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NOVEMBER 2018 TEXAS INSURANCE LAW UPDATE

FIFTH CIRCUIT HOLDS THAT MULTIPLE COLLSIONS CAUSED BY A RUNAWAY TRACTOR-TRAILER ARE A SINGLE ACCIDENT SUBJECT TO THE $1 MILLION PER ACCIDENT LIMIT IN A COMMERCIAL AUTO POLICY.

In *Evanston Insurance Company v. Mid-Continent Casualty*, --F.3d --, No. 17-20812, 2018 WL 6037507 (5th Cir. Nov. 19, 2018), the United States Court of Appeals for the Fifth Circuit addressed whether a multiple-vehicle crash caused by a runaway truck was a single occurrence under a commercial auto policy. The facts before the court were as follows.

Over a 10-minute period in Houston on November 15, 2013, a truck owned by Houston-based Global Waste Services LLC struck a Dodge Ram, a Ford F150, a Honda Accord, a toll plaza and a Dodge Charger. Two people, including the truck driver, died, and two others were injured, one very seriously. At the time of the accident, the Global truck was being driven by a Global employee who was driving erratically and lost control of the truck. In the ensuing litigation, Mid-Continent, which had issued a commercial auto insurance policy to Global with a $1 million per accident limit, paid out $1 million in settlement of one of the plaintiff's claims against Global. It then withdrew from the litigation, claiming exhaustion of its policy limit. Excess insurer Evanston Insurance then settled the remaining litigation for an additional $2.2 million.

Evanston subsequently filed suit in U.S. District Court in Houston seeking reimbursement from Mid-Continent for a portion of the payments Evanston made on Global's behalf, and the entirety of its defense costs. Evanston contended each separate impact between

another vehicle or object constituted a separate accident subject to separate liability limits, while Mid-Continent asserted that under Texas law there was only one accident because the various injuries stemmed from the truck driver's negligence.

The district court ruled in Evanston's favor, holding two accidents had occurred, and ordered Mid-Continent to pay Evanston about $1 million plus the costs of Evanston's defense. On appeal, the Fifth Circuit overturned the lower court concluding, "[t]he ongoing negligence of the runaway Mack truck was the single 'proximate, uninterrupted, and continuing cause' of all the collisions…The language of the contract provides that all injuries — no matter the number of vehicles involved or the number of claims made — arising from continuous or repeated exposure to substantially the same conditions are considered a single accident."

In reaching its conclusion, the Fifth Circuit reiterated what it previously recognized in a prior opinion: "While a single occurrence may result in multiple injuries to multiple parties over a period of time," "if one cause is interrupted and replaced by another intervening cause, the chain of causation is broken and more than one occurrence has taken place." If, on the other hand, the proximate cause for the injuries is continuous and unbroken, only one occurrence has taken place.

SAN ANTONIO COURT OF APPEALS CONCLUDES THAT UNDER THE FACTS BEFORE IT, AN EMPLOYEE'S HOME WAS NOT A LOCATION THAT COULD GIVE RISE TO A WORKERS' COMPENSATION CLAIM.

In *Martinez v. State Office of Risk Management*, --S.W.3d --, No. 04-14-00558-CV, 2018 WL 5808333 (Tex. App.—San Antonio Nov. 7, 2018, no pet. h.), the San Antonio Court of Appeals analyzed whether an employee injured while working at home was entitled to workers' compensation insurance. The facts of the case were undisputed.

Edna A. Martinez was employed by the Texas Department of Family and Protective Services as a caseworker. On Saturday June 9, 2001, Martinez was at home preparing for court hearings on the following Monday. She was seated at her kitchen table when she allegedly decided to retrieve a different pen from the other side of her kitchen. As she walked across the kitchen, she slipped and fell, breaking her shoulder and hitting her head in the fall. On Monday, June 11, 2001, she reported her injury and submitted a claim for workers' compensation benefits to the State Office of Risk Management (SORM), the claim administrator for state-agency employees. Her claim was denied on the grounds that she was not injured in the course and scope of her employment, was not engaged in the furtherance of her employer's business at the time of the injury, and had not established a causal connection between her injuries and her employment. Martinez appealed to the Texas Workers' Compensation Commission's Appeals Panel. The panel reversed the hearing officer's decision and rendered a decision that Martinez had sustained a compensable injury. According to the panel, Martinez's "injuries arose out of her employment because the employment had a causal connection with her injuries."

