The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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AMARILLO COURT OF APPEALS REVERSES AND RENDERS JUDGMENT AGAINST PLAINTIFF AFTER "PAID OR INCURRED" ANALYSIS APPLIED

Recently, the Amarillo Court of Appeals applied Section 41.0105, the Texas "Paid or Incurred" Statute, and held that after offsets and credits applicable to the judgment Plaintiff was not entitled to receive any award for damages and instead received a take nothing judgment. In *Progressive Co. Mut. Ins. Co. v. Delgado*, 2011 WL 356095 (Tex. App.—Amarillo February 3, 2011), the court reversed and rendered a decision to bring a judgment in line with the amounts of health care expenses actually paid or incurred by Delgado. In this case, Delgado originally filed suit against a commercial driver whose tow dolly carrying an automobile became disconnected from his vehicle and struck Delgado's pickup. Delgado additionally sued his insurance carrier, Progressive, alleging that the driver was an underinsured motorist. Prior to trial, the driver's liability carrier tendered its policy limits of $25,000 to Delgado.

This appeal ensued to address the perceived (and actual) error in entering a judgment for past medical and health care expenses in excess of the amounts actually paid or incurred by or on behalf of Delgado. At trial, counsel for both parties stipulated to the amount of Progressive's underinsured motorist policy limits, $25.055; Delgado settled the claims against the driver for limits of $25,000; and Delgado collected $2,525 in PIP benefits from Progressive prior to filing suit.

At the trial's conclusion, the jury found the driver negligent and awarded the following damages:

a.	Medical care incurred in the past.		
	1.	Covenant Medical Center	$49,269.39
	2.	Lubbock Surgical Associates	$ 1,567.00
	3.	Lubbock Diagnostic Radiology	$ 2,043.00
	4.	Efrem S. Alambar, M.D.	$ 89.00
b.	Past physical pain.		$13,258.00
c.	Past mental anguish.		$ 0
d.	Past physical impairment.		$ 5,000.00
e.	Physical disfigurement.		$ 0
f.	Past loss of earning capacity.		$ 1,200.00

Because the stipulated policy limits were $25,055, Delgado asked the court for judgment awarding the policy limits plus court costs, $793.30, or a total of $25,848.30.

In response, Progressive asserted that, of the $72,426.39 jury verdict, $52,968.39 represented an award of past expenses for medical care while $19,458.00 represented awards for past physical pain, physical

impairment, and loss of earning capacity. Progressive next applied section 41.0105 and argued the past medical expenses *actually paid or incurred* on behalf of Delgado were $4,763.77. After adding this amount, $4,763.77, to the jury's awards for past physical pain, physical impairment, and loss of earning capacity, $19,458.00, Progressive calculated Delgado's total collectible damages at $24,221.77. Because the $24,221.77 was less than its offsets and/or credits, $27,525.00 ($25,000.00 settlement with the driver $2,525.00 in PIP expenses), Progressive concluded that Delgado was entitled to a take nothing judgment.

At the hearing on the two motions, the trial court entered as exhibits the transcripts of the testimony of three witnesses who testified at trial. All the witnesses were used to show the actual amount paid or incurred as well as the policies and/or contracts between the providers and the insurance companies or governmental agency.

Here, the court calculated the total collectible damages at $24,221.77 ($4,763.77 in medical expenses plus $19,458 awarded by the jury for past physical pain, physical impairment, and loss of earning capacity). Because the Progressive offsets and/or credits were higher than the collectible damages, however, the appellate court concluded Delgado should take nothing from his jury award.

