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INSURANCE LAW UPDATE

By Jennifer Kelley

TEXAS COURTS OF APPEALS:

***David Fusaro v. Trinity Universal Insurance Company,* No. 05-14-00481-CV, 2015 WL 3561672 (Tex. App.—Dallas June 9, 2015, no pet.).**

The Dallas Court of Appeals affirmed summary judgment in favor of insurers, holding a motor vehicle exclusion in a Texas Homeowner's Policy applied to preclude coverage for bodily injuries sustained by the insured's friend while he was helping the insured replace the brakes on a motor vehicle belonging to the insured's mother. In *Fusaro*, the insured, along with a friend, was replacing the brakes on his mother's vehicle at his residence when the hydraulic jack gave way and fell on top of the insured's friend. The friend filed suit against the insured, seeking damages for his injuries. The insured tendered the lawsuit to his homeowners' insurance carrier, which denied coverage and declined to defend the insured based on a motor vehicle exclusion in the subject homeowners policy. The motor vehicle exclusion precluded coverage for bodily injuries arising out of the ownership, maintenance, operation, use, loading or unloading of "[m]otor or engine propelled vehicles or machines designed for movement on land, including attached machinery or equipment[,]" which were owned or operated by or rented or loaned to an insured. In a subsequent coverage lawsuit, the trial court granted summary judgment in favor of insurer based on application of the exclusion.

On appeal, the issue before the court was whether the friend was "operating" the vehicle at the time the injury occurred. The friend contended that, because he was not driving the vehicle when his injuries occurred, he was not "operating" the vehicle. The appellate court disagreed, noting that the dictionary defined "owned" as "to have or hold as property;" "operate" as "to perform a work or labor" and "to exert power or influence" and "to produce an effect;" "rent" as "to grant the possession and enjoyment of for rent;" and "loan" as "lend," which means "to give into another's keeping for temporary use on condition that the borrower return the same or its equivalent." Thus, the court stated, "[i]t is clear that the import of these terms and this clause is that the vehicle must be the insured's property ("owned") or the insured must have authorized possession ("rented or loaned") or exercise control of the vehicle whether the insured was performing a work or labor on the vehicle or producing an effect with the vehicle ("operated")." The exclusion, therefore, applied to preclude coverage because the insured "was performing customary acts of maintenance and handling on the motor vehicle loaned to him by his mother when the accident occurred which was normal operation of the vehicle."

***Texas Farm Bureau Casualty Insurance Company v. Brittni Sampley*, No. 07-13-00151-CV, 2015 WL 3463028 (Tex. App.—Amarillo May 26, 2015, pet. filed).**

The Amarillo Court of Appeals affirmed a trial court's order denying an insurer's request to remove an appraiser, concluding that a policy requirement that an appraiser be competent does

not result in a policy requirement that the appraiser be disinterested. In *Sampley*, the insured's personal vehicle suffered property damage. The insured and insurer disagreed about the scope of the loss, resulting in the insured invoking the policy's appraisal provision. The insured selected as her appraiser the same body-shop employee who had repaired her vehicle. After the insured rejected the insurer's demand for her to select a disinterested appraiser, the insurer requested a trial court to remove the appraiser.

On appeal, in support of its argument that the appraiser should be disinterested, the insured relied on a Texas Supreme Court case from 1919 that discussed the importance of disinterestedness on the part of the appraisers. The appellate court rejected the insured's position, noting that the case it cited involved an appraisal clause that expressly required appraisers to be both competent *and* disinterested. Because the appraisal provision at hand only required appraisers to be competent, the appellate court declined to impose a disinterestedness requirement independent of the contract language.

FIFTH CIRCUIT COURT OF APPEALS:

***Certain Underwriters at Lloyd's London v. Perraud*, No. 14-10849, 2015 WL 4747318 (5th Cir. Aug. 12, 2015) (unpublished).**

The Fifth Circuit Court of Appeals affirmed summary judgment in favor of insureds, noting that Texas courts have never recognized a sophisticated-insured exception to the doctrine of *contra proferentum*—that is, if a policy is susceptible to more than one reasonable interpretation, Texas law requires an insurance policy to be construed against the insurer and in favor of the insured—and concluding that, even if Texas courts were to adopt a sophisticated-insured exception, the exception would be narrowly applied. In *Perraud*, insureds sought coverage under a directors' and officers' liability policy for attorney fees and costs incurred in successfully defending criminal charges against them as employees. The insurer refused to pay on the basis of a policy exclusion. The trial court found the exclusion ambiguous and it interpreted the provision in favor of coverage applying the doctrine of *contra proferentum*. The trial court refused to apply a "sophisticated-insured exception" to the doctrine, concluding that even if Texas courts were to recognize the exception, the insurer presented no evidence indicating that the employer negotiated or drafted the exclusion at issue.

