

Insurance Coverage Case Law Update

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MANIFESTATION V. INJURY IN FACT

PROOF OF INJURY IN FACT

Vines-Herrin Custom Homes, LLC v. Great American Lloyds Ins. Co., 2011 WL 6396473 (Tex. App.-Dallas December 21, 2011). This case considered the application of the old "manifestation" rule of when coverage is triggered under a property damage policy, and the newer "injury in fact" rule, handed down by the Supreme Court in *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008). When the case was tried, the manifestation rule was in effect. The verdict was in favor of the insured that coverage was triggered under a CGL policy based the fact that the damage first manifested itself during the Great American Lloyds policy period. During the post-trial motion phase of the litigation, the "actual injury rule" was adopted by the in *Don's Bldg. Supply v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008). This rule states that coverage is triggered when the damage actually occurs, rather than when it manifests itself.

This is a construction defect case, based upon a homebuilders construction of a new home. The Great American Lloyds policy was in effect prior to the date that the home started to be built. Based on the findings of fact and conclusions of law specific to this case, the court found that the injury in fact had to have occurred prior to the manifestation of the damage, and since the policy was in effect in either case, coverage had to have been in effect. Therefore even though there was no evidentiary finding of when the damage occurred, as the policy periods in question began prior to the beginning of construction of the defective home, the injury in fact necessarily occurred during the policy period. Accordingly, the trial court judgment was affirmed for coverage in favor of the insured.

WHAT CONSTITUTES COURSE AND SCOPE OF EMPLOYMENT

VEHICLE FURNISHED FOR PERSONAL USE BY EMPLOYER

American Home Assurance Co. v. De Los Santos, No. 04-10-00852-CV (Tex. App.-San Antonio, January 18, 2012). This case considered what constituted course and scope of employment in a workers' compensation claim. In this case, DeLosSantos, the employee at issue had been furnished a car by his employer. The accident resulting in the employee's death occurred on a public highway at 5:50 a.m.

while De Los Santos was traveling in the company truck from his home in Orange Grove, Texas, to the Buck Hamilton Ranch to begin his work day and meet a Mr. Clark. Noting that work required travel between work and home is not generally considered travel in the course and scope of his employment, the court considered the exceptions allowing that travel from home to work can be compensable if (1) the transportation is furnished as a part of the contract of employment or is paid for by the employer; (2) the means of transportation are under the control of the employer; or (3) the employee is directed in the employee's employment to proceed from one place to another place. (Tex. Labor Code Ann. §401.011(12)). Establishing one of these circumstances does not establish that travel is in the course and scope of his employment but it does establish that travel is not automatically excluded from being within the course and scope of employment solely by virtue of the fact that the employee is traveling between home and work.

After considering case law, the court held that while furnishing De Los Santos with a company truck did meet exception (1) noted above, the evidence failed to establish **why** the truck was furnished in the course and scope of employment. In this case, the evidence could have shown that the employer provided the company truck because the work site was remote, or because the company-furnished truck was part of the employer's plan to have its employees arrive and leave at the same time, or that it was necessary for the employer to furnish De Los Santos with a company truck in order to induce him to the work site. The evidence did not demonstrate that a company truck was driven by De Los Santos as an integral part of his employment contract. The mere gratuitous furnishing of the vehicle by an employer to an employee as an accommodation is not sufficient to make a trip to a worksite within the course and scope of employment.

In response to an argument that De Los Santos was on a "special mission" the court noted that a "special mission" is a trip made by an employee under the direction and for the benefit of his employer. In this case, there was no evidence of a special mission, but that De Los Santos was traveling on his customary route to the work site.

The court also addressed the subsidiary argument that the travel originated in the employer's business because De Los Santos was transporting tools and equipment, as De Los Santos and Mr. Clark had agreed that De Los Santos would bring a barrel to the work site that day to catch petroleum liquid that spilled while they worked on the well. The court held this fact was not sufficient to render the accident during the course and scope of the employment as they were not carrying the equipment at the direction of their employer.