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THE SEPARATION OF DUTIES: DEFENSE AND INDEMNITY

Recently, the Texas Supreme Court issued a ruling that may change how insurance companies view their duty to defend and their duty to indemnify a company or party. The more traditional view for these duties was that if a company did not owe a duty to defend, then there was no duty to indemnify. However, with this new opinion, the Texas Supreme Court seems to be saying that just because a company has no duty to defend does not mean that they are off the hook to indemnify. According to the Court, these duties are separate obligations that are not so intertwined.

D.R. HORTON-TEXAS, LTD. v. MARKEL INTERNATIONAL INSURANCE CO., LTD.

In *D.R. Horton-Texas, Ltd. v. Markel International Insurance Co., Ltd.*, D.R. Horton (“Horton”), a general contractor, was listed as an additional insured on its subcontractor's insurance policy with Markel International Insurance Co., Ltd (“Markel”). Horton sought defense and coverage from Markel when Horton was sued in an underlying liability claim for alleged construction defects for a house that Horton had built.

In the underlying lawsuit, a family by the name of Holmes purchased a house built by Horton. Soon after the Holmes family moved in, they claimed that mold had infested the house and they sued Horton for the remedial costs. In their petition, the Plaintiffs identified only Horton as being responsible for the defects. They did not add any of the subcontractors as parties. In discovery responses, Horton alleged that its subcontractor, Rosendo Ramirez, performed some of the work on the home and that his work also contributed to the alleged defects. However, Ramirez was never listed as a party in that lawsuit.

Ramirez was insured by Markel and Ramirez’s policy named Horton as an additional insured entitled to coverage for claims against it arising from Ramirez's work. After the Plaintiffs sued Horton, Horton sought coverage from Markel. However, Markel argued that it had no duty to provide a defense to Horton because the Plaintiffs’ petition did not list Ramirez as a party nor did they argue that the subcontractor’s work contributed to the defects.

Because it had no duty to provide a defense, Markel further claimed that it had no duty to indemnify Horton. In other words, Markel’s position was that its named insured was not a party to the lawsuit; therefore, they did not have to defend or indemnify Horton, an additional insured.

The trial court granted summary judgment in Markel's favor and the Court of Appeals affirmed the trial court's ruling that Markel did not owe Horton a duty to defend or indemnify it against the claims brought by the Plaintiffs because there were no allegations in the Plaintiffs' petition that implicated Ramirez's work. The Court of Appeals reasoned that because Markel had no duty to defend, it also had no duty to indemnify Horton. Horton appealed to the Texas Supreme Court.

A DUTY TO INDEMNIFY

The Texas Supreme Court held that a duty to defend and a duty to indemnify are distinct and separate duties and that one duty can exist without the other. In this situation, the Court agreed that there was no duty to defend based upon the insurance policies and the pleadings. Therefore, the Court focused on whether Markel had a duty to indemnify Horton in this case.

The Court held that an insurer's duty to indemnify depends on the facts proven in the lawsuit and whether the damages caused by the actions or omissions proven are covered by the terms of the policy. Evidence is usually necessary in the coverage litigation to establish or refute an insurer's duty to indemnify. In this case, Horton presented evidence that showed that Ramirez was a subcontractor for the Holmes' house.

The evidence showed that Ramirez performed masonry work to the house that could have contributed to the mold defects discovered by the Plaintiffs. Horton also showed that Markel's policy for Ramirez named Horton as an additional insured. In addition, Horton was also able to provide evidence of mold testing, inspection reports, and the contract between Horton and Ramirez.

This evidence was intended to show two things. First, it was intended to show that Horton and Ramirez had a contract that read that Ramirez's insurance would cover Horton if it was sued for work that Ramirez did on the house. Second, the inspection reports and contract showed the scope of Ramirez's work and that Ramirez's work could be linked to the Plaintiffs' damages.

According to the Texas Supreme Court, this evidence presented by Horton raised sufficient fact questions at the trial level that should have defeated Markel's motion for summary judgment on the issue of the duty to indemnify. Horton was able to at least provide some evidence to show Ramirez's involvement with this house and that Horton was listed on his insurance policy.

The Court reversed the Court of Appeals on the duty to indemnify and found that a fact question did exist as to Markel's duty. This portion of the case was remanded back to the trial court level and this portion of the case will be reheard by the trial court.

WHAT CAN YOU TAKE AWAY FROM THIS?

1. If you are a general contractor, and you have been sued for work done, you should consider adding the subcontractors to the lawsuit either as a party or as a Responsible Third Party. You will want evidence at the trial court level to show some or all of the parties may be liable for any damages. One of the issues in this lawsuit was that Ramirez was not added as a party to the underlying claim.

2. A duty to indemnify is a fact question. Contrast this with the duty to defend which is a question of law based on the language in the pleadings and insurance policy. You will need evidence to show (1) the subcontractor's work or involvement with the project and (2) the parties' intentions at the outset of the project. In this case, Horton and Ramirez had a contract establishing that Ramirez would provide Horton coverage if sued for Ramirez's work. Horton was in a better position to prove this because Horton had (1) the contract with Ramirez stating this and (2) the documents to show the extent and scope of Ramirez's work and how it was tied in to the alleged defects.

Make sure to hang on to invoices, contracts, bids, bills, inspections, and reports and any other documents that show (1) what subcontractors were involved on a project and (2) what they did on the project.

3. Check your subcontractors' insurance. Make sure that your company is indeed listed as an additional insured before the work begins. Even under the best circumstances, and without any intentional misrepresentations, sometimes companies are not covered and it is important to actually see the document that shows the appropriate coverage.



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