FALL 2012 NEWSLETTER

INSURANCE LAW UPDATE

By Jennifer Kelley

THE SUPREME COURT OF TEXAS

***Malham v. Gov't Emples. Ins. Co.*, No. 03-11-00006-CV, 2012 Tex. App. LEXIS 1101 (Tex. App.—Austin Feb.8, 2012), *petition for review denied by Malham v. Gov't Emples. Ins. Co.*, No. 12-0630, 2012 Tex. LEXIS 885 (Tex. Oct. 19, 2012).**

The Supreme Court of Texas denied review of *Malham*, in which the Austin court of appeals determined that a city-owned vehicle did not meet the definition of "uninsured motor vehicle" as contained in a personal auto policy issued by GEICO.

In *Malham*, the insured was injured in a motor vehicle accident when the car in which she was a passenger was struck by a pickup truck owned by the City of Killeen and driven by a city employee while in the course and scope of his employment. The insured settled her claims against the City and the employee in exchange for payment to her of $87,500. Thereafter, the insured filed a claim under the uninsured motorist coverage provision of her GEICO policy seeking to recover medical expenses related to back surgery that she alleged was recommended to treat injuries sustained in the accident. The insured sought a declaration that the City vehicle that struck the car she was riding in was an "uninsured motor vehicle," as that term was defined in her contract with GEICO, and that she was entitled to recover $300,000 from GEICO under the terms and conditions of her uninsured-motorist coverage. The GEICO policy contained, in pertinent part, the following definition:

> I. "Uninsured motor vehicle" means a land motor vehicle or trailer of any type:
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> 1. To which no liability bond or policy applies at the time of the accident
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> ...
>
> II. However, "uninsured motor vehicle" does not include any vehicle or equipment:
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> ...
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> 2. Owned or operated by a self insurer under any applicable motor vehicle law.
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> 3. Owned by any governmental body unless:
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> a. the operator of the vehicle is uninsured; and
>
> b. there is no statute imposing liability for damage because of bodily injury or property damage on the governmental body for an amount not less that the limit of liability for this coverage.

The parties agreed to a bifurcated trial whereby they would first try the coverage issues, which presented pure questions of law, to the court and then set any remaining liability and

damages issues for a subsequent jury trial. After a bench trial, the court rendered a final take-nothing judgment in GEICO's favor.

In reviewing the trial court's judgment, the court of appeals determined that the City is a party to a Liability/Property Interlocal Agreement (the "Agreement"), which creates the Texas Municipal League Joint Self–Insurance Fund (the "Fund") for the purpose of "providing coverages against risks which are inherent in operating a political subdivision." The court determined that this type of agreement is a liability policy, meaning that the vehicle was not uninsured. The court, therefore, upheld the judgment for GEICO.

***GEICO Gen. Ins. Co. v. Austin Power Inc.*, 357 S.W.3d 821 (Tex. App.—Houston [14th Dist.] 2012), *petition for review denied by GEICO Gen. Ins. Co. v. Austin Power Inc.*, No. 12-0141, 2012 Tex. LEXIS 823 (Tex. Sept. 21, 2012).**

The Supreme Court of Texas denied review of *Austin Power*, in which the Houston [14th Dist.] Court of Appeals held GEICO had the duty to defend its insured in an action alleging that the insured had caused bodily injury arising from asbestos, even though the underlying complaint failed to identify the date of exposure to asbestos. The court found that even though there was no specific date of injury alleged, there were other indications of the time of injury.

In *Austin Power*, Weldon Bradley and his wife Ruth sued several defendants, including Austin Power, alleging that Weldon was injured by his exposure to the defendants' asbestos-containing products and machinery. In their factual allegations, the Bradleys did not identify the date Weldon's injury occurred. The trial court granted summary judgment in favor of Austin Power and dismissed it from the case.

The parties to the declaratory judgment lawsuit stipulated that Austin Power, the insured, incurred $54,706.00 defending the underlying lawsuit. GEICO sought a declaration that it had no contractual duty to defend its insured in the underlying lawsuit. The trial court entered judgment that GEICO had a duty to defend its insured.

