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SURVIVABILITY OF DTPA AND INSURANCE CODE CLAIMS

Last week, a Federal District Court judge in the Northern District of Texas had the opportunity to address the survivability of DTPA and Insurance Code claims following the death of an insured. In *Launius v. Allstate Insurance Company*, 2007 WL 1135347 (April 17, 2007), Judge Boyle determined that DTPA and Insurance Code claims do <u>not</u> survive an insured's death.

In *Launius*, the insured, Glasgow, sustained a first party property loss in a fire to his home in January 2002. Glasgow filed his proof of loss with Allstate in May 2002. Two years later, in May 2004, Allstate denied the claim. Allstate's denial letter explained that the denial was based on the evidence and information collected by Allstate indicating that the fire was intentionally set by Glasgow or someone else at his direction. The letter also stated that certain statements made by Glasgow violated the policy's Concealment or Fraud Clause. Subsequently, Glasgow died in March 2005, almost ten months after Allstate's denial of claim. Thereafter, in January 2006, the administrator of Glasgow's estate, Launius, filed suit against Allstate. Launius' suit asserted a breach of contract claim and alleged violations of the DTPA and Texas Insurance Code under §541.060. The parties filed cross-motions for summary judgment: Launius sought summary judgment on all of his affirmative claims while Allstate sought partial summary judgment only as to the extra-contractual claims under the DTPA and Insurance Code.

Allstate argued that Launius lacked standing to bring the claims under either the DTPA or the Insurance Code because any causes of action Glasgow may have had under those provisions were extinguished upon Glasgow's death. The Court first noted that neither the DTPA nor the Insurance Code make provision for the survivability of a decedent's cause of action. The Court also noted that "the Texas Supreme Court has avowedly sidestepped any discussion of the survivability of DTPA damages" and the intermediate appellate courts are split on the issue.

The Court began its analysis by examining both *Thomes v. Porter*, 761 S.W.2d 592 (Tex. App. – Fort Worth 1988, no writ) and *First National Bank of Kerrville v. Hackworth*, 673 S.W.2d 218 (Tex. App. – San Antonio 1984, no writ). Judge Boyle noted that *Thomes* and *Hackworth*, though coming to different conclusions, "offer the most thorough analysis" of this issue. Notably, both opinions recognized that the common law provides the applicable rule of decision where, as with the DTPA, a statute fails to specifically address the survivability of a cause of action.

Next, the Court noted that the *Thomes* court focused on the nature of a DTPA cause of action. The court noted that the DTPA is a creature of the legislature and represents an amalgam of common law fraud, contracts, and tort considerations. The *Thomes* court noted that under the common law, actions for breach of contract and for the wrongful acquisition of property by fraud or deceit survived the death of either party. The court then concluded that a cause of action under the DTPA should survive the death of the consumer.

The Court then contrasted *Thomes* with *Hackworth*. The *Hackworth* court focused on the nature of remedies afforded by the DTPA. First, it recognized the basic rule under the common law that actions primarily affecting property and property rights survived the death of the aggrieved party whereas actions asserting purely personal rights did not. Next, the court noted the right to recover punitive damages is purely a personal right. It also found that an award of treble damages and attorneys' fees, available under the DTPA, is punitive in nature. Based on these basic premises, the *Hackworth* court concluded that an action under the DTPA involves personal rights that, under the common law rule, do not survive the death of the consumer.

Judge Boyle then reconciled *Hackworth* with the Texas Supreme Court case of *PPG Industries, Inc. v. JMB/Houston Centers Partners Ltd. Partnership*, 146 S.W.3d 79 (Tex. 2004). *PPG Industries* addressed the assignability of DTPA claims, and noted that assignability issues are "related but sometimes distinct" to the survivability question. In holding the DTPA claims are not assignable, the Supreme Court followed the analytical path taken by the *Hackworth* court. That is, the *PPG Industries* Court noted that the DTPA is silent as to whether claims brought under that statute are assignable, and the Court relied upon the basic common law principle holding that property-based and remedial claims were assignable while claims that are personal and punitive in nature are not. Notably, the Supreme Court acknowledged that the DTPA embraces many common law causes of action, including breach of contract, fraud and misrepresentation. Akin to *Hackworth*, the Supreme Court focused on the nature of the remedies available under the DTPA in holding that a DTPA claim was personal and not assignable. The Supreme Court held "the personal and punitive aspects of DTPA claims cannot be squared with a rule allowing them to be assigned as if they were mere property." This *Launius* Court then noted if "DTPA claims cannot be assigned because of their personal and punitive attributes, then this Court fails to see how such claims can survive the death of a consumer given the common law rule holding that actions to vindicate personal rights terminate with the death of the aggrieved party."

In conclusion, the Court held that extending the holding of *PPG Industries* to the survivor context is warranted by Texas law. In short, based on an extension of *PPG Industries* and on *Hackworth* and other comparable intermediate appellate cases, the *Launius* Court determined that the Texas Supreme Court, if confronted with the issues raised, would find that a consumer's cause of action under the DTPA does <u>not</u> survive the death of the consumer and cannot be brought by a representative of the consumer's estate.

Next, the Court addressed the issue of whether the same analysis applies to claims under the Texas Insurance Code. The *Launius* Court found only two cases addressing the survivability issue in the Insurance Code context: (1) *Mendoza v. American National Insurance Company*, 932 S.W.2d 605 (Tex. App. – San Antonio 1996, no writ); and (2) *Great American Insurance Company v. Federal Insurance Company*, 2006 WL 2263312 (Aug. 8, 2006). *Mendoza* relied upon *Hackworth* in its determination that claims under the Insurance Code do not survive and cannot be brought by a representative of the decedent's estate. *Great American* relied upon the reasonable extension of *PPG Industries* to hold that claims under the Insurance Code are personal and punitive in nature and do not survive the insured's demise. Accordingly, the *Launius* Court held that Insurance Code claims do <u>not</u> survive the insured's death, cannot be brought by the a personal representative of the insured, and granted summary judgment to Allstate on its extra-contractual claims.