Editor's Note: *Delgado* falls squarely within the growing line of cases that provide for a conservative application of Section 41.0105. Other cases to reference include *Matbon, Inc. v. Gries*, 288 S.W.3d 471, 481 (Tex. App.—Eastland 2009, no pet.); *Mills v. Fletcher*, 229 S.W.3d 765, 769 (Tex. App.—San Antonio 2007, no pet.). *See also Tate v. Hernandez*, 280 S.W.3d 534, 540-41 (Tex. App. —Amarillo 2009, no pet.). The strong advisory explained in this case is the careful pleading for appropriate offsets and simultaneously providing testimony to support the actual incurred amounts paid for medical treatment. This case also seems to be consistent with the vast majority of cases which allow for a reduction in the amount of medical paid or incurred post verdict. In other words, in our experience, judges consistently allow Plaintiffs to put on evidence at trial of the "full" amount of medical expenses billed but will correct the issue on post-verdict motions.

TEXAS SUPREME COURT REVERSES COURT OF APPEALS BECAUSE IT HAD NOT CONSIDERED EXTRINSIC EVIDENCE IN DETERMINING GENERAL LIABILITY INSURER'S DUTY TO INDEMNIFY

Last Friday the Texas Supreme Court reversed a summary judgment granted in favor of National Union Fire Insurance Company against the Burlington Northern and Santa Fe Railway Company ("BNSF"), which sought a declaratory judgment that it was owed a defense and indemnify in a personal injury suit resulting from a collision between one of its trains and an automobile. *See The Burlington Northern and Santa Fe Ry. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. 10-0064, slip op., --- S.W.3d --- (Tex. February 25, 2011). The pleadings in the underlying lawsuit alleged that excessive vegetation near a crossing obstructed the driver's view of the oncoming train. The pleadings stated that the Railroad had a contract with SS Mobley Company ("Mobley") to carry out chemical weed control and that Mobley failed to use reasonable care to carry out its chemical weed control leading to excessive vegetation at the crossing at the time of the collision, which proximately caused the collision. The collision occurred in 1995 and the term of the contract with Mobley was 1994 through 1996.

BNSF was named as an additional insured under Mobley's comprehensive general liability policy issued by National Union, but National union denied BNSF a defense and it asserted it had no duty to indemnify. The National Union policy contained a "completed operations" exclusion. However, the policy also excepted from the completed operations exclusion "[w]ork that has not yet been completed or abandoned." The trial court granted National Union's motion for summary judgment and the court of

appeals affirmed. The court of appeals determined National Union did not have a duty to defend because the language in the plaintiffs' pleadings referenced Mobley's actions as having happened in the past, so the policy's "completed operations" exclusion precluded a duty to defend. The court of appeals determined there was no duty to indemnify because BNSF's arguments as to National Union's duty to indemnify were based entirely on its duty to defend arguments. Thus, the court of appeals did not consider evidence extrinsic to the policy and the pleadings when reaching its decision that there was no duty to indemnify.

In reversing the court of appeals, the Texas Supreme Court stated that in some circumstances the pleadings can negate both the duty to defend and the duty to indemnify. In this case, however, the pleadings did not show that contractual provisions and other extrinsic evidence could not possibly bring Mobley's vegetation control operations within coverage of National Union's policy for the 1995 accident when Mobley's contract unquestionably extended through 1996. The court stated that assuming, without deciding, the court of appeals correctly determined National Union owed no duty to defend, the court of appeals nevertheless erred by not considering all the evidence presented by the parties when it determined the question of National Union's duty to indemnify BNSF. Thus, the Texas Supreme Court reversed the court of appeals' judgment and remanded the case for further proceedings.

UNITED STATES DISTRICT JUDGE GRANTS GENERAL LIABILITY INSURER'S MOTION FOR SUMMARY JUDGMENT, CONCLUDING ABSOLUTE AUTO EXCLUSION APPLIED

Also last week, U.S. District Judge Nancy F. Atlas granted Colony Insurance Company's motion for summary judgment in *Colony Ins. Co. v. ACREM, Inc.*, C.A. H-10-1137, Rec. Doc. 23 (S.D. Tex. February 23, 2011) (Atlas, J.). ACREM operates a nightclub in Houston, Texas known as Stetson's Night Life ("Stetson's"). Colony issued a general liability insurance policy to ACREM. Allen Wayne and Eunice Waddell filed a lawsuit against ACREM and others in state court. In the pleadings, the Waddells alleged that Mr. Waddell was a patron at Stetson's on the evening of September 1, 2007; that, when leaving the nightclub and while walking through the Stetson's parking lot, Mr. Waddell was struck from behind by a vehicle driven by either Jason Pryor or Russell Stewart, Jr., both patrons of Stetson's that night; and that that ACREM improperly provided alcohol to Pryor and Stewart when they were obviously intoxicated. ACREM submitted the claim to Colony, which denied it had the duty to defend or indemnify.

