Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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TEXAS SUPREME COURT EXPANDS DEFINITION OF "SUIT" TO INCLUDE EPA ENFORCEMENT PROCEEDINGS

In a surprising decision involving administrative action by the EPA against an insured under CGL policies providing coverage for related "suits" against the insured, in *McGinnes Industrial Maintenance Corporation v. Phoenix Insurance Company*, 2015 WL 4080146 (Tex. June 26, 2015),the Supreme Court of Texas recently answered "yes," to the following question certified to the Court by the United States Court of Appeals for the Fifth Circuit:

Whether the EPA's PRP letters and/or unilateral administrative order, issued pursuant to CERCLA, constitute a "suit" within the meaning of the CGL policies, triggering the duty to defend.

In the 1960s, the insured dumped pulp and paper mill sludge into disposal pits near the San Jacinto River. In 2005, the EPA began investigating possible contamination and in 2007 served a general notice letter on the parent company offering "the opportunity to enter into negotiations with the EPA" regarding the cleaning of the site and to reimburse the EPA for costs incurred. In December 2008, the EPA sent another letter requesting detailed information and advising that failure to respond could subject the company to $32,500 per day in penalties. Then in July 2009, the EPA sent another letter to the insured letting it know that they determined the insured was responsible for cleaning up the site and demanded $378,863.61 in costs and requested a good faith offer to settle within 60 days. When no offer was made, the EPA issued a unilateral administrative order directing the insured to take remedial action and advising that a willful failure to comply would subject it to $37,500 in civil penalties and up to three times the resulting costs to the EPA.

During the time the dumping took place, McGinnes was insured under CGL policies issued by Phoenix Insurance and Travelers. And in May 2008, the insured requested a defense from the insurers in the EPA proceedings. The insurers refused asserting that the proceedings were not a "suit" under the policy as needed to trigger their duty to defend. The insured then filed a declaratory judgment action seeking coverage under the policies. The trial court agreed with the insurers' coverage position and granted judgment in their favor. The insured then appealed to the Fifth Circuit, and in turn, the certified question was sent to the Supreme Court of Texas.

The Supreme Court of Texas agreed with the insurers that "suit" commonly refers to court proceedings but, also can refer to an "attempt to gain an end by legal process." The court observed that the federal "Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) was intended to expedite the process by authorizing the EPA to act on its own in conducting essentially, pretrial proceedings, without the need to initiate court action until the end of the process. The Court observed that the EPA issues notice letter that serve as pleadings, they can conduct discovery and engage in mediation through "invitations" to settle. Fines and penalties for willful non-cooperation are like court sanctions- only prescribed by statute. And lastly, there is very limited opportunity for judicial review, but only at the end of the process, and that review is limited to an abuse of discretion standard, based on the EPA's own record.

After noting that the overwhelming majority of other states have rejected the insurers' position, the court answered yes to the certified question finding that the EPA investigation and proceedings triggered the insurers' duty to defend.

Editors Note: This was a 5-4 decision by the Court and the dissenting opinion is both pointed and serves to illuminate the serious implications for Texas insurance law should the holding be applied beyond the facts in this case. It begins by stating: "If you do not like your insurance policy, the Supreme Court of Texas can now change it for you. Never mind all those times the Court has said "we may neither rewrite the parties' contract nor add to its language." And later, addressing the majority's decision to follow other states' position on the issue: "Because it seems like a good thing to do here (and on top of that, everyone else is doing it). My law professors (and my momma) taught me better. I respectfully dissent." See below for a link to the majority and dissent.

