The Ninth Annual Texas Legal Update

Texas Insurance Law Update

Presented by Don D. Martinson
Written by Leslie Echols Pitts

I. Notable Texas Supreme Court Decisions

A. *Mid-Continent Cas. Co. v. Global Enercom Mgmt.*, 54 Tex. Sup. Ct. J. 28 (Tex. Oct. 1, 2010).

In *Global*, the insured contracted with a subcontractor for repair work on a cell tower from which three of the subcontractor's workers fell and died after being hoisted up on a rope via a pickup truck pulley-system. The insured sought indemnification under the subcontractor's commercial general liability and auto policies, but the issuing insurer refused applying an "auto use" and "subsequent-to-execution" exclusion. The trial court and appellate court disagreed, finding coverage under both policies.

On appeal to the Texas Supreme Court; however, the factors elucidated in *Mid-Century Ins. Co. of Texas v. Lindsey*, 997 S.W.2d 153 (Tex. 1999) were applied to find the "auto use" exclusion clearly triggered by the pickup truck's involvement in the accident. In so holding, the Court reasoned "[t]he accident did not merely happen because the rope broke; the accident did not merely happen in or near the truck; the workers could not have accomplished the same result without the truck; and one of the expected purposes of this particular truck was to perform towing and lifting activities." As to whether the policies' "subsequent-to-execution" exclusions applied, the Court found they did not even though the subcontract was not signed by the insured before the accident, recognizing that a contract need not be signed to be "executed" in Texas unless the parties explicitly require signature as a condition of mutual assent.

B. *State Farm Lloyds v. Page*, 315 S.W.3d 525 (Tex. June 11, 2010).

In *Page*, a homeowner sought coverage under her homeowner's policy for mold damage to her home and the contents of her home caused by a plumbing leak. The insured homeowner took the position that the policy was ambiguous and, therefore, coverage was afforded for all of her damages while State Farm argued that no coverage was provided for any of her damages. The Texas Supreme Court, however, held that the coverages provided for the dwelling (Coverage A) and the contents of the home (Coverage B) were distinct and separate and that while coverage is excluded for mold damages to the structure of the house under Coverage A, coverage is provided for mold damages to the contents of the home under Coverage B, when said mold damages result from plumbing leaks.

C. *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London,* 53 Tex. Sup. J. 780 (Tex. June 4, 2010).

In *Gilbert,* a general contractor sought coverage under its excess CGL policy for claims made against it by a party who claimed that its building suffered flood damages caused by Gilbert's work on a construction site in downtown Dallas. Gilbert had been hired by a governmental entity, Dallas Area Rapid Transit (DART), to oversee the construction project. The building owner sued Gilbert in tort and for breach of contract. In the breach of contract claim, the building owner alleged Gilbert assumed liability for the damage under its contract with DART. Except for the breach of contract claim, the trial court granted summary judgment for Gilbert on the basis of governmental immunity. The general contractor later settled the breach of contract claim and sought indemnity from its insurers.

In the coverage suit, the insurer claimed that the policy's contractual liability exclusion barred coverage for the breach on contract claims. The Texas Supreme Court agreed with the insurer, explaining that the relevant exclusion clearly applied to bar coverage for the breach of contract claims:

> Considered as a whole, the contractual liability exclusion and its two exceptions provide that the policy does not apply to bodily injury or property damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement, except for enumerated, specific types of contracts called "insured contracts" and except for instances in which the insured would have liability apart from the contract. In this case, Gilbert agreed under its contract with DART to "repair any damage to . . . facilities, including those that are the property of a third party, resulting from failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work." RTR originally sued on tort and statutory theories of liability, then added a breach of contract claim. But Gilbert prevailed on its summary-judgment motion, leaving only RTR's breach of contract claim. Thus, the only liability theory remaining at the time Gilbert settled arose from Gilbert's undertaking in the contract with DART--an obligation Gilbert assumed by contract. And Gilbert does not claim there are facts that could result in its being liable under some other theory besides breach of contract.

The *Gilbert* court also addressed an argument that the excess insurer overstepped when it "urged" counsel for Gilbert to file a motion for summary judgment on all of the non-breach of contract claims so that the excess insurer could then deny any indemnity obligations that might later arise as to the remaining breach of contract claims. The court concluded (1) that the excess insurer was not exercising control of the defense and (2) that Gilbert was not prejudiced by any of the excess insurer's actions with regards to its suggestions to defense counsel. As such, the excess insurer was not estopped from denying coverage for the breach of contract claims.