On appeal, the only issue before the San Antonio Court of Appeals was whether the employee's home was a location that could give rise to a worker's compensation claim. The court analyzed sections of the Texas Labor Code, noting: (1) Chapter 658 sets out the work hours required for salaried employees (not less than 40 hours a week), the regular office hours for state employees (8 a.m. to 5 p.m.), the possibility of staggered working hours, and the place where work shall be performed; and (2) Chapter 659 relates to how employees accrue compensatory time and overtime, how they accrue longevity pay, how they are paid and how often they are paid, and how their pay is deducted. Disagreeing with Martinez, the court found that these sections in the Labor Code did not conflict with the Texas Workers' Compensation Act and, therefore, limited a state employee's scope of employment by mandating that the state employee obtain prior written authorization before working at home. Because the undisputed evidence established Martinez did not obtain approval before working at home, she was not acting within the scope of her employment when she was injured and, therefore, did not sustain a compensable injury under workers compensation.

FORT WORTH COURT OF APPEALS UPHOLDS "ZERO DAMAGES" AWARD IN UM/UIM DISPUTE, AND IT FINDS THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN QUASHING AN INSURER REPRESENTATIVE'S DEPOSITION.

In *Blevins v. State Farm Mutual Automobile Insurance Company*, No. 02-17-00276-CV, 2018 WL 5993445 (Tex. App.—San Antonio Nov. 7, 2018, no pet. h.), the Fort Worth Court of Appeals addressed legal and factual sufficiency challenges to the jury's finding of zero damages, and it also addressed the trial court's exclusion of testimony. The facts of the case were as follows.

Williams Blevins was involved in a multi-car wreck on October 2, 2011, losing consciousness temporarily at the scene but coming to before being removed from his car. He was taken by ambulance to Texas Health Harris Methodist Hospital in Fort Worth, where he was evaluated and sent home several hours later with a pain reliever and an anti-nausea medication. Prior to the wreck, Blevins had been diagnosed with a seizure disorder and with "Severe Obstructive Sleep Apnea." An MRI taken three days after the wreck indicated no significant change from Blevins' January exam.

At least eight months after filing his lawsuit, and nearly two years after the accident, Blevins was referred by his counsel to Andrew Houtz, Ph.D., for a neuropsychological evaluation to "assess his current level of neuropsychological functioning, identify cognitive strengths and limitations, evaluate for residual cognitive deficits secondary to a closed head injury, and obtain additional psychological data for differential diagnosis and appropriate treatment planning." During the trial, Dr. Houtz told the jury that his previous review of Blevins's medical records had shown a diagnosis of a "severe concussion"[10] and included reported symptoms "consistent with that severe concussion since the time of this wreck." But on cross-examination, Dr. Houtz conceded that—

- he did not actually recall having seen any medical records describing Blevins's concussion as "severe";
- he had not seen the Texas Neurology records or Blevins's MRI results;
- although he had thought that Blevins had had some "brain bleeding" as a result of the accident, the records do not actually show that; and
- Dr. Houtz's recollection of Blevins's having had a "subdural hematoma or some type of bleed" in the space between the skull and the brain was also not supported by the medical records.

The jury found negligence and proximate cause in connection with one of the drivers of the other vehicle. The jury was not asked to compensate Blevins for any economic damages such as medical expenses or lost wages, and for each of the noneconomic-damages categories submitted to the jury, it returned a finding of zero damages.

The appellate court upheld the jury verdict, noting that during the underlying trial, Blevins did not put into evidence or seek to recover any out-of-pocket medical bills or repair costs, nor did he seek lost wages or recovery for any diminished earning capacity. Rather, his principal trial theory was that the wreck had caused a traumatic brain injury that had permanently diminished his cognitive abilities and affected his family relationships. The jury, therefore, was asked only about damages for past and future physical pain and mental anguish, past and future disfigurement, and past and future physical impairment. The court further noted that the voluminous medical records put before the jury referred here and there to a bump on Blevins's head and associated swelling, to a concussion that was not serious and that resolved quickly, and to a leg abrasion. This handful of objective yet relatively insignificant injuries were barely mentioned in testimony, and mostly in the cross-examination of Blevins's expert, who had not, until over a lunch break at trial, reviewed Blevins's medical records or known about his past concussions, seizures, depression, severe sleep apnea, and other medical issues. For these reasons, the court could not conclude the jury went against the great weight and preponderance of the evidence in such a way as to show a manifest injustice.