The Colony policy contained an "Absolute Auto, Aircraft and Watercraft Exclusion" ("Auto Exclusion"), which excluded coverage for any bodily injury arising out of or resulting from the use of an automobile. ACREM argued that the Auto Exclusion did not apply because the driver of the automobile that struck Mr. Waddell was not an employee or other agent of ACREM or, alternatively, that the Auto Exclusion is ambiguous because it does not clarify whether it applies to vehicles used by third parties. The court found that the clear and unambiguous policy language did not limit the Auto Exclusion to vehicles driven by ACREM or its agents. The court also rejected ACREM's argument that it intended for the Auto Exclusion to exclude coverage only if the automobile involved in the incident was owned or operated by an employee or other agent of ACREM because, under clearly-established Texas law, the intent of the parties is determined by the unambiguous terms of the contract itself.

ACREM also argued that the Auto Exclusion was inconsistent with the "Limitation to Coverage to Business Description" ("Business Description Limitation"), which limited

coverage to bodily injury caused by or resulting from the business described as "Bar with Dance Floor." The court found this argument unpersuasive because the Business Description Limitation is a limitation on coverage, not an extension of coverage. It provides an additional requirement for coverage by adding the limitation that the bodily injury or property damage "is caused by or results from the business described in the Schedule," which in this case was "Bar With Dance Floor." The court concluded that the Business Description Limitation and the Auto Exclusion were not in conflict.

The court ruled that the Auto Exclusion applied to exclude coverage and that there were no facts that could be proven in the underlying lawsuit that would be covered by the policy. Accordingly, the court concluded Colony did not owe ACREM either a duty to defend or a duty to indemnity.

UNITED STATES DISTRICT JUDGE ABATES LAWSUIT BECAUSE PLAINTIFF FAILED TO PROVIDE PRE-SUIT WRITTEN NOTICE OF SPECIFIC COMPLAINT

Recently, United States District Judge Lee H. Rosenthal granted a motion for abatement filed by an insurer based on the insured's failure to provide prior written notice of the complaint and the amount of damages sought, including fees, not later than the 61st day before the date the action was filed as required under Chapter 541 of the Texas Insurance Code. *See Greater Mount Zion Baptist Church v. Harry Blaker and Union Ins. Co.*, C.A. H-10-3921, Rec. Doc. 7 (S.D. Tex. February 14, 2011) (Rosenthal, J.). The defendants asked the court to abate the suit until the 61st day after the plaintiff provided the statutory written notice of its claims under the statute and the plaintiff did not respond.

The court quoted the Texas Insurance Code which states: "The court shall abate the action if, after a hearing, the court finds that the person is entitled to an abatement because the claimant did not provide the notice as required by Section 541.154." The court noted there is an exception to the written notice requirement if giving notice is impracticable because the action must be filed to prevent the statute of limitations from expiring. But the pendency of limitations did not excuse the requirement in this case because there was no pleading or proof that limitations made the statutory notice impracticable. The court also noted the plaintiff could not argue the state court petition provides notice because the content of the petition did not meet the requirements of the statutory notice. It provided neither reasonable detail of "the specific complaint" or "the amount of actual damages and expenses, including attorney's fees reasonably incurred in asserting the claim against the other person" as required under the statute. Accordingly, the court granted the motion for abatement and ordered the case be abated until 60 days after the plaintiff provides written notice to the defendants as required by Texas Insurance Code § 541.154.