



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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COVERAGE FOR EXEMPLARY DAMAGES VIOLATE TEXAS PUBLIC POLICY UNDER AN UMBRELLA POLICY FOR AN AUTO ACCIDENT

Last Friday, a three-judge panel of the Fifth Circuit applied the Texas Supreme Court's decision in *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 655 (Tex. 2008) to determine that coverage was not provided for exemplary damages awarded in an auto accident suit. *Minter v. Great Amer. Ins. Co.*, 2010 WL 3377639 (5th Cir. Aug. 27, 2010) (slip opinion). In its decision, the parties conceded that the policy allows for coverage for punitive damages, and that the Texas Legislature had not made a public policy decision relevant to the case. The panel turned to the facts of the case to determine whether the coverage should be available under Texas general public policy.

The accident represented the insured's third DWI conviction. The insured had admitted that he was a "danger to the folks on the highway" and that it was "possible someone might get hurt." Under the facts presented, the panel held that Texas public policy prohibits the insurer from indemnifying the \$1,650,000 exemplary damages award.

CO-PRIMARY INSURANCE CARRIER BOUND BY DECLARATORY JUDGMENT AGAINST COMMON INSURED BY ANOTHER CO-PRIMARY CARRIER

In a case of first impression, the Austin Court of Appeals decided on Friday that an insurance company was in privity with its insured such that a declaratory judgment entered against its insured by a co-primary carrier was binding against other carriers. *Truck Ins. Exch. v. Mid-Continent Cas. Co.*, ___ S.W.3d ___, 2010 WL 3370517 (Tex.App.—Austin Aug. 27, 2010). Truck and Mid-Continent had a common insured. The insured was sued for damages relating to a construction defect, and submitted the claim to both carriers for a defense. Truck defended and Mid-Continent refused. Mid-Continent filed an action in federal court based on diversity to have its obligation to the insured determined. The federal court determined that Truck was not a necessary party and went on to enter a declaratory judgment that Mid-Continent's policy did not provide coverage. While the federal action was pending, Truck filed a declaratory judgment in state court against Mid-Continent seeking a determination of Mid-Continent's obligation to their common insured and reimbursement for defense costs. Mid-Continent defended arguing that Truck could not seek recovery against co-primary insurers, and that the federal decision was preclusive.

In its decision, the Austin appellate court first considered the preclusive effect of the federal coverage decision. In doing so, the court applied Texas res judicata law – a prior final judgment by a court of competent jurisdiction, identity of the parties or privity, and a second action based on the same claims that

could have been raised in the first action. The court found all three factors to be present, holding that the federal decision was preclusive.

The court went on to consider whether Truck was barred by the Texas Supreme Court's decision in *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765 (Tex. 2007). In holding that Truck was barred, the Austin appellate court rejected the Fifth Circuit's analysis in *Trinity Universal Ins. Co. v. Employers Mut. Cas. Co.*, 592 F.3d 687 (5th Cir. 2010).

TEXAS SUPREME COURT REVISITS PROXIMATE-CAUSE JURY CHARGE IN WORKERS COMPENSATION CASE FOR FIRST TIME SINCE 1943, AND DETERMINES THAT FEE-SHIFTING ATTORNEY'S FEES PROVISION IS QUESTION FOR JURY

Also on Friday, the Texas Supreme Court addressed three issues of first impression in a workers compensation carrier's challenge to an award of death benefits under the Texas Workers Compensation Act. *Transcontinental Ins. Co. v. Crump*, ___ S.W.3d ___, 2010 WL 3365339 (Tex. Aug. 27, 2010). Faced with three issues, the court determined: (1) that expert testimony based on differential diagnosis is reliable; (2) that the trial court's omission of but-for component in a jury charge was incorrect; and (3) that an insurer carrier is entitled to have the disputed reasonable and necessary attorneys fees determined by the jury. The court reversed and remanded the case for a new trial.

In reaching its determination that an expert can be reliable on differential diagnosis, the court applied the standard threshold for examining expert witness testimony. The court subjected the testimony to the *Robinson* and *Gammill* analyses. While the court noted that not all factors are applicable, the court concluded that sufficient factors supported the testimony for it to be reasonable for a jury to rely on it.