Austin Power held a CGL policy issued by GEICO's predecessor, covering the period from December 31, 1969, to December 31, 1970. On appeal, GEICO argued that because there was no specific date of injury alleged in the petition, it failed to make any allegation that suggested Weldon was injured during the policy period. The appellate court disagreed, finding several allegations that indicated a date of injury which triggered a duty to defend. The court observed that the Bradleys alleged that the insured "created hazardous and deadly conditions to which Mr. Bradley was exposed and which caused him to be exposed to a large amount of asbestos fibers." By re-incorporation, the Bradleys alleged that Weldon was exposed to asbestos "on numerous occasions," and that "each exposure" caused or contributed to his injuries. In the conspiracy count against all defendants, the court found allegation that "for many decades, Defendants [acted] ... individually, jointly and in conspiracy with each other and other entities...." The court further observed that the Bradleys used the past tense in alleging that Weldon "*has suffered* injuries" from asbestos exposure (emphasis by the court). The court concluded that, in effect, the Bradleys alleged that Weldon was injured sometime before the

petition was filed, and there was nothing in the pleadings that negated the possibility that the injury occurred between December 31, 1969 and December 31, 1970.

***Smith v. City of Lubbock*, 351 S.W.3d 584 (Tex. App.—Amarillo 2011), *petition for review denied by Smith v. City of Lubbock*, No. 11-0902, 2012 Tex. LEXIS 703 (Tex. Aug. 17, 2012).**

The Supreme Court of Texas denied review of *Smith*, in which the Amarillo Court of Appeals held that an employee could not sue the city for lack of adequate auto liability insurance because the Workers' Compensation Act is the only valid avenue of recovery when an employee is injured.

In *Smith*, the issue before the Amarillo Court of Appeals was whether or not the Texas workers compensation laws barred an employee from suing his employer upon an UM injury suffered by the employee while working. The damages at issue arose when the employee was struck by an intoxicated driver while the employee was working for the City of Lubbock. The intoxicated driver was not an employee of the City nor was he sufficiently insured. The employee made a claim for UM benefits under the policy purchased by the City for its employees, even though he had already received workers' compensation benefits. The claim was denied and a lawsuit resulted. The City argued that the state workers' compensation laws barred the employee from additional recovery. The employee claimed that those statutes only precluded recovery for work-related injuries arising from common law torts as opposed to a contract and that his claim arose from an insurance contract.

In discussing the case, the court of appeals pointed out that the Workers' Compensation Statute does not contain the words "tort" or "negligence." It does not mention a particular chose-in-action. Given that the common law choses-in-action of tort and contract have existed for more than a century, the court noted that it was safe to presume that the legislature knew of them when enacting Section 408.001(a) of the Workers' Compensation Statute. However, the legislature opted not to express them in the statute. Instead, the legislature incorporated terms focusing upon a remedy for particular injuries, not a cause of action through which remedies are generally sought. Those terms were "workers' compensation benefits" being the "exclusive remedy" for "work-related injuries" encountered by employees "covered by workers' compensation insurance."

The court noted that it cannot be doubted that breach of contract is a common law claim. Thus, the employee's effort to categorize his claim upon the policy as one for breached contract to trump the exclusivity provision was of little value to him. The court concluded that if an employee suffers work-related injuries and seeks their redress from an employer that subscribes to a workers' compensation program, there is only one way to obtain them. It is through that compensation program. It does not matter if the employer provides those benefits from its own pocket or via a contract with a third party insurer; once it provides them, the Workers' Compensation Statute bars the employee from forcing the employer to redress the injuries through other means. The court emphasized that for the court to rule otherwise would provide the employee a backdoor way of recovering more from his employer than the exclusive workers' compensation remedy.

***Liberty Mut. Ins. Co. v. Ricky Adcock*, 353 S.W.3d 246 (Tex. App.—Fort Worth 2011), petition for review granted by Liberty Mut. Ins. Co. v. Adcock, No. 11-0934, 2012 Tex. LEXIS 687 (Tex. Aug. 17, 2012).**

The Supreme Court of Texas granted review of *Adcock*, in which the Fort Worth Court of Appeals held that the Texas Department of Insurance, Division of Workers' Compensation Division ("Division") has no implied right to review lifetime income benefits ("LIBs") under Texas Labor Code §408.161 after the initial administrative and appellate remedies have been exhausted.