Also on appeal, the court addressed whether the trial court erred by quashing Blevins's trial subpoena for a State Farm representative to appear. Concluding the trial court did not err by quashing Blevins's trial subpoena, the court of appeals noted that evidence regarding UM/UIM coverage is not relevant to the underlying controversy being resolved by the jury and is best heard at a hearing after the verdict. The court, therefore, reasoned:

> [b]ecause it would have been improper for the jury to have heard much about Blevins's UIM coverage, and because applying its terms would have been a job for the trial court if Blevins had gotten a favorable jury verdict on damages, we disagree with Blevins that a State Farm representative should have testified at trial. His trial subpoena contained twelve categories of information, none of which bore on the sole issues for trial: (1) the relative liability of Olivia Head and Lesley Matos, and (2) Blevins's damages. Although Blevins argues that he should have been allowed to question a State Farm representative in his "breach of

> contract" case, he did not (yet) have any contract claims to pursue: State Farm would have breached a contract only if it refused to pay UIM benefits after their amounts were established, such as by a favorable jury verdict in this lawsuit. . . .

HOUSTON (14TH) COURT OF APPEALS HOLDS INSURER WAIVED ENFORCEMENT OF ANTI-ASSIGNMENT CLAUSES IN ITS INSUREDS' AUTOMOBILE INSURANCE POLICIES IN CONNECTION WITH GLASS REPAIR CLAIMS.

In *Safeco Insurance Company of America v. Clear Vision Windshield Repair, LLC*, -- S.W.3d --, No. 14-17-00103-CV, 2018 WL 6175914 (Tex. App.—Houston [14th Dist.] Nov. 27, 2018, no pet. h.), the Houston (Fourteenth) Court of Appeals addressed whether Safeco Insurance Company of America had waived enforcement of anti-assignment clauses in its insureds' automobile insurance policies with respect to glass repair claims. The facts of the case were undisputed.

Safelite, a third party administrator for Safeco, handled Safeco's insureds' claims of automobile glass damage nationwide. Safeco authorized Safelite to pay glass repair vendors directly. Despite having an exclusive third-party administrator, Safeco would also sometimes handle and pay directly any glass repair claims. During the underlying trial, a Safeco representative testified that Safelite does not have the authority to enforce an anti-assignment clause for any glass repair claim submitted to it for payment. He further testified that during his time at Safeco, he had never experienced the anti-assignment clause being enforced as to any glass repair claim.

Clear Vision is in the business of repairing chips in automobile windshields. Clear Vision conducts business inside automobile dealership repair shops. When a customer with a chipped windshield comes into a dealership where Clear Vision operates, a Clear Vision representative asks if the customer would like the windshield repaired. Clear Vision charges a flat rate of $150 to repair a chipped windshield. If the customer agrees to the repair and has insurance, Clear Vision verifies the insurance information from the customer's insurance card. Clear Vision does not confirm insurance coverage with Safeco before performing the repairs. Clear Vision makes the repair after the customer signs an assignment of his right to payment under the policy, as well as any cause of action he might have if the insurance company fails to pay. Once the repair is completed, Clear Vision submits an invoice to each customer's insurance company seeking direct payment for the repair.

According to Douglas Stroh, president of Clear Vision, Clear Vision has submitted thousands of glass repair claims to Safeco since 2011. Clear Vision does not have a contractual relationship with Safeco as a preferred provider or otherwise. As a result, for each windshield Clear Vision repairs, its first contact with Safeco is when it sends an invoice for the completed repair. Stroh estimated that when Clear Vision submits invoices directly to Safeco, Safeco pays those invoices about eighty-five percent of the time despite the lack of a contractual relationship between Clear Vision and Safeco. Safeco usually pays the full amount of the invoice. As to the

unpaid invoices, Safeco did not give the anti-assignment clause as the reason for non-payment. When Clear Vision submits invoices to Safelite, Safelite typically does not pay the full amount. According to Stroh, Safelite has never informed Clear Vision that it could not pay Clear Vision's invoices. Nor has Safelite raised the anti-assignment clause as a reason to not pay a Clear Vision invoice. Safeco does not dispute that it sometimes pays Clear Vision's invoices directly, but it asserts that it does so only as a convenience to its insureds.

Clear Vision repaired chips in the windshields of automobiles owned by individual appellees Elizabeth Dutson, Bruce Houck, Matthew O'Neill, and James McCubbin. It is undisputed that Safeco issued automobile insurance policies to these four individual appellees, the policies were in effect on the dates of loss and provided coverage for windshield repairs, and this coverage was not subject to a deductible. Each of the insureds' policies contained the following anti-assignment clause: "Your rights and duties under the policy may not be assigned without our [i.e., Safeco's] written consent." All four of the insureds signed documents assigning to Clear Vision their right to payment for the windshield repairs, as well as their causes of action in the event Safeco failed to pay for the repairs. It was undisputed that Safeco did not consent in writing to any of the insureds' assignments. It was also undisputed that Clear Vision did not contact Safeco seeking permission for an assignment of the insureds' policy benefits.