Looking at the second issue, the court noted that it had not addressed the issue for producing cause in a jury charge in a workers compensation case since 1943. The court noted that its jurisprudence regarding producing cause had developed over the years, including its recent product liability case, *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 35 (Tex. 2007). The court determined that the test announced in *Ledesma* – a substantial factor in bringing about the injury or death and without which the injury or death would not have occurred – applies in workers compensation cases.

Lastly, the court considered whether the insurer is entitled to have the claimant's reasonable and necessary attorney's fees determined by a jury. The trial court had refused to submit the issue to the jury and determined the award. Turning to the language of Texas Labor Code section 408.221 (c), the court determined that the statute was silent on the issue of judge-jury analysis. As both sides presented a reasonable interpretation of the statute's language, the court determined that the statute was ambiguous. In reviewing other similar fee-shifting statutes and the general rule that attorney's fees are a jury question, the court held that section 408.221(c) must also be submitted to the jury.

AWARD OF ATTORNEY'S FEES MANDATORY WHEN PLAINTIFF FAILS TO TIMELY SERVE EXPERT REPORT IN HEALTHCARE LIABILITY LAWSUIT

In another case of first impression issued on Friday, the Texas Supreme Court determined that an award of attorney's fees in medical malpractice cases whether the plaintiff failed to timely serve an expert report is mandatory. *Garcia v. Gomez*, ___ S.W.3d ___, 2010 WL 3365341 (Tex. Aug. 27, 2010). In that decision, the court reviewed the statutory language to determine that the award was mandatory. The court further noted that the defendant doctor's attorney had testified regarding a reasonable and necessary amount of attorney's fees in the case, \$1,200. The dissent argued that there was no evidence that any fees had been incurred, which is also a requirement under the statute.

MEDICAL BENEFITS REIMBURSEMENT RULE AS APPLIED BY DIVISION OF WORKERS COMPENSATION VALID

In an opinion issued on Thursday, the Austin Court of Appeals took on another issue of first impression, upholding the validity of rule 134.1 of the Texas Administrative Code regarding medical benefits reimbursement. *Vista Healthcare, Inc. v. Texas Mut. Ins. Co.*, __ S.W.3d __, 2010 WL 3370530 (Tex. App.—Austin Aug. 26, 2010). The case involved administrative actions of the Division and its predecessor agency dating back to 2001. And, since other insurance entities had been engaged in similar disputes, they intervened in the action along with the Division. Vista operated an ambulatory surgical center in Houston and, in one instance, had billed the workers' compensation carrier \$5,643.21, for which it was reimbursed \$397.80. Thus, Vista challenged the reasonableness of the reimbursement scheme under the rule and the statutes. In its decision, the Austin appellate court gave deference to the Division's interpretation of its own rule, holding that the rule and its application were valid.

WORKERS COMPENSATION CARRIER ESTABLISHES THAT CONFLICTING MEDICAL TESTIMONY PREVENTS IMPOSITION OF BAD FAITH LIABILITY BECAUSE LIABILITY NOT REASONABLY CLEAR AS BONA FIDE DISPUTE EXISTED

On Wednesday, the San Antonio Court of Appeals considered whether Texas Mutual had established a defense to a bad faith lawsuit brought by a workers' compensation claimant after Liberty Mutual challenged the claimant's "extent of injury" through judicial review and determination by a jury. *Durst v. Texas Mut. Ins. Co.*, 2010 WL 3332198 (Tex. App.—San Antonio Aug. 25, 2010) (not reported). By summary judgment motion, Texas Mutual sought to establish its defense to the bad faith lawsuit through evidence that conflicting medical opinions existed about the extent of injury. In response, Durst asserted his own evidence that Texas Mutual's position was a "sham" and liability had become reasonably clear. Here, the court found that there was no evidence that any of the medical testimony presented by Texas Mutual was not objectively prepared or that reliance on the information was unreasonable.

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