interpretation of the policy is "that coverage is limited to injuries arising out of 'four acres' of 'vacant land'" 

- 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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