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UNINSURED AND UNDER-INSURED MOTORIST CLAIMS

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I. RULES OF CONSTRUCTION FOR CONSTRUING INSURANCE POLICIES

A. General Rules:

1. Same Rules of Construction as Any Contract.

2. Insurance policies are construed according to the same rules of construction that apply to contracts generally. **Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.,** 267 S.W.3d 20, 23 (Tex. 2008). Interpretation or construction of an unambiguous contract is a matter of law to be determined by the court. **Coats v. Farmers Ins. Exch.,** 230 S.W.3d 215, 217 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

B. Plain Language:

1. **Security Mut. Cas. Co. v. Johnson,** 584 SW 2d 703, 704 (Tex. 1979). Words in an insurance policy are to be given their plain, ordinary meaning unless the policy gives them a different meaning.

2. **Fiess v. State Farm Lloyds,** 202 SW 3d 744, 751 and n.30 (Tex. 2006) To determine the plain and ordinary meaning of the words of an insurance policy, Courts routinely turn to dictionary definitions.

C. Ambiguity:

1. **National Union Fire Ins. vs. Hudson Energy Co.,** 811 S.W.2d 552, 555 (Tex. 1991). "Generally, a contract of insurance is subject to the same rules of construction as other contracts. If the written instrument is worded so that it can be given only one reasonable construction, it will be enforced as written. However, if a contract of insurance is susceptible of more than one reasonable interpretation, we must resolve the uncertainty by adopting the construction that most favors the insured. The Court must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent. In particular, exceptions or limitations on liability are strictly construed against the insurer and in favor of the insured."

D. Interpretations of Exclusionary Clauses:

1. If the language of an exclusionary clause in an insurance policy is clear and unambiguous, the well established rule of construction directing adoption of that construction most favorable to the insured, is not applicable. Consequently, absent ambiguity, neither party can be favored by its construction. **Maryland Casualty Co. v. State Bank & Trust Co.,** 425 F.2d 979 (5th Cir. 1970) *cert.* denied, 400 U.S. 828, 27 L. Ed. 2d 57, 91 S. Ct. 55 (1970). **Monte Christo Drilling Corp. v. Byron-Jackson Tools, Inc.,** 266 F. Supp. 123 (S.D. Tex. 1966).

2. The court must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent." **Nat'l Union Fire Ins. Co. v. Hudson Energy Co.,** 811 S.W.2d 552, 555, (Tex. 1991).

II. COVERAGE ISSUES

A. Eight Corners Rule

1. The duty to defend is determined, regardless of the of the truth or falseness of the allegations, by reviewing the facts alleged within the four corners of the petition and the coverages and exclusions contained within the four corners of the policy. **Heyden Newport Chemical Corp. v. Southern General Ins. Co.,** 387 SW 22 (Tex. 1965).

B. Exceptions to the Eight Corners Rule:

1. **Weingarten Realty Management Co. v. Liberty Mut. Fire Ins. Co.,** __ S.W.3d __ (Tex. App.—Houston [14th Dist.] (2011). After acknowledging that the Supreme Court has never expressly recognized an exception to the eight corners rule, the Court noted that other courts has recognized a "very narrow exception" allowing extrinsic evidence "only when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim." ***GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 308 (Tex.2006); *see also Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 654 (Tex.2009).** The Court recognized an exception to the eight-corners rule for the first time. In the underlying case, Johnson sued her employer and the landlord. After she was assaulted by an unknown person while working, Johnson sued the landlord, but spelled the landlord's name wrong in the petition. However, the correct defendant appeared and answered the lawsuit. The court noted the entity actually sued was a "separate and distinct" entity from the intended defendant. The correct defendant never challenged the error and Johnson never fixed it.

The landlord's carrier defended. Shortly before trial, the landlord made a demand upon Johnson's employer's carrier, Liberty Mutual, to provide a defense as an additional insured under its policy. Liberty Mutual rejected the demand to provide the defense to the landlord because the name of the defendant in the petition did not match the name on the policy. The landlord and its insurer sued Liberty Mutual for coverage.

As an exception to the eight-corners rule, the court noted that Liberty Mutual was asking the court to assume that the alleged facts were true. In doing so, Liberty Mutual argued that a complete stranger to the policy was asking for a defense to which it was not entitled. Here, the extrinsic evidence at issue was the policy's reference to parties to lease agreements, requiring the court to consider lease agreements to determine insured status under the policy.

The court distinguished other eight-corners cases by noting that Liberty Mutual was not challenging the merits of the underlying claim. The court noted that "[i]n light of the facts of this case, we are persuaded of the need for a very narrow exception to the eight-corners rule. The exception applies only when an insurer establishes by extrinsic evidence that a party seeking a defense is a stranger to the policy and could not be entitled to a defense under any set of facts.

2. **GuideOne Specialty Mutual Insurance Co. v. Missionary Church of Disciples of Jesus Christ,** 2011 WL 3670009 (N.D.Tex., July 7, 2011). The Court allowed the use of extrinsic evidence in support of the insurer's motion for summary judgment when the "eight-corners rule" did not apply to the duty to defend under that policy due to revisions in the policy language. The court observed that decisions applying the eight-corners rule

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