Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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EL PASO FEDERAL DISTRICT COURT IMPOSES DUTY TO DEFEND IN TRUCKING ACCIDENT CASE

Last Tuesday, an El Paso Federal District Court Judge ordered Canal Insurance Company to defend the estate of a deceased insured in a suit brought by a passenger involved in a single-vehicle accident. In *Lopez v. Canal Ins. Co.*, No. EP-14-CV-00372-KC, 2015 WL 4094277(W.D. Tex. July 7, 2015), Canal insured a trucking company, Moore Freight. Franceware and Munoz were both in the cab of a Moore truck involved in a single-vehicle accident which killed both men. While it was undisputed that both men were in the truck, and the truck was being operated with Moore Freight's permission, few other facts of the accident were clear or uncontested.

The estate of Munoz sued numerous defendants. In the Third Amended Petition, Munoz sued Rosa Franceware as the administrator of the estate of Franceware. The actual administrator of Franceware's estate, Jessica Lopez, sought a defense from Canal. Canal refused on the ground that no claims were made specifically against Lopez.

In an apparent effort to avoid all confusion concerning estate administrators, the Munoz claimants amended their petition again (the Live Petition), eliminating all references to specific administrators, the estate of Franceware, and Franceware himself as named defendants. However, the Live Petition still made allegations against Franceware in its text. Canal also refused to defend this petition on the ground that it did not make any claims against the estate of Franceware.

The court refused to be taken in by either of Canal's positions. The court cut smoothly through all confusion concerning the estate administration by pointing out that because the Third Amended Petition created a reasonable inference that Franceware was driving a Moore truck with Moore's permission, Franceware was an insured for purposes of this claim, and Canal owed its duties to Franceware. Thus, the claimants did not have to expressly name the estate of Franceware and did not have to correctly identify the administrator in order for their claims to trigger a duty to defend Franceware and his estate, regardless of the exact identity of the administrator. The court called Canal's position on this issue, "misguided" and "without merit."

With regard to the Live Petition, Canal also argued that it ended any possible duty to defend that might have been created by the Third Amended Petition because it no longer named Franceware or his estate as defendants in any form and did not make any claims against them. Again, the court disagreed. Although omitting a defendant from a live pleading ordinarily operates as a dismissal of that defendant, the entire petition still must be considered as a whole. A pleading may be in any form that gives a party fair notice of the claims against it. Here, the petition no longer named Franceware as a defendant, but in its body continued to make specific allegations regarding his conduct and liability. The court held this petition did not dismiss Franceware, did not constitute an abandonment of the claims against him, and did not alter the duty to defend created by the Third Amended Petition.

As an alternative position, Canal also argued that the policy's employee exclusions negated coverage because Franceware and Munoz, as operators of a commercial vehicle, are considered statutory employees of Moore Freight, the named insured. For the third time, the court disagreed. After applying the policy's Separation of Insureds clause, the question to be considered was not whether Munoz and Franceware were employees of Moore, but whether Munoz was an employee of Franceware. Under the eight corners rule, nothing in the petition led to that inference. Similarly, nothing in the petition led to the inference that Munoz was Franceware's fellow employee. To the contrary, the Third Amended Petition merely alleged in the alternative that Munoz was an employee of one of the several defendants, and the Live Petition alleged he was on his way to a job interview with Moore. Thus, considered under the eight-corners rule, the Court concluded the "fellow employee" exclusion did not bar coverage either.

In a final note, this ruling disposed of only the duty to defend. The Munoz claimants asserted a host of other claims against Canal, including extra-contractual damages, and those claims remain in litigation.

HOUSTON FEDERAL DISTRICT COURT GRANTS SUMMARY JUDGMENT TO WIDOW SEEKING DEATH BENEFITS

Last Wednesday, a Houston federal judge granted summary judgment in favor of a bereaved widow seeking benefits from her employer's Accidental Death & Dismemberment plan for her husband's death in a drunk-driving accident. *James v. Life Ins. Co. of N. Am.*, No. CIV.A. H-12-2095, 2015 WL 4126580 (S.D. Tex. July 8, 2015). While the court's opinion is heavily influenced by ERISA-specific administrative law issues, the facts of this case and the court's conclusion are of broader general interest.

The carrier denied the widow's claim for $300,000 in death benefits on the ground that her husband had been illegally driving with a blood alcohol content of 0.19% (over twice the legal limit) and, therefore, his death was not an "accident," which the policy defined as a "sudden, unforeseeable external event…." The policy did not further define the term "unforeseeable" and the court concluded it incorporates an inherent element of reasonableness. Therefore, the definition of an "accident" does not exclude every event that can possibly be foreseen, however remote, but only excludes those which can be *reasonably* foreseen. Referring to other court opinions citing National Highway Traffic Safety Administration data which show that just 0.17% of impaired trips actually result in death, the court noted: "It cannot reasonably be said that a less than one percent chance of death makes death reasonably foreseeable."

The carrier argued its claim decision was not based solely on the fact of the illegal blood alcohol content but that it applied several case-specific factors, including the severity of the impairment and the weather and road conditions, to make this claim decision. However, its letters to the widow told a different story: the carrier advised her that in order to win her administrative appeal of the original claim decision she would need to present proof that her husband was not legally intoxicated.

Although the court's opinion did not mention it, the magistrate judge's memorandum reviewed several other cases involving policies issued by this carrier which contained express intoxication exclusions. The clear subtext is that the carrier could have written such an exclusion into this policy but did not do so and, if it wished to avoid paying benefits for intoxication-related losses, it should have done so.