D. *Texas Health Insurance Risk Pool v. Sigmundik,* 53 Tex. Sup. J. 770 (Tex. May 28, 2010).

In *Sigmundik,* a Texas health insurance risk pool appealed when the trial court refused to allocate any of the $800,000 settlement funds to it in a case in which it had intervened and established a right of subrogation for $336,874.71. The risk pool had paid the sums for the medical care of a man who was hurt in an oilfield explosion and later died of his injuries. The trial court denied the risk pool any recovery on

the basis that the decedent's estate and family had not been "made whole" by the settlement and therefore were entitled to all of the settlement proceeds. The risk pool argued that the express right to subrogation contained in the insurance policy was absolute and applied whether or not the other parties had been made whole. Reaffirming its decision in *Fortis Benefits v. Cantu*, 234 S.W.3d 642 (Tex. 2007), the *Sigmundik* court determined that the "made whole" doctrine has no application in a subrogation case based on a contractual right of subrogation.

E. *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740 (Dec. 11, 2009).

In *D.R. Horton*, a general contractor sought a defense and indemnity in a construction defect lawsuit as additional insured on its subcontractor's CGL policy. The insurer prevailed in the lower courts, arguing that it has no duty, under the eight-corners doctrine, to provide a defense or indemnity because the homeowners' petition in the underlying liability action did not implicate its named insured, the subcontractor that performed the allegedly defective work. D.R. Horton, the general contractor seeking coverage, argued for the adoption of an exception to the eight-corners doctrine to allow parties to introduce extrinsic evidence relating to coverage-only facts in the duty-to-defend analysis. The Texas Supreme Court refused to consider the extrinsic-evidence exception because the issue had not been properly reserved for appellate review.

However, the court went on to address and solidly reject the insurer's argument that because there was no duty to defend under the relevant pleadings, there was likewise was no duty to indemnify. In holding that there can be a duty to indemnify where there is no duty to defend, the court explained:

> The insurer's duty to indemnify depends on the facts proven 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. This is especially true when the underlying liability dispute is resolved before a trial on the merits and there was no opportunity to develop the evidence, as in this case. We hold that even if Markel has no duty to defend D.R. Horton, it may still have a duty to indemnify D.R. Horton as an additional insured under Ramirez's CGL insurance policy. That determination hinges on the facts established and the terms and conditions of the CGL policy.

Rehearing was denied in the case on December 11, 2009.

F. *Metro Allied Ins. Agency, Inc. v. Lin*, 53 Tex. Sup. Ct. J. 174 (Dec. 11, 2009).

In *Metro Allied*, a premium amount for CGL coverage with contractual liability coverage was quoted by the agent and received from the insured contractors. Said coverage was never procured, however. After the contractors' public works contract was terminated, the surety company completed the contract under the performance bond. The contractors settled with the surety and then sued the insurance company and agent in negligence and under the DTPA, alleging that the surety's indemnity claim would have been covered by the CGL policy, had it been issued. At trial, the contractors did not present any expert testimony or other evidence that a typical CGL policy would provide coverage for breach of an indemnity agreement under a performance bond.

In the absence of such evidence, the Court found no right of recovery established holding that the DTPA's producing cause standard contained a cause-in-fact element, and thus required more than simply a misrepresentation of coverage:

> The law is clear that misrepresentations about insurance coverage cannot, under the doctrine of estoppel, expand coverage provided in an insurance policy. [citations omitted]. An insurance agent's independent representations may affect his responsibilities to his client, but they cannot add to or alter the coverages of any insurance contract or provision. [citations omitted]. Therefore, Lin's testimony regarding McGlothlin's statements about coverage is no evidence that a contract, had one existed, would actually have covered his damages. There must be proof of an insurance policy that would cover the alleged injury.

G. *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248 (Tex. Oct. 30, 2009).

Chrysler represents a rare per curiam case where an opinion was rendered without the benefit of oral arguments. Therein, the issue was whether a "known-falsity" exclusion applied to defeat coverage for a corporation where the corporation's employees made defamatory statements against the claimants while knowing that the statements were false. Under the policy's "known-falsity" exclusion, coverage for defamation was excluded for statements made or directed by the insured with knowledge of their falsity. The intermediate appellate court held that the exclusion was inapplicable to the insured company because no corporate *officer* knew that the defamatory statements were false. The Texas Supreme Court, however, disagreed, holding that the exclusion applied because the employees' knowledge of the falsity of the defamatory statements must be imputed to the corporation because there was a finding that the employees involved – a general manager, a comptroller, and a used car sales manager - were corporate vice-principals. As such, the exclusion applied and the insured company took nothing against the insurer.

Rehearing was denied in the case on December 11, 2009.

II. <u>Notable Fifth Circuit Court Decisions</u>

A. *Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel LLC*, 2010 U.S. App. LEXIS 19561 (5th Cir. Tex. Sept. 21, 2010).

Rentech Steel addressed the issue of whether an insurance policy that excludes coverage for an "obligation" incurred under "any workers' compensation law" bars coverage for a judgment rendered in an employee's negligence action against an employer that did not subscribe to the Texas workers' compensation system. Because the Texas Worker's Compensation Act ("TWCA") imposes no obligation on a nonsubscriber to compensate an employee for injuries sustained due to the employer's own negligence, the Court found the exclusion wholly inapplicable. Alternatively, assuming *arguendo* that the exclusion was ambiguous, the Court found it reasonable to interpret the exclusion to exclude only mandatory benefit payments.

