Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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COURT OF APPEALS CONCLUDES THAT EQUIPMENT SHIPPER OWED DUTY TO THIRD-PARTY MOTORIST TO SAFELY LOAD EQUIPMENT ONTO TRAILER

Last week, Court of Appeals of Texas, Dallas, concluded that shippers owe a duty to third-party motorists under the general negligence theory of recovery. In United Rentals N. America, Inc. v Evans, No. 05-18-00665-CV, 2020 WL 4783190 (Tex. App.—Dallas, Aug. 18, 2020, mem. op.), United Rentals arranged to transport (1) a forklift with a boom arm and (2) a Genie S-125 boom lift, from its branch in San Antonio to its branch in Irving. The forklift was considered an ordinary-sized load and could be transported on a flatbed trailer without a permit. The boom lift was considered an "oversized" load if transported on a flatbed trailer and, in that case, would require a permit providing a route to safely transport the cargo. To transport the boom lift without a permit, it needed to be transported on trailer with a lower deck, such as step-deck trailer.

United Rentals hired one company to transport the forklift (with boom arm) and another company to transport the boom lift. Martinez, the driver assigned to the forklift, arrived at United Rentals' office first, with a flatbed trailer, stating that he was there for a "boom." The driver did not have a bill of lading, so United Rentals' operations manager contacted United Rentals' region equipment manager and told her that a driver was there to pick up a "boom" to take to Irving but did not have a bill of lading number. The equipment manager pulled the bills of lading and found one boom lift, the Genie S-125, leaving the San Antonio location for Irving. She printed the bill of lading for the boom lift and sent it to the operations manager, and the boom lift was subsequently loaded onto Martinez's flatbed trailer. Neither Martinez nor United Rentals measured the boom lift upon loading. Martinez, having at this time received the bill of lading number (for the forklift) on his cellular phone, showed it to United Rentals' operations manager. The operations manager wrote the number down on the bill of lading received from the equipment manager, but he did not notice that the numbers did not match. Martinez signed the bill of lading not realizing he had been given the wrong piece of equipment, and he left with the boom lift between 9:00 and 9:30 a.m.

At 10:45 a.m., the driver assigned to the boom lift arrived at United Rentals' office with a "step-deck" trailer to pick up the boom lift, and a bill of lading for the boom lift. However, no one at United Rentals notified anyone that Martinez was given the wrong equipment.

At about 11:15 a.m., Martinez was driving north on I-35 approaching a construction zone in Salado, Texas. There were multiple signs warning that the upcoming under-construction bridge was low and that loads over 13 feet, 6 inches needed to exit prior to the overpass. Martinez, apparently unaware that his load was 14 feet, 7 inches, did not heed those warnings, and his load struck the bridge. Consequently, the bridge beams collapsed across the northbound and southbound lanes of the highway just as Clark Davis, driving south in a pickup truck, reached the bridge. One of the beams fell on the hood of Davis's truck, crushing the truck's engine and entire occupant compartment into a space about a foot and a half in depth. Davis died at the scene from multiple blunt force trauma and mechanical compression.

Davis's mother and son filed a wrongful death and survival action against United Rentals, among others. Following a trial, the jury found United Rentals negligent under the general negligence theory (assigning 30% of responsibility to United Rentals), and awarded, among other damages, $5 million to Davis' estate for Davis' conscious pain and mental anguish prior to death.

On appeal, United Rentals contended that it, as a shipper, did not owe a legal duty to safely secure, measure, or transport the boom lift; rather, it was the carrier and driver who owed such duties. United Rentals further contended that it had no duty to see that the carrier or Martinez shipped the cargo safely, even if United Rentals participated in the loading process. According to United Rentals, the claims against it should have been confined to a negligent-undertaking or negligent-control claim, and it could not be liable under a general negligence theory.

The Court of Appeals disagreed and concluded that United Rentals owed a duty of reasonable care to Davis under the facts presented. The court further concluded that "a party, other than the carrier, [under a general negligence theory] may owe a duty to third-party motorists for dangerous conditions created by that party and that it could reasonably foresee." The court reasoned that although the applicable federal safety rules and the Texas Transportation Code impose a statutory duty on carriers (as opposed to shippers) regarding safely securing and transporting their loads, the statutes do not relieve a party who breaches a common law duty of care from liability for its own negligence. "While common law rules regarding a carrier's liability to a shipper . . . govern the rights and liabilities among carriers and shippers, those same rules do not govern a case involving personal injury to an innocent party with no connection to the trucking industry."

