

ALERT

Lost Earnings Awarded as Breach of Employment Agreement Excluded as "Amounts Owed Under a Written Contract"

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Applying Texas law, the Court of Appeals of Texas has held that no coverage is available for lost past and future earnings awarded to an employee who was terminated without cause in violation of his employment contract because such amounts were excluded under the employer's policy as "amounts owed under a written contract."

Pinnacle Anesthesia Consultants, P.A. v. St. Paul Mercury Ins. Co., 2012 WL 404967 (Tex. App. Feb. 9, 2012).

The employee's contract provided that the employer could not terminate him except for cause. In 2004, after the employer fired the employee, the employee brought suit for breach of the employment agreement for terminating him without cause. The jury found the employer liable for the breach and awarded the employee \$900,000 in past lost earnings and \$5 million in future lost earnings, among other relief.

The employer was insured under an employment practices liability policy. The insurer provided the employer with a defense of the claim subject to a reservation of rights, and after the judgment was entered, the parties sought a declaration regarding coverage under the policy. The insurer argued that no coverage was available for the \$5.9 million awarded as past and future lost earning pursuant to a policy exclusion that provided that "[t]he Insurer shall not be liable for that part of Loss that constitutes: 1. amounts owed under a written contract or agreement" The employer disputed the application of this provision, arguing that it was limited to amounts owed by the employer under the contract at the time of termination, which could not include the jury's subsequent award of lost earnings. The court

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disagreed, holding that "amounts owed," as used in the exclusion, are determined at the time of loss – *i.e.*, at the time of the judgment.

The court also found that the employer's interpretation of the exclusion was not reasonable, and thus the exclusion could not be deemed ambiguous. In addition, the court rejected the employer's argument that the lost earnings were consequential damages that could not be amounts owed under the employment contract. The lost earnings, the court determined, were the necessary and natural result of the employer's breach of the contract, and thus they were direct, not consequential, damages due under the contract. Accordingly, the court held that the \$5.9 million award was excluded from coverage as "amounts owed under a written contract."