F | H | M | B | K

Fanning Harper Martinson Brandt & Kutchin

COVERAGE DEPARTMENT:
Jennifer Kelley
Direct Dial: 972-860-0304
jkelley@fhmbk.com
Kathryn Vaughan
Direct Dial: 972-860-0309
kvaughan@fhmbk.com
Mariam Shakir
Direct Dial: 972-860-0363
mshakir@fhmbk.com
Stephanie Pitel
Direct Dial: 972-860-0352
spitel@fhmbk.com

www.fhmbk.com

JANUARY 2021 TEXAS INSURANCE LAW UPDATE

AMARILLO COURT OF APPEALS HOLDS THAT INTENTIONAL ACT BASED ON MISTAKE OF FACT DOES NOT CREATE AN "OCCURRENCE"

In *Latray v. Colony Ins. Co.*, No. 07-19-00350-CV, 2021 Tex. App. LEXIS 168* (Tex. App. – Amarillo January 11, 2021), the Amarillo Court of Appeals concluded that an intentional act committed after relying on a mistake of fact did not constitute an "occurrence" under a liability policy.

The City of Kosse ("City") hired Clifton Boatright ("Boatright") to demolish an old high school. The agreement between Boatright and the City included Boatright's removal and disposal of debris resulting from the demolition. As required by the agreement, Boatright also secured liability insurance through Colony Insurance Company d/b/a Colony Specialty Insurance Company ("Colony"). David Garrett ("Garrett"), a friend of Boatright and a tenant on property owned by W.L. Roberts, asked Boatright for permission to use some of the debris for erosion control. Boatright mistakenly believed the property on which Garnett wished to place the debris belonged to Garnett. Neither Garnett nor Boatright sought Roberts' permission before dumping 40 tons of debris on the Roberts' property. Upon finding the debris on his property, Roberts filed suit against Boatright and others for illegal dumping and damage to his land. Roberts secured a judgment against Boatright, while the trial court also issued a Turnover Order under Section 31.002 of Texas Civil Practices and Remedies Code, appointing Michelle Latray

("Latray") as receiver to take possession of non-exempt property to liquidate for benefit of Boatright's judgment creditors. In accordance with the judgment against Boatright, Latray sought relief under Colony's policy issued to Boatright, yet Colony denied coverage, after which Latray filed suit against Colony for breach of contract, violation of the Deceptive Trade Practices Act ("DTPA"), violation of Section 541 of Texas Insurance Code, and breach of the common duty of good faith and fair dealing (the "underlying action"). Both Colony and Latray moved for summary judgment. As per Colony, Boatright's actions were intentional and therefore were not covered under the policy. Latray, however, argued that even though Boatright's conduct was intentional, Boatright was operating under a misconception that he had the authority to dump debris on Roberts' property, making the alleged negligence "accidental." The trial court found in favor of Colony and Latray appealed to the Amarillo appellate court, arguing that Boatright's intentional act of taking the debris to Robert's property and leaving it where Garrett directed constituted an "occurrence."

As to duty to defend, the appellate court sided with Colony, finding that there was no "occurrence" or accidental conduct alleged in the underlying action and therefore Colony owed no duty to defend Boatright in the underlying action. In reaching its decision, the court relied on *Curb v. Tex. Farmers, Ins. Co.*,[1] and ruled that two factors determined whether an insured's conduct was accidental (1) the insured's intent, and (2) the reasonably foreseeable effect of the insured's conduct. Therefore, considering that Boatright intended to move the debris to Roberts' property, leave it there, and because the damage to Roberts' property was the very presence of the debris at the property, the damages were a reasonably foreseeable result of Boatrights' intentional conduct, as the damages ordinarily flowed from such conduct. As such, there was no "occurrence" under Colony's policy. Also, contrary to Latray's contentions, the court held that the mere assertion of negligence was insufficient to trigger a duty to defend, finding that the duty depends on the allegations in the pleadings and the policy coverage, not the legal theories alleged.