On appeal, the insurer did not challenge the trial court's ambiguity finding; it only challenged application of the sophisticated-insured exception and denial of its Rule 59(d) motion. The Fifth Circuit analyzed the variety of approaches other jurisdictions have employed when applying the sophisticated-insured exception. The court noted that no Texas court has ever recognized the exception and that the Supreme Court of Texas had recently declined the opportunity to do so on certified question. Refusing to offer an opinion on whether Texas courts would actually recognize the exception, the Fifth Circuit, instead, assumed for purposes of the appeal that Texas courts did recognize the exception. The court noted, however, that in light of Texas' strong policy in favor of coverage Texas would recognize a narrowly applied sophisticated-insured exception. Thus, because the insurer did not present any evidence that the insured did or could have influenced the terms of the exclusion, the district court did not err by declining to apply the exception even if, *arguendo*, it were applicable in Texas.

***Lila McWhirter, Individually and as Representative of the Estate of Eugene McWhirter v. AAA Life Insurance Company*, No. 14-20594, 2015 WL 4720323 (5th Cir. Aug. 10, 2015) (unpublished).**

The Fifth Circuit Court of Appeals affirmed a trial court's summary judgment in favor of an insurer, holding that life insurance policy covering accidents that occurred while "exiting from any private passenger automobile . . ." was not triggered where the insured's fall and subsequent death occurred after he exited the vehicle. In *McWhirter*, the insured attended a party with his wife and daughter. After the party, the wife drove the family home and backed into the driveway. Shortly thereafter, the insured fell and hit his head. The wife and daughter did not witness the fall. They discovered the insured lying parallel to the car on his back. The insured died as a result of his head injuries. The wife submitted a claim for life insurance. The insurer denied the claim, determining the fall occurred after the insured exited the vehicle.

On appeal, the Fifth Circuit reviewed the claim forms and letters submitted by the wife and daughter to the insurer, as well as the wife's and daughter's affidavits which included an account of the accident that was inconsistent with the claim forms and letters. The Court found the wife's and daughter's "unsubstantiated assertions" in their affidavits insufficient to create a genuine issue of material fact. Addressing the wife's contention that language relating to vehicles should be interpreted liberally in favor of coverage, the Fifth Circuit observed that the Texas Supreme Court, addressing a similar case, considered whether an accident arose out of use of a truck and noted that "if the insured had finished exiting the truck and then fell, or if he had fallen out of the car without any involvement of the vehicle, there would be no coverage." Thus, the Fifth Circuit held that Texas cases did not support a conclusion that the policy language at issue in the subject policy should be interpreted to apply to falls that occur after exiting a vehicle.

***Cox Operating, LLC v. St. Paul Surplus Lines Insurance Company*, No. 13-20529 (5th Cir. Jul. 30, 2015).**

The Fifth Circuit affirmed judgment in favor of the insured, concluding, in relevant part, that the notice provision in the policy could be waived and that violation of any deadline under the Texas Prompt Payment of Claims Act ("the Act") begins accrual of statutory interest. In *Cox*, the insured incurred substantial costs for cleaning up pollution and debris when Hurricane Katrina caused damage to its oil-and-gas facilities. After reimbursing the insured over $1.4 million of its costs, the insurer filed suit seeking a declaration that the remainder of the insured's costs were not "pollution clean-up costs" covered by the policy. At the conclusion of a jury trial, the district court entered judgment in favor of the insured, awarding the insured damages for breach of the policy and penalty interest under the Act.

On appeal, the insurer argued that the award of damages should be reduced because (1) it included costs that the insured did not report to the insurer within one year of the clean-up work as required under the policy; and (2) it constituted a double recovery inasmuch as it included damages for costs that were already reimbursed by other insurance carriers. The insured also argued the penalty-interest award should be reduced, or eliminated entirely, because the district court calculated the amount of penalty interest based on an incorrect date when penalty interest began to accrue.

With regard to the one-year notice provision in the policy, the insurer cited to the Fifth Circuit's decision in *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653 (5th Cir. 1999), in which the court held that a notice provision appearing in a policy's "insuring language" could not be waived. Consequently, the insurer argued that the costs reported by the insured after the one-year mark were not recoverable. The Fifth Circuit disagreed, noting that the holding in *Matador* stressed it was the parties' "objective intent" that determined whether a policy's provision could be waived. Thus, because (1) the policy viewed "as a whole" was ambiguous as to whether the notice provision could be waived; (2) the cost-reporting requirement at issue was distinguishable from the incident-reporting requirement in *Matador*; and (3) the insurer sent a denial letter to the insured that arguably waived the reporting requirement, the Fifth Circuit could not conclude that the "objective intent" of the parties was that the notice provision be unwaivable.