In *Adcock*, Liberty Mutual Insurance Co. ("Liberty") and the Division, argued on appeal that the trial court erred by granting summary judgment for the employee. In particular, Liberty and the Division argued that the Division had jurisdiction in 2009 to review a 1997 award of LIBs to the employee to determine whether or not the employee still had total and permanent loss of use of his hands and legs. The Fort Worth Court of Appeals disagreed, noting that the statutory language at issue stated that LIBs are paid until the death of the employee, and further noting the Legislature's intent when enacting the TWCA to provide for review under several other circumstances, but not once entitlement to LIBs has been established, clearly indicates that the Legislature gave the Division no express or implicit authority for further review of LIBs after eligibility is determined. Thus, the Fort Worth Court of Appeals concluded that the Division has no implied right to review LIBs under Texas Labor Code §408.161 after the initial administrative and appellate remedies have been exhausted.

THE FIFTH CIRCUIT

***Colony Nat'l Ins. Co. v. Unique Industrial Prod. Co.*, No. 11-20355, 2012 U.S. App. LEXIS 17977 (5th Cir. Aug. 24, 2012).**

In *Colony Nat'l Ins. Co.*, an insured was facing two lawsuits in Minnesota and Texas for allegedly supplying defective brass fittings and swivel nuts used in residential plumbing systems since 2002. The insurer, which provided insurance to the insured under two commercial general liability policies that were effective from October 2005 to October 2007, denied its insured coverage because the insured knew about the losses from its defective plumbing products before it took out an insurance policy with the insurer. The insurer filed suit seeking a declaration that it had no duty to indemnify its insured.

The underlying petition alleged that the insured knew the swivel nuts were defective in 2004, but it further alleged that the insured agreed to use different swivel nuts. The underlying petition did not allege that the insured knew that the different swivel nuts were defective before the policy date of October 16, 2005. The district court, however, found that a "known-loss exclusion," which barred coverage where the insured knew of a loss before purchasing the policy entitled the insurer to summary judgment. In reaching its conclusion, the court reviewed the application for the policy and an affidavit.

On appeal, the Fifth Circuit reversed the district court's ruling that the insurer was not required to indemnify its insured against the claims in the two underlying lawsuits over defective

plumbing products. In reaching its conclusion, the court noted: "Here, the district court erred in finding no duty to defend by looking to extrinsic evidence to support its determination". "Without more, the allegations do not clearly and unambiguously fall outside the scope of coverage of the commercial general liability policies and a potentially covered claim clearly exists. Thus, unless an exclusion is applicable, the factual allegations lodged in the Texas and Minnesota lawsuits trigger Colony's duty to defend." The Fifth Circuit remanded the case to the district court to decide whether the insured breached a consent-to-settle provision in the policy when it entered into settlements in the underlying suits without the insurer's consent. The clause stipulated that the insurer's liability would be limited if the insured settled specific claims in the underlying suits on its own, without consulting or involving the insurer.

TEXAS COURTS OF APPEALS

***American Home Assurance Co. v. De Los Santos,* No. 04-10-00852-CV, 2012 Tex. App. LEXIS 7891 (Tex. App.—San Antonio Sept. 19, 2012).**

In *De Los Santos*, a worker did not have an office job but was assigned to work on a gas lease on a large piece of fenced farmland. His employer furnished him with a company-owned truck and paid for his work-related fuel expenses. The truck was not for personal use. The worker spent a significant part of his workday traveling to wells and job sites. He traveled to the same location each day to begin his workday. The worker was fatally injured in a motor vehicle accident while driving from home to work. The worker's widow sought workers' compensation benefits. The trial court awarded judgment in favor of the widow.