With regard to Colony's duty to indemnify, the appellate court also found in favor of Colony. Relying on *Argonaut Sw. Ins. Co. v. Maupin*,[2] the appellate court found that Boatright intended to move the debris onto Roberts' property and the damages sustained were the consequence of the very presence of the debris. The court distinguished Boatright's actions from actions of those who intend to perform an act yet perform the act negligently, leading to an effect that would not have resulted had the act been performed as intended. Instead, the appellate court noted that no matter how carefully Boatright would have performed the act of dumping the debris, the same damages would have occurred. The fact that Boatright believed Garrett to be the owner of the land where he dumped the debris and that Garrett was using the debris for erosion control did not

[1] No. 11-03-00406-CV, 2005 Tex. App. LEXIS 4480 (Tex. App.—Eastland, June 9, 2005) (finding that where a group of high school kids strung fishing line around a courtyard intending to trip their friends, yet a teacher tripped and injured herself, there was no "occurrence" under the school kids' parents' homeowners' policy because the injury was of the type that would ordinarily follow from the students' conduct, even where students were not targeting the teacher).
[2] 500 S.W.2d 633 (Tex. 1973).

change the fact that Boatright acted intentionally, even if he did not intend the result. Therefore, the court held that Colony owed no duty to indemnify Boatright in the underlying action.

WESTERN DISTRICT OF TEXAS FINDS NO CONTRACTUAL DUTY TO PAY UIM BENEFITS PRIOR TO JUDGMENT AGAINST TORTFEASOR'S LIABILITY AND DETERMINATION OF UNINSURED STATUS

In *Vasquez v. Allstate Fire & Cas. Ins. Co.*, No. SA-20-CV-01300-JKP, 2021 U.S. Dist. LEXIS 2635 (W.D. Tex. January 6, 2021), the Western District of Texas concluded an underinsured motorist ("UIM") claim is not viable prior to determination of tortfeasor's liability.

Eva Vasquez ("Vasquez") was involved in a motor vehicle accident where an uninsured driver, Heriberto Dimas ("Dimas"), caused Vasquez' bodily injury. Vasquez was insured under an automobile policy provided by Allstate Fire and Casualty Insurance Company ("Allstate"). When Vasquez submitted a claim for UIM coverage, Allstate denied payment. Vasquez then sued Allstate for breach of contract, breach of good faith and fair dealing and violation of Title 5 of the Texas Insurance Code. In addition, Vasquez sought declaratory relief under Chapter 37 of the Texas Civil Practice and Remedies Code. Allstate filed a motion to dismiss Vasquez' claims for failure to state a cause of action under Federal Rules of Civil Procedure Rule 12(b)(6), except Vasquez' request for declaratory relief. Allstate argued that Vasquez failed to plead facts sufficient to establish her entitlement to UIM benefits and Allstate had no duty to pay such benefits until Vasquez obtained a judgment establishing Dimas' liability and underinsured status, as well as the amount of any recoverable damages.

The Western District of Texas held that an insured' legal entitlement to receive UIM benefits arose upon obtaining a judgment establishing the alleged tortfeasor's liability and underinsured status. The mere request for UIM benefits or the filing of suit against the insurer did not trigger the insurer's contractual duty to defend. The *Vasquez* court further recognized that the insured has two options: 1) in order to determine liability of the uninsured motorist, the insured may obtain a judgment against the tortfeasor, or 2) the insured may litigate UIM coverage with the insurer –yet, the proper channel to bring such claims is through a declaratory judgment action, *not* a breach of contract claim. Considering that Vasquez did not allege that she obtained a judgement establishing Dimas' liability, the Western District held that Vasquez' claims based on Allstate's failure to pay UIM benefits were premature.

Additionally, the Western District dismissed Vasquez' claims, *sua sponte*, for lack of subject matter jurisdiction, holding that the claims were not ripe for adjudication inasmuch as Vasquez' purported injury was dependent on establishing Dimas' liability, determination of damages, and Allstate's subsequent denial of payment, none of which had occurred. However, Vasquez' request for declaratory relief with respect to UIM coverage was preserved.