After Clear Vision had repaired the insureds' windshields, Clear Vision submitted invoices directly to Safeco for payment. The invoices included the assignments from the insureds. Safeco eventually paid Clear Vision $150 each on the invoices for the Dutson, Houck, and McCubbin repairs. Safeco did not pay the O'Neill invoice. The trial court found that Safeco rejected the O'Neill invoice because it did not include sales tax. Safeco did not notify Clear Vision that it was refusing to pay the O'Neill invoice because of the anti-assignment clause in O'Neill's policy.

On appeal, the dispositive issue was whether the trial court correctly concluded Safeco had waived enforcement of the anti-assignment clauses in its insureds' policies. The appellate court affirmed the trial court's ruling, noting that the record showed "that Safeco paid Clear Vision's invoices for the Dutson, Houck, and McCubbin repairs. Safeco's intentional conduct in paying Clear Vision for these repairs is inconsistent with Safeco's later claim that it owed Clear Vision nothing because it had not consented to Dutson, Houck, and McCubbin assigning Clear Vision their rights to payment under the policies." In addition, as to the O'Neill repair, the court noted that the Clear Vision invoice was rejected by Safeco because it did not include sales tax. Thus, because Safeco refused to pay on this ground, and because Safeco did not invoke the anti-assignment clause, the court of appeals concluded there was sufficient evidence to support the trial court's finding that Safeco had waived enforcement of the anti-assignment clause.

NOVEMBER 2018 MCS-90 UPDATE (FEDERAL COURTS)

MINNESOTA DISTRICT COURT CONCLUDES "SELF-INSURANCE" IS "OTHER INSURANCE" FOR PURPOSES OF MCS-90 AND, THEREFORE, MCS-90 WAS EXCESS TO THE "SELF INSURANCE".

In *United Financial Casualty Company v. Bountiful Trucking, LLC*, No. 17-5320, 2018 WL 5921010 (D. Minn. Nov. 13, 2018), the issue before the court was whether MCS-90 coverage was applicable when there was "self-insurance" available. The case arose out of a May 2016 collision between a tractor-trailer and a train in Callaway, Minnesota.

Defendant Biya Buta is the sole owner and operator of Defendant Bountiful Trucking, and was driving the tractor-trailer, a 2006 Kenworth, involved in the collision. At the time of the accident, he was working as an independent contractor and was hauling nearly 10,000 gallons of propane in a propane trailer owned by Defendant CHS Inc. and operated pursuant to CHS's federal motor-carrier operating authority. The collision caused an explosion, which in turn caused significant property damage and injured a firefighter, Defendant Chad Schouveiller. The other named Defendant, Jesse Sheldon, was the train's engineer.

Bountiful maintained liability insurance through Plaintiff United Financial Casualty Company. However, the 2006 Kenworth was not listed as an insured vehicle under the United policy. Moreover, according to United, its underwriting guidelines did not allow United to write policies for any vehicle hauling hazardous products such as propane.

Bountiful's independent contractor agreement with CHS required Bountiful to maintain insurance on the 2006 Kenworth, and to indemnify CHS from any loss resulting from Bountiful's intentional or negligent conduct and from Bountiful's failure to maintain insurance as the agreement required. CHS maintained insurance through Old Republic Insurance Company for independent contractor vehicles and does not dispute that Bountiful's 2006 Kenworth would be included under its Old Republic policy. United provided a defense to Buta and Bountiful in the state-court lawsuits under a reservation of rights, and Old Republic agreed to do the same. Notably, there was a $5 million dollar deductible on the Old Republic policy.

Bountiful's United policy contained a MCS-90 endorsement. The endorsement stated that United covers losses "regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route ... authorized to be served by the insured or elsewhere." CHS contended that the endorsement required United to provide coverage. United argued that, at most, the endorsement might require United to indemnify Bountiful as an excess carrier, but it does not require United to defend Bountiful. To that end, United sought summary judgment that Bountiful's policy provided no coverage for the claims in the underlying state-court lawsuits.

The sole issue before the district court was whether the federally required MCS-90 endorsement obligated United to insure Bountiful with respect to the underlying lawsuit. United contended (1) that the endorsement does not apply because Bountiful was operating under CHS's motor-carrier authority at the time of the accident, not its own, or in the alternative (2) United's coverage is excess of whatever insurance CHS maintained, which was sufficient to meet the federal minimum requirements. The district court agreed with United, reasoning that the purpose of the MSC-90 endorsement was to protect the public and ensure that there are funds available for recovery in the event of injury caused by a motor carrier. Thus, because there was "other coverage" available, United was only obligated to provide excess coverage to the extent that CHS's insurance was insufficient.