DOES MCS-90 REQUIRE EXCESS CARRIER TO "DROP DOWN" DUE TO INSOLVENT SELF-INSURED?

In *Wells v. Gulf Insurance Company*, 2007 WL 1002137 (April 4, 2007), the Fifth Circuit recently addressed whether the MCS-90 requires an excess insurer to drop below its liability floor and pay a judgment when the underlying self-insured is insolvent. Although the district determined that the terms of the MCS-90 so provided, the Fifth Circuit reversed, holding that the MCS-90 imposes no such obligation.

The Court began its analysis by examining what the MCS-90 is and its terms. Specifically, the Court noted the Motor Carrier Act of 1980 and its implementing regulations require carriers to demonstrate that they are in some way insured against damage they may cause. A carrier can fulfill its responsibility by (1) a form MCS-90 endorsement attached to a contract of insurance; (2) a surety bond; or (3) self-insurance. The insured in this case, BTI, satisfied the Act through self-insurance up to a $1 Million. BTI then entered into excess insurance contracts.

Jason Wells was injured in an accident involving a truck that BTI operated. Wells sued BTI and obtained a $417,771 judgment, but BTI's bankruptcy thwarted execution directly against BTI. Wells then tried to collect the judgment from Reliance, BTI's first layer excess, but Reliance was insolvent. Finally, Wells sued Gulf. Gulf's excess insurance contract with BTI contained the MCS-90 endorsement, which the Act's regulations prescribe when an insurance contract is a carrier's method for satisfying the $1 Million minimum financial responsibility requirement, but which was unnecessary because of BTI's self-insurance. Wells' theory of liability was that the endorsement's language placed Gulf in the position of a surety because it was the first solvent insurer, and therefore it was liable for the entire judgment.

The Court then examined the express terms and conditions of the MCS-90 endorsement. In reliance upon the verbiage of the MCS-90 endorsement, Wells argued Gulf was obligated to pay the judgment because it was the first solvent insurer of any kind, primary or excess. The district court agreed and granted Wells summary judgment.

In its holding, the Fifth Circuit in *Wells* noted the district court relied primarily upon public policy considerations in holding that the endorsement's language purported to excise any provision that would limit recovery by an injured third party renders an excess insurer's policy primary as a matter of law when it is the first solvent insurer. The Fifth Circuit noted that no federal public policy would compel the district court's construction because the Act allows for self-insurance and does not require the MCS-90 in this case.

Notably, the MCS-90 is only required when an insurance policy is *used to satisfy the Act*. Federal public policy appears unconcerned with the possibility of an insolvent self-insured because the only assurance the regulations require is the Federal Motor Carrier Safety Administration's satisfaction that the entity is qualified to provide such protection. It necessarily follows that under this scheme there may be circumstances in which an injured party will not be able to recover from a self-insured.

Also, the Court relied upon the express terms of the MCS-90 wherein the endorsement specifically retained the policy's liability limits – that is, the policy's monetary parameters. What the endorsement altered were the coverage limits, that is, vehicles and persons insured, conduct insured against, and the like. The retention of the limits of liability clause can have no meaning at all if the surrounding verbiage is read to excise the policy's applicable limits. Accordingly, the excess carrier had no duty to drop down and satisfy Wells' judgment against BTI.

INDEPENDENT CONTRACTOR DOES NOT COME WITHIN THE PARAMETERS OF THE EMPLOYER'S LIABILITY EXCLUSION

The Court in *Evanston Insurance Company v. McChristian*, 2007 WL 950391 (March 26, 2007), held that an independent contractor did not come within the purview of the Employer's Liability Exclusion. Thus, the Employer's Liability Exclusion did not apply and did not preclude coverage for bodily injury claims asserted against the insured by its independent contractor.

UIM OFFSET NEED NOT BE PLED AS AN AFFIRMATIVE DEFENSE

In *Maspero v. Safeco Lloyds Insurance Company*, 2007 WL 949638 (March 30, 2007), the Tyler Court of Appeals recently addressed the issue of whether, in a case to recover UM benefits, an offset of liability coverage benefits paid by the tortfeasor must be plead as an affirmative defense or may be applied as an element of the insured's cause of action. Maspero argued the insurer must plead and prove its entitlement to an offset of payments received from the tortfeasor. Safeco argued Maspero failed to present evidence that the tortfeasor who caused the collision was actually underinsured, a required element of a UM claim. Therefore, Safeco argued, Maspero was not entitled to any damages and Safeco did not need to plead and prove offset.

The Tyler Court noted it is a plaintiff's burden in a UM claim to prove: (1) an insurance contract existed under which the insured had UM coverage; (2) the damages were covered damages; (3) the damages were proximately caused by the negligent act or omission of another driver; (4) the negligent driver was uninsured or underinsured; and (5) all other applicable policy provisions have been satisfied. Accordingly, it was Maspero's burden to put on evidence to support each of these elements at trial. Where the insured fails to put on evidence that the other driver was uninsured or underinsured, the insured has failed to satisfy the requisite elements of the insured's cause of action. Further, where the amount awarded by the jury is less than the amount actually recovered by the insured from the tortfeasor, such issue goes to whether the tortfeasor was "uninsured" or "underinsured" as opposed to any offset, and does not need to be pled or proved as an "offset."