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INSURANCE LAW UPDATE

By Jennifer Kelley

***Leordeanu v. American Protection Ins. Co.*, 54 Tex. Sup. J. 291 (December 3, 2010).**

In *Leordeanu*, an employee officing out of her apartment drove her company car forty miles to business appointments, then to a restaurant for dinner with clients. Adjacent to the employee's apartment complex, was a company-provided self-storage unit, in which she kept drug samples and marketing materials. The employee intended to stop at the unit on her way home and empty her car of business supplies in preparation for an out-of-town personal trip the following day. Midway there, however, the employee ran off the highway and was seriously injured. American Protection Ins. Co. denied the employee's workers' compensation claim, concluding that she was not in the course and scope of employment at the time of the accident. The Texas Supreme Court disagreed, holding that the employee was within the course and scope of her employment as defined in section 401.011(12) of the Texas Labor Code.

In reaching its conclusion the court reviewed the historical development of the "dual purpose rule" and the "coming and going rule." The court stated that the dual purpose rule was devised for the distinct situation in which an employee was traveling between work and a place other than home, whereas the coming and going rule developed separately and was specifically for travel between home and work. The court reasoned that if the dual purpose rule also applied to travel to and from work, homeward-bound travel could never be in the course and scope of employment. Thus, the court held that only the coming and going rule as set forth in section 401.001(12)(A) applied to travel to and from the place of employment, while the dual purpose rule in section 401.011(12)(B) applied to other dual-purpose travel.

***VRV Dev. L.P. v. Mid-Continent Casualty Co.*, 2011 U.S. App. Lexis 456 (5th Cir. January 7, 2011).**

In *VRV*, four homeowners and the City of Dallas sued a developer for negligently designed and built retaining walls that collapsed, damaging the homeowners' yards and undermining support for a public utility easement. Mid-Continent Casualty Company refused to defend and indemnify the developer in the lawsuit, arguing no property damage was alleged to have occurred during the effective policy periods, and certain policy exclusions precluded coverage. The Fifth Circuit agreed with Mid-Continent Casualty Company, finding that damages to property other than the retaining wall occurred after the policy expired and that the damage to the retaining wall was not covered based on a policy exclusion.

In reaching its conclusion that there was no coverage for damage to the retaining wall, the court looked at the language of the policy. The court recognized that Mid-Continent had a general obligation to cover property damage to the retaining wall that occurred during the policy period; however, that obligation did not extend to damage to the retaining wall arising out of work performed by the developer and its subcontractors, based on the following language:

> . . . exclusion (l) to the CGL policies precludes coverage for "'property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'" "Your work" means, inter alia, "[w]ork or operations performed by you or on your behalf." The "products-completed operations hazard" means any property damage "occurring away from premises you own or rent and arising out of . . . 'your work' except . . . [w]ork that has not yet been completed or abandoned."

The Fifth Circuit also examined the claims for damages to the homeowners' yards and the City's easement. The court concluded that "[b]ecause the property damage did not occur during the policy period, it [did] not trigger Mid-Continent's duty to defend." In reaching its decision, the court reiterated that to determine when damage occurred, the focus is "on the time of the 'actual physical damage' to the property, and not the time of the 'negligent conduct' or the 'process . . . that later results in' the damage."

***RLI Ins. Co. v. Gonzalez*, 2011 U.S. App. Lexis 472 (5th Circ. January 7, 2011).**

In *RLI*, an employee's family brought suit against the employer, alleging that the employee "'was exposed to dangerous levels of silica dust' through sandblasting while employed by [the employer] . . . ." And that the employee's death 'was caused by respiratory failure caused by silicosis,' a respiratory disease caused by prolonged inhalation of silica dust." The employer forwarded a copy of the suit to its insurance company, requesting that the insurance company defend the lawsuit under its umbrella policy. The insurance company responded that it did not have a duty to defend or indemnify under the Umbrella Policy. The Fifth Circuit agreed with the insurance company, concluding that the Umbrella Policy contained several endorsements that barred the employer's claims for defense and indemnity.

In reaching its conclusion, the court looked at the "Pollution Exclusion Absolute" endorsement, which stated "that the Umbrella Policy did not cover bodily or personal injury arising as a result of the 'contamination of the environment by pollutants that are introduced at any time, anywhere, in any way.'" The policy defined pollutants as "smoke, vapors, soot, fumes, acids, sounds, alkalis, chemicals, liquids, solids, gases, waste, . . . and all other irritants and contaminants." The court concluded that "[s]ilica dust is unambiguously a "pollutant" under the language of the Pollution Exclusion."

The Fifth Circuit also addressed the employer's arguments that: (1) the Pollution Exclusion was ambiguous, (2) the umbrella policy created an "inference that silica dust claims are not included by general Pollution Exclusion", and (3) the umbrella policy as a whole is ambiguous because it conflicts with the Pollution Exclusion. The court concluded that: (1) "[t]he language in the Pollution Exclusion unambiguously applies to claims arising from 'contamination of any environment by pollutants that are introduced at anytime, anywhere, in any way[,]'" (2) "[t]he existence of a separate exclusion for asbestos does not create ambiguity in the Pollution Exclusion[,]" and (3) "[b]ecause the terms of the Pollution Exclusion supercede any conflicting language in the original Umbrella Policy, the Pollution Exclusion unambiguously controls what is covered by the policy.