BINDING AUTHORITY
Insurance Coverage Decisions: Issued Today - Impact Tomorrow
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March 4, 2011

On Wednesday March 9 at 3 PM Eastern I will be putting on a Webinar for the CPCU Society that addresses significant substance contained in "General Liability Insurance Coverage: Key Issues In Every State." The webinar will examine the various schools of thought that have been adopted by courts nationally to address a dozen critical coverage issues. I will also discuss what I believe to be the most critical coverage issue facing liability insurers today. Much more information about the webinar can be found at the CPCU website. It's only an hour, not too expensive, you don't have to leave your desk and I'll try to keep it lively. I hope you can join.

Don't Mess With Texas's Duty to Defend: High Court Continues To Adhere To Its Unique Rule That The Duty To Indemnify Is Broader Than The Duty To Defend

In New Jersey the Duty to Defend is the Duty to Depend, as coverage for defense costs is limited to claims that are ultimately covered under the policy.

In California, and other states, the Duty to Defend is the Duty to Lend, as an insurer that defends can then sometimes seek reimbursement for defense costs paid for claims for which there was no duty to defend.

In those states that strictly limit consideration of the Duty to Defend to the four corners of the complaint, the duty to defend is the Duty to Unbend. Alternatively, in the many states that require an insurer to also consider information outside the complaint to find a Duty to Defend, such duty is the Duty to Append.

In those states, such as Hawaii, that allow an insurer to consider information outside the complaint to disclaim a Duty to Defend, so long as such facts are not in dispute in the underlying litigation, the Duty to Defend is the Duty to Blend.

And in those states that require an adjuster to wear nautical clothing when determining the Duty to Defend, it is the Duty of Lands' End.

The standard for determining the duty to defend is by far the most important issue in liability coverage. No other issue arises in just about every claim – regardless of the facts or type of liability policy at issue. See Chapter 4 of "General Liability Insurance

Coverage: Key Issues In Every State" for a detailed discussion of the standards in all 50 states.

Speaking of duty to defend, last week the Texas Supreme Court left no doubt that the state continues to adhere to its unique rule that the duty to indemnify is actually broader than the duty to defend. In other words, in just about every state, where the duty to defend is broader than the duty to indemnify, a finding that there is no duty to defend automatically forecloses any duty to indemnify. But everything is bigger in Texas – and this includes an insurer's duty to indemnify.

In its late 2009 decision in *D.R. Horton-Texas, Ltd. v. Markel International Ins. Co.*, the Supreme Court of Texas stated: "*We hold that the duty to indemnify is not dependent on the duty to defend and that an insurer may have a duty to indemnify its insured even if the duty to defend never arises*."

Last week in *The Burlington Northern and Santa Fe Railway Company v. National Union*, the Supreme Court of Texas revisited its jaw-dropper in *D.R. Horton*. And just as in *D.R. Horton*, an insurer that the court concluded may not have a duty to defend was nonetheless still potentially liable for an $8 million verdict.

Burlington Northern is a simple and brief opinion. At issue was coverage for Burlington Northern, as an additional insured, for a fatal accident at a railroad crossing. The policy under review was issued to a weed control company. It was alleged in the underlying action that excessive vegetation near the crossing obstructed the driver's view of the oncoming train. *Burlington Northern* at 1.

The policy issued to the weed control company retained by Burlington Northern contained a Completed Operations exclusion. The Texas Court of Appeals determined that the insurer did not have a duty to defend Burlington Northern because the language in the complaint referenced the weed control company's actions as having happened in the past. Therefore, the court concluded that the policy's "completed operations" exclusion precluded a duty to defend and a duty to indemnify. *Id.* at 2, 4.

The Texas Supreme Court acknowledged that, "[i]n some circumstances the pleadings can negate both the duty to defend and the duty to indemnify." *Id.* at 4. But the Texas high court held that this was not such case. Essentially, even if the complaint stated that the weed control company's actions took place in the past, thereby precluding a duty to defend based on the "completed operations" exclusion, other evidence could exist that takes the claim outside the scope of the "completed operations" exclusion.

The court held:

[I]n this case the pleadings do not show that contractual provisions and other extrinsic evidence cannot possibly bring Mobley's vegetation control operations within coverage of National Union's policy for the 1995 accident when Mobley's contract unquestionably extended through 1996. Assuming, without deciding, that the court of appeals correctly

determined that National Union owed no duty to defend, the court nevertheless erred by not considering all the evidence presented by the parties when it determined the question of National Union's duty to indemnify BNSF.

Id. at 4 (citations omitted).

D.R. Horton, and now *Burlington Northern*, place insurers with Texas claims in a quandary (and in any "four corners" state that adopts *D.R. Horton*). If an insurer determines, based on the four corners/eight corners of the complaint, that it owes no defense obligation, it is entitled to disclaim coverage for such obligation. That is clear. But then what happens? Consider these scenarios.

The underlying claim is not defended and a default judgment is entered, followed by an assessment of damages hearing. Or the case is defended inadequately by the insured, leading to a larger verdict than should have been. [Not all insureds are huge railroad companies that can adequately defend themselves.] Or the case may be settled – possibly with a consent judgment that passes a "reasonableness" test, but for more than the case is really worth. Translation – across the board potential for increased exposure for the insurer. In other words, under all of these scenarios, an insurer that unquestionably had no duty to defend may be penalized for exercising a longstanding right.

In Texas, where a finding of no Duty to Defend does not necessarily preclude a Duty to Indemnify, the Duty to Defend may be the Duty that Doesn't End.

A copy of the Supreme Court of Texas's February 25th opinion in *The Burlington Northern and Santa Fe Railway Company v. National Union* can be accessed here:

http://www.supreme.courts.state.tx.us/historical/2011/feb/100064.htm

If you have any questions please let me know.

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