

The Defense Chronicles

A Newsletter Update from Thornton, Biechlin, Segrato, Reynolds & Guerra, L.C.

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Internet Updates

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for the most recent
significant changes
in the law that affect
you.

New Name, New Office Set Firm on Exciting Path for 2005

The year 2005 has marked some exciting changes for our law firm. Our former partner, Joe Frazier Brown, Jr., was appointed to the bench as a state district court judge. The name of our law firm has changed and we have moved our main office in San Antonio to a new location. While these are all important new developments, what has not changed is our commitment to providing the highest level of legal services for our clients.

It was Governor Rick Perry's appointment of Joe Brown to the bench that prompted the name change for our firm, formerly known as Thornton, Summers, Biechlin, Dunham & Brown, L.C. With Joe's appointment, requiring that we remove his name from the firm's name, with Tom Dunham's untimely death a number of years ago, and the departure of other partners, we thought it was time to update. Although Bob Thornton retired several years ago, he remains active in the life of the firm as a retired senior partner and still maintains an office here. Given Bob's leadership over the years, and his continued dedication to the firm, we are honored to retain his name within the firm's new identity, Thornton, Biechlin, Segrato, Reynolds & Guerra, L.C.

As such, our firm now includes 36 attorneys with offices in four cities, serving all of central and south Texas – and beyond. We have developed a diversified and impressive list of clients. In San Antonio, we have expanded our office space on the Fifth Floor of the One International Centre at the intersection of Loop 410 and State Highway 281. Our Austin office will also move to a larger location in a few months. Our Corpus Christi and McAllen offices are busy as well.

Over our 35 years of service, we have prided ourselves on allegiance to our clients and our ability to serve them by solving their legal problems with creative and cost-effective lawyering. We have enjoyed the reputation of being ready and able to try any lawsuit, regardless of the subject matter, while our primary strength remains knowing how to achieve the result that best serves the interests of our clients. As Thornton, Biechlin, Segrato, Reynolds & Guerra L.C., we look forward to many more years of helping you solve your legal problems, and the problems of those you represent. &

SHARE OF SETTLEMENT

Liberty Mutual Insurance Company v. Mid-Continent Insurance Company, 2005 WL 730072 (5th Cir. (Tex.) March 31, 2005).

In this lawsuit between two liability insurers, Liberty Mutual sought to recover from Mid-Continent a portion of what it paid to settle a claim against Kinsel Industries, a covered insured under each of their respective \$1 million CGL policies.

Kinsel was a general contractor for the State of Texas on a highway construction project where an automobile accident occurred in the construction zone covered by Kinsel's contract with the State. Due to the construction, two eastbound lanes of the highway were closed, so that eastbound and westbound traffic were each routed into one of the two normally westbound lanes. A westbound driver crossed into the lane assigned to eastbound traffic and collided head-on with an eastbound automobile, driven by James Boutin and carrying his wife and their two children. The Boutin family members suffered substantial injuries, and in the underlying lawsuit, they all sued the driver of the other vehicle, the State of Texas, Kinsel, and Crabtree (the highway signs and dividers subcontractor on the project) in Liberty County.

Both Liberty Mutual and Mid-Continent assumed the defense of Kinsel, and the underlying case ultimately settled for \$1.5 million. Based on its own, substantially lower evaluation of the case, Mid-Continent decided it would only pay \$150,000, so Liberty Mutual (which also had a \$10 million excess policy covering Kinsel) paid the remaining \$1,350,000 – and then brought this lawsuit against Mid-Continent for \$600,000, the amount Liberty Mutual asserted Mid-Continent was obligated for as its remaining proportionate share of the \$1.5 million settlement. Mid-Continent removed the case to federal court in the Northern District of Texas based on diversity of citizenship.