SOUTHERN DISTRICT OF TEXAS DECLINES TO APPLY THE *GRIFFIN* EXCEPTION

In *AIG Prop. Cas. Co. v. Schultz*, CA No. H-20-3213, 2021 U.S. Dist. LEXIS 9844*, (S.D. Tex. January 19, 2021), the Southern District of Texas concluded duty to indemnify was not justiciable although no duty defend on strict eight corners analysis because facts could be developed that would trigger a duty to indemnify.

AIG Property Casualty Company ("AIG") provided an excess insurance policy to John Schultz ("Schultz"). On October 29, 2019, Schultz was involved in an automobile accident that allegedly injured John and Ambrie Garcia, after which the Garcias sued Schultz in state court, alleging that he negligently caused the accident and sought over $1million in damages (the "*Garcia* action"). While the *Garcia* action was pending, AIG commenced a declaratory judgment action in the Southern District of Texas against Schultz, seeking a declaration that the AIG policy did not provide coverage for any damages that arose out of Schultz' ownership, maintenance, or use of the auto with respect to the *Garcia* action or any other claims arising out of Schultz' October 29, 2019 accident. AIG, therefore, argued that it owed not duty to defend or indemnify Schultz in the *Garcia* action. Specifically, AIG relied upon an exclusionary provision in its policy, according to which there was no coverage for liability arising out of ownership, maintenance, use, loading or unloading of any auto that was not covered by any underlying insurance or not listed on the Declarations Page of AIG's policy. AIG pointed out that there were no autos listed on AIG's Declarations Page. Schultz, however, moved for dismissal of the declaratory judgment action, arguing that AIG's duty to indemnify was not justiciable because Schultz had not been held legally liable in the *Garcia* action. The Southern District agreed with Schultz and granted his motion to dismiss AIG's declaratory judgment action.

In reaching it decision, the Southern District noted that the petition in the *Garcia* action alleged that the Garcias were driving a 2017 Ford Explorer and Schultz was operating a 2015 Chevrolet Suburban when Schultz suddenly and without warning struck the back end of Garcias' [vehicle]. The court held that these facts were not sufficient to show whether the narrow exception of *Griffin*[3] applied, because coverage was not impossible. Application of the eight-corners rule left open the possibility that some set of facts could be developed in the *Garcia* action that would trigger a duty to defend. The court noted, for example, that AIG policy's exclusion did not apply to rented, borrowed, or newly acquired autos. Considering that neither Garcias' petition nor the AIG policy established ownership of the 2015 Chevrolet Suburban, the possibility remained that said vehicle may have been rented, borrowed or newly acquired. Therefore, the facts alleged in the *Garcia* action potentially asserted a claim for coverage under the AIG's insurance policy, and

[3] In *Farmers Texas County Mutual Insurance Co. v. Griffin*, 955 S.W.2d 81, 83 (Tex. 1997) the Texas Supreme Court held that the duty to indemnify is justiciable before the insured's liability is determined in liability suit when the insurer has no duty to defend and the same reasons that negate the duty to defend likewise negate the possibility that the insurer would have a duty to indemnify.

the duty to defend was not conclusively negated. The court further noted that AIG did not allege that any judgment had been rendered against Schultz, or any settlement reached, in the *Garcia* action, or that Schultz was legally obligated to pay any sums as damages which AIG policy would cover. Therefore, the court held that any ruling addressing AIG's duty to indemnify for damages Schultz may become obligated to pay would be hypothetical and would constitute an advisory opinion by the court. As such, the court held that AIG failed to state a claim for which relief could be granted and AIG's request for declaratory relief was subject to dismissal for lack of subject matter jurisdiction.

SOUTHERN DISTRICT OF TEXAS REJECTS AN INSURED'S CLAIM UNDER PROMPT PAYMENT STATUTE FOR FAILING TO SATISFY HIS BRUDEN OF SHOWING INSURANCE CARRIER HAD RECEIVED ALL REASONABLY REQUESTED INFORMATION AND DOCUMENTATION

In *Caramba, Inc. v. Nationwide Mut. Fire Ins. Co.*, CA No. H-19-1973, 2021 U.S. Dist. LEXIS 14113, (S.D. Tex. January 26, 2021), the Southern District of Texas held that an insured had not satisfied the elements for its claim pursuant to §542.08 of the Texas Insurance Code.