In a second issue on appeal, United Rentals argued that, to the extent Davis suffered conscious pain and mental anguish prior to his

death, that pain and anguish lasted no more than ten to fifteen seconds, and such a short duration, regardless of how extreme, could not support a $5 million verdict. United Rentals requested that the award be remitted to no more than $400,000. The Court of Appeals, noting that there are no objective guidelines to assess the monetary equivalent of pain and suffering, and that juries are given a great deal of discretion in awarding an amount of damages it deems appropriate, concluded the evidence was legally and factually sufficient to support the $5 million dollar award. The court reasoned that the award was not "flagrantly outrageous, extravagant, or excessive that it shock[ed] the judicial conscience."

U.S. DISTRICT COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF INSURER BASED ON MOTOR VEHICLE EXCLUSION

Last week, the United States District Court, Northern District of Texas, concluded that Allstate had no duty to defend or indemnify its insured homeowner in suit against the insured homeowner arising from a motor vehicle collision. Allstate v. Daum, No. 3:20-CV-0671-D, 2020 WL 4883956 (N.D. Tex., Aug. 20, 2020, mem. op.),

In the underlying lawsuit, Jillian Pierce's minor granddaughter, for whom Pierce was legal guardian, was at the insured's residence and under the insured's care, when the granddaughter was riding a bicycle in the alley behind the home and was struck by a motor vehicle. In the underlying lawsuit, Pierce contended that the insured was negligent because the insured allegedly failed to properly supervise and manage the granddaughter and because the insured allowed the granddaughter to ride her bicycle in the street and alley.

The insured requested coverage from Allstate under a House & Home Policy (the "Policy") for Pierce's claims against her. The Policy excluded coverage for "bodily injury or property damage arising out of the ownership, maintenance, use, occupancy, renting, loaning, entrusting, loading or unloading of any motor vehicle or trailer."

Allstate sought a declaratory judgment that it was not obligated to defend or indemnify its insured in the underlying lawsuit. And Allstate moved for summary judgment based on the Policy's exclusion.

Based on the exclusion, the court concluded that Allstate did not owe a duty to defend or indemnify the insured and granted Allstate's motion for summary judgment. The court reasoned that "the plain meaning of this exclusion is that it excludes coverage for claims that arise out of incidents involving automobiles." The court further reasoned that "the claims in the underlying lawsuit were for bodily injury (i.e., the granddaughter's injuries), and that those injuries arose out of the use of a motor vehicle."

U.S. DISTRICT COURT DISMISSES INSURED'S ACTION SEEKING DECLARATORY JUDGMENT THAT POLICY COVERS CLOSURE OF RESTAURANTS DUE TO COVID-19

Last week, the United States District Court, Northern District of Texas, dismissed an insured's action seeing declaratory judgment that its policy covers restaurants' closure due to COVID-19, concluding that the declaratory judgment action was duplicative of the insured's breach-of-contract action. In *Vandelay Hospitality Group v The Cincinnati Insurance Co.*, No. 3:20-CV-1348-D, 2020 WL 4784717 (N.D. Tex., Aug. 18, 2020, mem. op.), Vandelay purchased a commercial property insurance policy ("Policy") from Cincinnati. The Policy insured three of Vandelay's restaurants in Dallas, allegedly including coverage for direct physical loss and those incurred due to business interruptions.

Pursuant to COVID-19 related court orders prohibiting access to any premises operated as dine-in restaurants, and solely permitting take-out dining services, Vandelay closed all three of its restaurants. The same day, Vandelay provided a notice of claim under the Policy to Cincinnati, but Cincinnati submitted a reservation of rights letter to Vandelay indicating that the COVID-19 pandemic, without more, would not constitute direct physical loss or damage to property sufficient to trigger coverage under the Policy.

Vandelay subsequently sued Cincinnati, alleging a claim of breach of contract and seeking a declaratory judgment that the Policy covers the claimed losses. In response, Cincinnati moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted.

The court granted Cincinnati's motion and dismissed Vandelay's declaratory judgment action, without prejudice, based on the court's conclusion that Vandelay's declaratory judgment action was duplicative of its claim of breach of contract. "Because the purpose of a declaratory judgment is remedial and determines the parties' rights, duplicative relief may not be sought in a declaratory judgment. In other words, under Texas law, a trial court errs by granting...declaratory relief where the declarations sought duplicate the issues already before the trial court." The court reasoned that Vandelay's declaratory judgment action —that (1) the Policy is an all-risk commercial property insurance Policy and that it provides coverage for business income losses and extra expenses; (2) that the forced closures of the insured restaurants' premises is a prohibition of access to their premises and covered as defined in the Policy; (3) that Vandelay sustained direct loss to property because of COVID-19 and the related state and local orders; and (4) that the lost business income it sustained and continues to sustain is due to the necessary suspension of their operations— will be resolved in the context of Vandelay's claim of breach of contract.