COURT FINDS PLAINTIFF IN BAD FAITH CASE MAY COMPEL DISCOVERY OF INSURANCE DEFENSE ATTORNEY'S FEE INFORMATION

Last Tuesday, the Corpus Christi Court of Appeals denied an insurer's petition for writ of mandamus after finding that the insurer's defense counsel attorney fee information was relevant and discoverable by plaintiffs in a bad faith lawsuit. In *In Re National Lloyds Insurance Company*, 2015 WL 4380929 (Tex. App. - Corpus Christi July 15, 2015), the insured's attorneys' fee expert in the multidistrict litigation (MDL) stemming from the March and April 2012 Hidalgo County hail storms, testified that "the fees [of] the opposing party to the plaintiff's are "a factor" and one of the "indicators of a reasonable fee." The insured's attorneys then sent additional discovery regarding the defense fees and costs that accrued in the underlying cases. The insurer's counsel objected on the grounds that the information sought was irrelevant and violated the attorney-client and work-product privileges. The trial court overruled the objections and ordered that the information be produced with redactions to protect any privileged information. The insurer then filed a petition for mandamus seeking to overturn the order.

The Corpus Christi Court of Appeals reviewed the factors identified by the Texas Supreme Court relevant to attorney fee determination and observed that the other party's fees and arrangements were not included. But the court also noted that those factors were not exclusive. And while they agreed with the insurer that their fees may be irrelevant in a given cause of action the court stated: "However, based on the specific facts underlying this original proceeding, we conclude the trial court acted within its discretion in concluding that the fees were relevant and discoverable." And to address the insurer's attorney-client and work-product concerns, the court found that the records could be sufficiently redacted to protect the privileges. Accordingly, they denied the insurer's petition for writ of mandamus and the left the trial court's order intact.

Editor's Note: We anticipate that this case will be appealed to the Texas Supreme Court and we will continue to monitor this case for further developments. Insurers interested in filing an amicus brief should contact Christopher Martin of our firm at martin@mdjwlaw.com for additional information.

COURT REJECTS REFINERY'S ARGUMENTS TO SECURE INSURED STATUS UNDER POLICY ASSIGNED TO PARENT CORPORATION

In a recent decision analyzing a complex series of property transactions, choice of law issues and policy reformation arguments, the U.S. District Court in San Antonio rejected the refinery's arguments seeking coverage under a policy assigned to a parent corporation and granted summary judgment in favor of the insurer. In *Chartis Specialty Insurance Company v. Tesoro Corporation*, 2015 WL 4154136 (W.D.Tex. July 10, 2015), a refinery which began operations in 1913, was transferred between a series of owners and in recent decades was subject to remediation orders from the EPA addressing contamination issues at the refinery. And in one of the most recent property transfers, an insurance policy potentially applicable to cover the remediation expense was transferred to Tesoro Corporation instead of Tesoro Refining and a declaratory judgment lawsuit followed.

The court first analyzed the refinery's effort to secure third-party beneficiary status under the policy assigned to its parent corporation. Applying Texas law, the court observed that "parties are presumed to be contracting for themselves only" and that absent a clear intention in the agreement to confer direct benefit to a third party, enforcement efforts by the third party must be denied. Following review of the policy, the court noted that the named insured was "Tesoro Corporation, which made no promise to Tesoro Refining regarding the proceeds of the insurance policy that it executed with Chartis." The court made a similar finding applying California law and granted Chartis's motion on the third party beneficiary issue.

Next, the court examined the refinery's reformation claims and the insurers argued a statute of limitations defense in response. The court noted that under both Texas and California law, "an insured party that accepts a policy without disagreement is presumed to know its contents....Because Tesoro Corporation did not contest the endorsement at the time of the assignment, the Tesoro parties are presumed to know the contents of the policy." The presumption however, is rebuttable and the court then focused on when the Tesoro parties should have discovered the mistake in order to apply Texas' four-year statute of limitations or California's three-year limitations period.

To address the limitations issue, the court examined the date on which the cause of action accrued - the date the Tesoro parties should have reasonably discovered that the policy did not cover Tesoro Refinery. In doing so, the court considered Tesoro's litigation seeking $50 million indemnity from a previous owner related to a self insured retention for cleanup costs and found it "inconceivable" that during that 2006 litigation, Tesoro Refinery did not examine the Policy. "Accordingly, the Court finds, as a matter of law, that the Tesoro parties should have discovered that Tesoro Refining was not covered under the Policy by at least 2006, rendering the 2011 and 2012 filings beyond the limitations period." as a result, the court granted Chartis's motion for summary judgment.