Caramba Inc d/b/a Pueblo Viejo ("Caramba") owned a commercial property, a restaurant in Porter, Texas, for which it had insurance from Nationwide Mutual Fire Insurance Company ("Nationwide") from October 26, 2016 to October 27, 2017. On June 26, 2018, Caramba filed a claim under Nationwide's policy ("Policy") for wind damage and interior water damage to the restaurant resulting from Hurricane Harvey in August 2017. Nationwide contacted Caramba the following day and requested additional information. On July 9, 2018, Nationwide inspected the restaurant. On July 13, 2018, Nationwide engaged Stephens Engineering Consultants, Inc. ("Stephens") to investigate the purported damages. Following its inspection of the restaurant, on July 27, 2018, Stephens provided a written report on August 10, 2018, opining that the restaurant did not sustain any wind damage from Hurricane Harvey. As a result, on August 17, 2018, Nationwide denied coverage. Caramba then submitted additional information, including an estimate from DELK, LLC ("DELK") showing that the damages amounted to $420,612.87. On February 9, 2019, Nationwide reaffirmed its denial of coverage. Caramba subsequently filed a lawsuit against Nationwide seeking payment for the purported damages. On February 14, 2020, Caramba's damages expert, Kevin Funsch ("Funsch") opined in his expert report that damages to Caramba's restaurant amounted to $190,088.93, far less than DELK's estimate.

Nationwide moved for summary judgment on Caramba's breach of contract and extra-contractual claims. The Southern District of Texas denied summary judgment on Caramba's breach of contract claim, yet dismissed all extra-contractual claims against Nationwide. Caramba filed a motion for reconsideration as to dismissal of its claim pursuant to §542.058 of the Texas Insurance Code ("§542.058 claim"). However, the Southern District again ruled in favor of Nationwide and dismissed Caramba's request for reconsideration.

In its motion for summary judgment, Nationwide had argued that Caramba could not show that Nationwide wrongfully rejected the claim or otherwise delayed payment. Caramba, however, in its response, did not counter Nationwide's argument and did not address the §542.058 claim. The court noted that, in its motion for reconsideration, Caramba correctly argued that §542.058 did not require any predicate of a bad faith finding, as §542.058 only required liability under the policy and failure to comply with the timing requirements. The Southern District held that in order to establish a §542.058 claim, the insured must establish that: 1) the insured made a claim under an insurance policy, 2) the insurer is liable for that claim, and 2) the insurer failed to comply with the timing requirements of the statute. Noting that §542.058 requires an insurer to make a payment within 60 days of receiving all items, statements, and forms reasonably requested and required, Caramba had the burden to raise a genuine issue of material fact as to when Nationwide received all items, statements, and forms reasonably requested and required. The court noted that Caramba did not cite to any evidence showing when Nationwide received all items, statements, and forms reasonably requested and required. Even though Caramba argued that it alleged in its complaint that it sent a letter to Nationwide on December 3, 2018, the Southern District held that Caramba was required to go beyond the pleadings and designate specific facts to defeat summary judgment. In its reply papers to its motion for reconsideration, Caramba pointed to evidence showing that August 15, 2018 was the date Nationwide had all necessary information to make payment. However, the Southern District did not allow Caramba to rely upon same, as Caramba missed its opportunity to do so while initially opposing Nationwide's summary judgment motion. The court further noted that, undisputedly, after August 15, 2018, Plaintiff submitted DELK's report valuing the damages at $420,612.87, and then subsequently Plaintiff's own expert opined that the damages amounted to $190,088.93. Therefore, Plaintiff failed to show a date on which nationwide had all information necessary to decide the claim and as such, Plaintiff's motion for reconsideration of its §542.058 claim was denied.