As to the insurer's challenge to the district court's calculation of penalty interest under the Act, the Fifth Circuit began its analysis by noting that the Texas Supreme Court has not yet explained whether, and when, an insurer's violation of section 542.055 of the Texas Insurance Code—that is, notice of acceptance or rejection of a claim—triggers the accrual of penalty interest under section 542.060 of the Texas Insurance Code. Making an *Erie* guess, the Fifth Circuit concluded that the plain language of the Act provides that a violation of any of the Act's deadlines begins the accrual of statutory interest under section 542.060. Thus, the court found no reversible error in the district court's calculation of penalty interest.

***Ironshore Specialty Insurance Company v. Aspen Underwriting, Limited*, 788 F.3d 456 (5th Cir. 2015).**

The Fifth Circuit, applying the Texas Supreme Court's holding in *In re Deepwater Horizon*, ____ S.W.3d ____, No. 13-0670, 2015 WL 674744 (Feb. 13, 2015), in which the supreme court held that an underlying contract must be consulted to determine scope of coverage if the insurance policy directs one to consult the underlying contract, concluded that an excess insurer did not have to pay its full policy limits because the subject insurance policy incorporated a $5 million limit from an underlying contract. In *Ironshore*, a fire at a Texas oil well resulted in the death of two men. The oil-well owner and the employer of the two men that died entered into a master services agreement (MSA) containing an indemnity provision in which they agreed to cover any liability resulting from claims brought by their own employees, even if the other party was at fault. They separately agreed to obtain $5 million of insurance that would cover claims asserted by their own employees against the other party. The oil-well's excess insurer filed a declaratory judgment action against the employer's excess insurers, contending that the employer's excess insurers were obligated to provide coverage up to the full limits of their policies.

On appeal, the only issue before the court was whether the insurance policies incorporated the $5 million limit referenced in the MSA. The Fifth Circuit, discussing *Deepwater Horizon*, noted that the coverage analysis begins with the four corners of the insurance policy. Only if the insurance policy references the underlying contract is it to be considered. Thus, the Fifth Circuit stated that if there is no limit to the coverage in the policies, it is "irrelevant" that the MSA contemplated a $5 million limit. According to the insurance policies, the additional insureds were only insureds under the policies if the named insured was

"obliged by any oral or written 'insured contract'" to provide insurance to said parties. The Fifth Circuit analyzed whether the "insured contract" and "where required" provisions in *Deepwater Horizon* were both necessary to the holding in that case, or whether each provision standing alone was sufficient to support the holding. Making an *Erie* guess, the Fifth Circuit concluded that the "insured contract" provision on its own was sufficient to incorporate the underlying contract in *Deepwater Horizon*. Consequently, the nearly identical language at issue before the Fifth Circuit was sufficient to incorporate the $5 million limit on coverage for the additional insureds with regard to the excess policies.

***American Home Assurance Company v. Oceneering International, Incorporated*, No. 14-20222, 2015 WL 1881911 (5th Cir. Apr. 27, 2015) (per curiam).**

The Fifth Circuit affirmed summary judgment in favor of the insurer, holding that the law of the case doctrine did not apply in a subsequent coverage lawsuit. In *American Home*, Chevron hired Aker Maritime, Inc. to provide design and engineering services for the construction of a "riser system" that attaches a floating spar to the ocean floor as part of an off shore oil production facility. A stability problem plagued the riser system, and eventually resulted in a crack in the spar's hull. Oceaneering International, Inc. repaired the hull, and Chevron put Aker in charge of designing a permanent fix. Aker ordered Grade A bolts from Lone Star as part of the fix, but Lone Star sent Grade 2 bolts. Oceaneering unknowingly accepted the wrong bolts, and the bolts later failed. Chevron sued Oceaneering and a jury returned a verdict in favor of Chevron. Oceaneering sought indemnification from its insurer. In the subsequent coverage suit, the insurer argued there was no "physical injury to tangible property, including all resulting loss of use of that property," and that the sistership exclusion applied to preclude coverage. The district court granted the insurer's a summary judgment based on the sistership exclusion.

On appeal, the Fifth Circuit did not reach the sistership exclusion because it concluded that Oceaneering had failed to "carry its burden of establishing 'property damage' as required by the Policy" in order to trigger the insurer's duty to indemnify. The court noted that the insurer's duty to indemnify comes into play only if Oceaneering was liable for "property damage," which was defined as "[p]hysical injury to tangible property." Oceaneering argued that the Fifth Circuit was bound by the law of the case doctrine to follow its two prior opinions with regard to the underlying lawsuit, both which, Oceaneering contended, found that the defective bolts caused property damage to the spar. The Fifth Circuit concluded that it was not bound in the separate coverage action through the law of the case doctrine because the prior statements were in a separate proceeding, rather than a subsequent stage of the same proceeding as required for the law of the case doctrine to apply. Additionally, the court noted that the prior findings were not addressing "physical injury to tangible property," but rather were addressing other issues before the court. Thus, the insurer did not have duty to indemnify Oceaneering.