On appeal, the San Antonio Court of Appeals reversed the trial court's judgment, holding that the widow was not entitled to benefits because the worker was not in the course and scope of his employment when the accident occurred. In reaching its decision, the court noted that the worker was scheduled to meet a work acquaintance at a well. The meeting was not scheduled by the employer. And, the worker agreed to bring a barrel to catch any petroleum liquid that spilled while they were working on the well. Based on the evidence, the court rejected the widow's contention that the worker was on a special mission when the accident occurred. Instead, the court concluded that he was traveling on his customary route on a public highway to his regular work site, and that he was not acting under the specific direction of his employer at the time of the accident.

FEDERAL DISTRICT COURTS

***Mag-Dolphus, Inc. v. Ohio Casualty Ins. Co.*, No. 4:11-CV-1525, 2012 U.S. Dist. LEXIS 129939 (S.D. Tex. Sept. 12, 2012).**

In *Mag-Dolphus*, an insured sustained property damage as a result of Hurricane Ike and reported a claim to its insurer. The insurer inspected the damage and estimated the total claim value at just over $40,000. After the parties failed to agree on the amount of loss, the insurer invoked the policy's appraisal provision. Each party selected independent appraisers, and the appraisers subsequently selected an umpire. The umpire awarded almost $192,000 in replacement costs, less depreciation, deductibles and previous payments. The insurer promptly

issued payment to its insured consistent with the award, and later issued a second check for the recoverable depreciation. Several months later, the insured sued its insurer asserting causes of action for breach of contract, common law and statutory bad faith, fraud and violations of the Texas Insurance Code.

The U.S. District Court ultimately granted summary judgment in favor of the insurer. The court concluded that the insured's invocation of the appraisal provision and the insurer's timely payment of the binding and enforceable appraisal award estopped any assertion by the insured of breach of contract. Thus, because the breach of contract claim failed as a matter of law, the court also ruled that the insured's claims for bad faith must also fail in the absence of a showing that the insurer failed to timely investigate the claim or committed some act so extreme as to cause independent injury apart from the claim under the policy. Finally, the court ruled that the insured did not meet its burden of proof on the fraud and Insurance Code allegations.

***Benton v. Lexington Ins. Co.*, No. 4:12-cv-01546, 2012 U.S. Dist. LEXIS 124388 (S.D. Tex. Aug. 31, 2012).**

In *Benton*, the insured's property was substantially damaged by a wind storm. Shortly after the storm, the insured filed a claim against its insurance policy for damage to the interior, exterior, roof and other structures. The insured requested that its insurer cover the cost of repairs to the property pursuant to the Policy. The insurer assigned the claim to a risk service group, who in turn assigned the claim to an adjuster. The insured eventually filed suit against its insurer, the risk service group, and the adjuster alleging that his claim was improperly handled, underestimated, and wrongfully denied.

The insurer, pursuant to 28 U.S.C. § 1446(a), subsequently removed the case to federal court on the basis of diversity jurisdiction, asserting that the adjuster, a non-diverse defendant, had been improperly joined as a defendant in the action. The insurer, in response filed a motion to remand alleging that removal of the case was improper because the adjuster was not improperly joined as a defendant and complete diversity of citizenship was non-existent among the parties.

The federal district court noted that the improper joinder issue turned on whether the insurer could establish *any potentially* viable state law cause of action against the adjuster. The insurer did not contest that it was possible to maintain a claim under Chapter 541 of the Texas Insurance Code against an adjuster in his individual capacity, but instead asserted that the insurer had failed to offer any specific facts in support of its claims against the adjuster and its failure to proffer any actionable facts related to the adjuster's conduct constituted a failure to state a claim. As a consequence, the insurer argued that there was no reasonable possibility of recovery against the adjuster based on the facts alleged by the insurer in its petition. This federal district court disagreed.

The federal district court noted that the insurer had a "heavy burden to establish with certainty that the plaintiff has *no reasonable possibility* of recovery against [the adjusters] individually". The court concluded that the insurer had not provided the court with the evidence necessary to forecast that the insured had no reasonable possibility of recovery against the

adjuster in state court. In reaching its conclusion, the court noted that the insurer's pleadings tended to suggest that the adjuster, while acting as a "person" engaged in the business of insurance, performed and/or contributed in some way to the insurer's investigation and/or decision relative to the insured's claim. Thus, the adjuster could *potentially* be held personally liable to the insured under § 541.060 of the Texas Insurance Code.