

State's high court rulings should impact coverage purchases



A year and a half into the recession, some local businesses are slowly beginning to re-evaluate their market position in hopes that we are seeing the first signs of economic improvement. Although many local businesses may have weathered the economic turmoil better than those in harder hit areas of the country, they have not been immune to the downturn. As managers look to continue cutting costs and maximizing their financial position, many are re-evaluating their corporate risk management strategies, including the type and amount of insurance they carry.

Over the past 18 months, the Texas Supreme Court has decided numerous cases which impact several aspects of business insurance and are important in any assessment of business insurance needs. In addition to the cases discussed in this article, there have been numerous other insurance related cases decided by the court. This is a summary of the most important cases, which, in my opinion, are relevant to local companies and their business insurance needs.

- **Late Notice of an Insurance Claim** — *PAJ Inc. v. Hanover Ins. Co., Prodigy Communications Corp. v. Agriculture Excess & Surplus Ins. Co., and Financial Industries v. XL Specialty Insurance Company* — In these cases, the Court held that an insurance company cannot deny an insurance claim based on untimely notice if the claim is made within the applicable reporting period and the insurer has not been harmed by the late notice. Tip: As in the past, businesses should report claims as soon as possible. If an issue arises concerning notice, the insurance company must show that they have been harmed in order to deny a claim based on late notice.

- **Reimbursement for Uncovered Claims** — *Excess Underwriters at Lloyd's London v.*

Frank's Casing Crew & Rental Tools — The Court held that an insurance company cannot unilaterally seek reimbursement for amounts it pays to settle an uncovered claim on behalf of its insured, absent a policy provision allowing for reimbursement or a separate agreement with the insured. Tip: Businesses should check their policies for reimbursement provisions. Insurers may require a reimbursement provision or a separate reimbursement agreement prior to settling a claim, in which coverage is in dispute.

- **Insurance Coverage for Punitive Damages Awards** — *Fairfield Ins. Co. v. Stephens Martin Paving* — The Court found that the public policy of Texas does not prohibit insurance coverage for exemplary (punitive) damages on gross negligence claims in the workers' compensation context. It should be noted that the Court limited its ruling to the workers' compensation arena, and there are legislative prohibitions to coverage for exemplary damages for certain types of insurance. Tip: Businesses should check to see if they have coverage for exemplary damages; if not, coverage may be available.

- **Additional Insured Coverage** — *Evaston Ins. Co. v. Autofina Petrochemicals* (two separate decisions by the same name) — In these decisions, the Court found that "additional insureds" are generally entitled to broad coverage, even where the main insured is not at fault and the additional insured is the sole negligent party. Tip: Businesses should carefully consider the coverages afforded to any additional insureds under their insurance policies, and what coverage is available to them under any policies in which they are named an additional insured. Businesses should also consider whether additional insured coverage under a business partner's policy is an economical insurance alternative.

- **Insurance Company's Broad Duty to Defend** — *Zurich Am. Ins. Co. v. Nokia, Inc.* — In this case, the Court reaffirmed that an insurance company's duty to defend under a liability insurance policy is very broad and applies to the entire case. In a situation where a business is faced with multiple legal claims, some covered and some not, the insurance company must provide a defense for the

entire action (although the insurance company will only be liable for damages on the covered claims). Tip: Businesses should seek a defense from their insurance company even if some of the claims asserted are arguably not covered. So long as one of the claims is covered, the insurance company generally must provide a defense for the entire action.

- **Insurance in Construction Defect Cases** — *Don's Building Supply, Inc. v. OneBeacon Insurance Company and Pine Oaks Builders Inc. v. Great American Lloyds Ins. Co.* — In these cases the Court found that construction defect claims are covered by the insurance policy in effect at the time that the defective work began to do tangible physical damage to property (even if the damage was undiscovered). Tip: These cases are very important to the building and construction industry and businesses in the industry should carefully consider how they impact coverage for any existing building defect cases as well as the purchasing of insurance for future claims.

- **Statutory Prompt-payment Requirements apply to Duty to Defend Claims** — *Pine Oaks Builders, Inc. v. Great American Lloyds Ins. Co.* — The Court reaffirmed that insurers providing a defense under a liability policy must comply with statutory prompt-payment requirements, and they are liable for an 18 percent per annum penalty if the fail to do so. Tip: Businesses that seek coverage for their defense costs under their liability policy should be familiar with the payment deadlines that the insurance company must comply with.

When it comes to evaluating corporate risk management strategies, there are many factors for business owners and managers to consider and analyze — and the cases cited above highlight the importance of understanding the frequently changing law related to insurance coverage. When looking at the type and amount of insurance your business carries, consider seeking professional advice from someone with an understanding of the insurance industry and experience in a wide variety of insurance matters.

Attorney **THOMAS SANDERS** leads Cox Smith's insurance industry practice and can be reached at tsanders@coxsmith.com.