B. *Minter v. Great Am. Ins. Co.*, 2010 U.S. App. LEXIS 17985 (5th Cir. Tex. Aug. 27, 2010)

In *Minter*, the insurance issue before the Fifth Circuit was whether exemplary damages awarded in an underlying personal injury lawsuit against an intoxicated truck driver and its owner were insurable under Texas law. Applying the "two-step process" announced in *Fairfield Ins. Co. v. Stephens Martin Paving, L.P.*, 246 S.W.3d 653 (Tex. 2008), the Court held that they were not, as a matter of general Texas public policy, given that the accident represented the driver's third DWI conviction. The district court's judgment as to the excess insurer being liable for exemplary damages was reversed.

C. *Mid-Continent Cas. Co. v. Bay Rock Operating Co.*, 614 F.3d 105 (5th Cir. Aug. 4, 2010).

In *Bay Rock*, the Fifth Circuit agreed with the district court that appellant was in privity with its insured well driller, and, thus, was collaterally estopped from re-litigating the state court's finding that the well operator's insurer had a right of subrogation against the insured in a negligent blow out case. The underlying state lawsuit also established that the insured of the subrogee incurred losses and was awarded damages as a result. The subrogee's lack of an ownership interest in the well did not defeat any claim for coverage.

Because appellant failed to create a triable jury issue as to whether any of the damages awarded against its insured were because of physical injury to tangible property, the district court did not err in concluding that the damages were related to physical injury to tangible property and covered by the policies. Any argument as to application of an underground equipment limitation was waived. The district court did not err in its interpretation of the well control provisions; appellant's proposed interpretation would have led to absurd results. The control costs awarded were covered by the policies. Two other exclusions did not negate coverage because they were superseded by the oil and gas endorsement (the blowout endorsement).

Petition for review was denied in the case on April 23, 2010.

D. *Employers Mutual Casualty Company v. Bonilla,* 613 F.3d 512 (5th Cir. July 29, 2010).

In *Bonilla,* the question before the Fifth Circuit was whether a commercial auto policy was liable for a $1.8 million verdict against a business owner. The business was a Jolly Chef mobile catering truck. A cook was seriously burned after a pilot light ignited some combustible material on the truck that had been put on the floor to break-up accumulated grease. The cook was washing dishes on the truck at the time of the accident. The insurer took the position that no coverage existed for the claims. The auto policy afforded coverage for claims "caused by an accident and resulting from the ownership, maintenance or use of a covered auto." The Fifth Circuit examined whether the claim can be said to have arisen from the "use" of the truck. Eventually, the court concluded that the injuries did arise out of the "use" of the truck, explaining:

> There is nothing in the caselaw to suggest that Texas would interpret "use" under a business auto policy, in which the stated purpose of the vehicles being insured was for mobile catering, in a way that did not include the hazards that arise from maintaining the mobile catering equipment. Cleaning a mobile kitchen was not simply a speculative event that might conceivably occur, nor was the cleaning foreign to the vehicle's inherent purpose.

. . .

> We go no further than to hold, in what is a slight *Erie* guess but relying on substantial direction from the Texas courts, that a business vehicle policy covers the intended and identified uses of that business vehicle. The "injury-producing act" was cleaning the floor of the truck so that food could safely be prepared. The cleaning was a natural, expected, and necessary use of mobile catering Truck 219 and was covered by the Auto Policy.

E. *Amerisure Insurance Company v. Navigators Insurance Company,* 611 F.3d 299 (5th Cir. July 13, 2010).

In *Amerisure*, the Fifth Circuit addressed the viability of contractual subrogation claims among primary and excess insurers in light of its holding in *Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co.,* 236 S.W.3d 765 (Tex. 2007). The case involved a primary insurer's attempt to recover from an excess insurer $1 million it paid towards a settlement after the excess insurer pressured the primary insurer to tender its limits to get the underlying case against the mutual insured settled. The primary insurer paid its policy limits, but reserved the right to seek reimbursement. In the ensuing coverage litigation, it was determined that the primary insurer had no coverage obligations but that the excess insurer did owe coverage.

The excess insurer nonetheless argued that the primary insurer had no subrogation rights in light of the *Mid-Continent* case and, therefore, could not seek reimbursement. In finding in favor of the primary insurer, the *Amerisure* court "reject[ed] the overly broad view of *Mid-Continent's* subrogation exclusion" because that broad view would "effectively end contractual subrogation in Texas." Rather, the *Amerisure* court concluded that the existing case law did not preclude the primary insurer's subrogation claim against the excess insurer and that if coverage existed under the excess insurer's policy, the primary insurer was able to pursue reimbursement from the excess insurer.