Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

SEPTEMBER 10, 2013

FIFTH CIRCUIT CERTIFIES "ADDITIONAL INSURED BASED ON SERVICE CONTRACT" QUESTIONS TO SUPREME COURT OF TEXAS

Applying Texas law, the Fifth Circuit recently concluded that when a service provider agrees to secure insurance for an additional insured and to indemnify them for certain claims, the terms of the insurance policy determine the insurer's obligations which may not be limited to those stated in the indemnity provision. *In re Deepwater Horizon v. Transocean Offshore Deepwater Drilling, Inc.* 2013 WL 776354 (5th Cir. La. March 1, 2013), (*See also Texas Insurance Law Newsbrief*, March 11, 2013). Last week on rehearing, however, the court acknowledged important and determinative questions of Texas law for which there is no controlling Texas Supreme Court precedent and withdrew its earlier opinion in order to certify two questions to the Supreme Court of Texas.

The Fifth Circuit observed: "The Texas Supreme Court has never recognized a sophisticated insured exception to the general rule of interpreting insurance coverage clauses, nor has it ever indicated *contra proferentem* would not apply in construing these clauses." Furthermore: "it is possible that such an exception may be deemed appropriate in a case like this, where all the parties involved are highly capable contractors." They continued:

On the one hand, the facts here indicate Insurers were not involved in drafting the Drilling Contract, and thus construing ambiguities in that contract against them might be inappropriate. But on the other, the Insurers were involved in drafting the umbrella policy language at issue, and the failure of that policy language to limit coverage in underlying "Insured Contracts" to the liabilities assumed by the named insured in those contracts is part of what ails the Insurers now.

Accordingly, the Fifth Circuit certified the following questions as issues of first impression to the Supreme Court of Texas:

1. Whether *Evanston Ins. Co. v. ATOFINA Petrochems., Inc.*, 256 S.W.3d 660 (Tex. 2008), compels a finding that BP is covered for the damages at issue, because the language of the umbrella policies alone determines the extent of BP's coverage as an additional insured if, and so long as, the additional insured and indemnity provisions of the Drilling Contract are "separate and independent"?

2. Whether the doctrine of *contra proferentem* applies to the interpretation of the insurance coverage provision of the Drilling Contract under the *ATOFINA* case, 256 S.W.3d at 668, given the facts of this case?

Editor's Note: We will continue to follow this significant case for further developments. (Click here to for full opinion).

CORPUS CHRISTI COURT OF APPEALS AFFIRMS SUMMARY JUDGMENT FOR ALLSTATE ON BAD FAITH AND "LACK OF COOPERATION" CAUSES OF ACTION

Last Thursday, the Corpus Christi Court of Appeals affirmed a trial court's granting of a no-evidence motion for summary judgment in favor of an insurer and rejected claims of lack of cooperation and bad faith causes of action asserted by the insured. In *Hennen v. Allstate Insurance Company*, No. 13-12-00645-CV (Tex. App. – Corpus Christi, September 5, 2013), the Hennen's settled with Direct TV for $40,000 following a fire at their residence. Afterwards, they filed suit against Allstate alleging that they settled for 1/5 the "true" value of their claim because Allstate refused to allow them access to Allstate's expert. The trial court granted Allstate's no-evidence summary judgment motion and this appeal followed.

On appeal, the court assumed that Texas law recognizes a cause of action for the alleged "lack of cooperation" in order to address the issues on appeal. The court found no evidence to support the Hennen's "conclusory and speculative" damages assessment. Further, they found no evidence of damages proximately caused by Allstate's alleged bad faith. Accordingly, summary judgment in favor of Allstate was affirmed. (Click here for Opinion).

COURT REJECTS EFFORTS TO SIMPLY REFER TO RESPONSE TO PRIOR MOTION IN OPPOSITION TO LATER NO-EVIDENCE MOTION – SUMMARY JUDGMENT AFFIRMED

Last Wednesday, the San Antonio Court of Appeals affirmed a no-evidence summary judgment in favor of the insurer after rejecting the insured's efforts to argue evidence referenced in a prior response to a traditional motion for summary judgment. In *Sadler v. Texas Farm Bureau Mutual Insurance Companies*, 2013 WL 4736392 (Tex.App.-San Antonio, September 4, 2013), the insureds sought coverage after crashing their vehicle into their home's garage, asserting that the agent assured them that the policy would cover "anything that happened on their property or to their house." The claim was denied and this lawsuit followed.

In response to a traditional motion for summary judgment, the trial court denied the motion and the insureds agreed to drop their breach of contract claim and replead their DTPA claims. They did and the insurer then filed a no-evidence motion for summary judgment. The insureds failed to file a response, and instead, reportedly referred to their prior response and, claimed judicial admissions in the no-evidence motion were sufficient to preclude summary judgment. The trial court granted the insurer's motion and this appeal followed.

On appeal, the court rejected the insureds' arguments regarding the prior response, noting that a timely response must be filed. And, the alleged judicial admissions provided no evidence in opposition to the no-evidence motion. Further, there was no evidence in the record that the insureds notified the court that they intended to rely on their previous response and, that the court was not required to search the record without more specific guidance or incorporating the prior evidence or response by reference. Accordingly, the court found that the insureds failed to meet their burden to "produce more than a scintilla of evidence raising a genuine issue of material fact" and summary judgment in favor of the insurer was affirmed.

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