

# TEXAS INSURANCE LAW NEWSBRIEF

OCTOBER 23, 2014

## HOUSTON COURT OF APPEALS GRANTS MANDAMUS TO SEVER & ABATE EXTRA-CONTRACTUAL CLAIMS

Last Thursday, in *In re Allstate County Mutual Insurance Company*, 2014 WL 5285850 (Tex. App.—Houston [1<sup>st</sup> Dist.] Oct. 16, 2014), Houston's First Court of Appeals granted mandamus relief to partially sever and abate extra-contractual claims against an insurer, pending resolution of the breach of contract claim.

After a single-car auto accident left a child dead, the child's family sought underinsured motorist benefits from Allstate, the business auto insurer for the employer of the child's father. Allstate denied the claim, concluding that neither the father nor the child were insureds under the policy issued to the father's employer. The family sued Allstate for breach of contract, common-law bad faith, and violations of the Texas Insurance Code. They also sued an insurance agent, alleging that in the event they were found not to be insured under the policy, both Allstate and the agent had made misrepresentations on which they relied.

Allstate moved to sever and abate all causes of action other than breach of contract, arguing that Texas law generally requires the claimant to prove contractual entitlement to the policy proceeds before it can recover extra-contractual damages. Although the trial court denied this motion, the Court of Appeals, considering the issue under the mandamus standard, agreed with Allstate. The court observed that ample Texas case law supports the requirement that a showing of contractual liability is generally a threshold finding for extra-contractual claims. The court also noted a separate line of cases establishing this rule in the specific context of underinsured motorist insurance claims. The court agreed that being required to prepare for and litigate claims that are not ripe and may be rendered moot is a burden which has no adequate remedy by appeal, and justifies mandamus relief.

However, with regard to the misrepresentation claims, the family pleaded them in the alternative to the breach of contract, so proving contractual liability was not a prerequisite to recovery. Just as importantly, the agent had *not* filed a similar motion for severance, leaving one set of misrepresentation claims still combined with the contract claim, thus preventing severance.

This finding highlights two lessons: First, severance and abatement of extra-contractual claims can be achieved based on the prejudice involved in being required to litigate claims which may be rendered moot. And second, when claims are alleged against more than one defendant, concerted action by all affected co-defendants may be critical to achieving success.

## SOUTHERN DISTRICT OF TEXAS STRICTLY APPLIES EIGHT CORNERS RULE TO DETERMINE DUTY TO DEFEND

In *Federal Ins. Co. v. Northfield Ins. Co.*, 2014 WL 47189484 (S. D. Tex. Sep. 22, 2014), two liability carriers recently disagreed on which carrier owed a duty to defend their mutual insured against a claim for contractual defense and indemnity. ExxonMobil sued the insured, Wagner, seeking contractual defense and indemnity for three underlying suits against ExxonMobil alleging environmental damage to properties where Wagner had conducted operations. Federal, who insured Wagner for seven consecutive years, defended Wagner. Northfield, who insured Wagner for one year, refused to defend Wagner. Strictly applying the Texas "eight corners" rule, the court concluded that several policy exclusions barred coverage for Wagner under Northfield's policy, and Northfield was correct in its refusal to defend Wagner.

Notably, neither carrier briefed the issue of whether ExxonMobil's lawsuit against Wagner, seeking contractual defense and indemnity, sought damages because of "property damage." Instead, both parties treated ExxonMobil's defense/indemnity suit against Wagner merely as a vehicle for passing the property damage claims in the underlying environmental suits directly to Wagner, and analyzed Wagner's potential coverage in the context of pollution exclusions in their policies.

The court made note of this omission several times, and hinted it thought the parties should have briefed it. The court observed that there is Fifth Circuit precedent supporting the proposition that the phrase "because of... property damage" in the standard CGL insuring agreement is broad enough to cover both direct liability and indirect liability via indemnity. However, it is important to bear in mind that even under this rule, when a lawsuit against an insured seeks only defense of an underlying suit which is ongoing, or

seeks only defense costs for a resolved suit in which the claimant was not held liable for property damage, such a claim may not be a claim for “property damage.”

## MDJW First Friday Webinar - Expedited Discovery and Level I Discovery Deadlines

Robert Owen and Vicki Kurhajec - presenters

November 7, 2014

Our next First Friday will be held on November 7, 2014 at noon **Central** Time. Robert Owen, an associate in the Houston Office, and Vicki Kurhajec, a paralegal in the Austin office, will present Expedited Discovery and Level I Discovery Deadlines, exploring the new expedited discovery rules issued by the Texas Supreme Court and how they affect claims handling.

Mr. Owen is an associate in Martin, Disiere, Jefferson & Wisdom’s appellate section where he represents clients in the Texas Courts of Appeals and the United States Fifth Circuit Court of Appeals. Mr. Owen also assists clients and trial counsel with complex issues in litigation, including jurisdiction contests, summary judgments, preservation of error at trial, the jury charge, and posttrial motions. Before entering private practice, Mr. Owen served as a briefing attorney for the Honorable Charles W. Seymore of the Fourteenth Court of Appeals of Texas.

Ms. Kurhajec earned her Bachelors of Business Administration from Texas State University. She became a licensed property and casualty insurance adjuster in 1992 working as a claims litigation adjuster for Farmers Insurance handling personal and commercial lines claims. During her eleven year tenure with Farmers, she also served on the American Arbitration Association panel for three years and participated in numerous in-house insurance seminars giving presentations on first party claims handling and coverage issues. Ms. Kurhajec joined Martin, Disiere, Jefferson and Wisdom as a litigation paralegal in 2011. Ms. Kurhajec has continued to maintain an active insurance license.

We have applied to the Texas Department of Insurance for one hour of Texas CE credit. Insurance professionals accredited by the Texas Department of Insurance should have their license number available during the training in order to request credit for the course.

Register for this webinar at: <https://student.gototraining.com/r/8395412655354142976>. After registering you will receive a confirmation email containing information about joining the training. We have a limit of 200 participants for the webinar.

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