After a bench trial, and following *General Agents Insurance Company of America, Inc. v. Home Insurance Company of Illinois*, 21 S.W.3d 419 (Tex. App. – San Antonio 2000, pet. dism'd by agr.), which held that each insurer “owed a duty to act reasonably” in exercising its rights under its CGL policy, the federal district court awarded Liberty Mutual \$550,000. The district court found, “it was objectively unreasonable for Mid-Continent to refuse to change its estimate that Kinsel's potential exposure was only 10-15% of the total liability.”

Mid-Continent appealed to the United States Court of Appeals, Fifth Circuit, contending that, having timely assumed the defense of the case together with Liberty Mutual, it was entitled to determine how much it would pay, or offer to pay, in settlement, and that it owed no duty in that respect to Liberty Mutual or Kinsel, except only for the duty it owed to Kinsel, in the event of an adverse judgment, to indemnify Kinsel under its policy up to the policy limits and, if the judgment exceeded the policy limits, under *Stowers*, for the entire judgment if its refusal of the plaintiff's offer to settle within policy limits was unreasonable. Mid-Continent noted, under *American Centennial Insurance v. Canal Insurance*, 843 S.W.2d 480 (Tex. 1992), the Texas Supreme Court held that the only duty a primary insurer owed to an excess liability carrier was by way of the excess carrier's subrogation to the *Stowers* rights of the common insured, and there was no independent duty owed by the primary carrier to the excess carrier.

In the appeal, Liberty Mutual cited the case relied upon by the federal district court, *General Agents*, for the proposition that co-insurers owe a duty to one another to act reasonably in settlement.

Reviewing Texas case law at length, the Fifth Circuit ultimately concluded there was no controlling Texas Supreme Court precedent to resolve the issues presented. Accordingly, the Fifth Circuit certified to the Texas Supreme Court the question of, under the circumstances presented in this case, whether a co-primary-insurer owes a duty to reimburse the other primary insurer who has paid more than their proportionate share of a settlement. &

- Richard C. Harrist

Our next issue will feature short profiles of our named partners, as well as offer more insight into our revised format to compliment our new name and San Antonio location.

TEXAS ATTORNEY GENERAL MUST STRICTLY COMPLY WITH CLASS ACTION CERTIFICATION REQUIREMENTS IN ACTIONS BROUGHT PURSUANT TO ARTICLE 21.21 OF THE INSURANCE CODE

Lubin v. Farmers Group, Inc., 2004 WL 3119023 (Tex. App.—Austin, Jan. 21, 2005).

In this case, the Austin Court of Appeals held that the Attorney General must comply with the procedural requirements related to class action suits brought under sections 17 and 18 of Article 21.21 of the Texas Insurance Code.

In late 2001, Farmers Group, Inc., ceased offering HO-B (“all-risk”) homeowners policies and began offering HO-A (“stated-peril”) homeowners policies that limited coverage for water damage and eliminated mold coverage. An investigation by the Texas Department of Insurance resulted in the Department determining that despite the decrease in coverage, Farmer’s premiums had increased and the increase was the result of the manner in which Farmer’s calculated homeowner rates. The Attorney General’s Office then opened an investigation into Farmer’s failure to disclose the use of credit scoring as one of the factors determining rates. In August 2002, the Attorney General sued Farmers for failure to adequately disclose its rating practices and the use of credit scoring and for discriminatory rating practices. That same month, the Commissioner of Insurance issued a cease and desist order requiring that Farmers change its rating practices within three months; and Farmers filed a declaratory action against the Commissioner. In a November 2002 settlement agreement, the Attorney General agreed to amend its pleadings by transforming its suit into a class action.

The Attorney General complied and brought its claims against Farmers as a class action pursuant to section 17 of article 21.21 of the Insurance Code. Individual policy holders intervened and objected to class settlement arguing that the Attorney General failed to comply with section 18 of article 21.21 which requires the appointment of a class representative. The Attorney General admitted no class representative was appointed, but argued that this requirement need not be followed because of his “parens patriae” capacity.

The Austin Court of Appeals disagreed with the Attorney General. According to the Court, the plain language of section 18 requires the appointment of a

class representative and the legislative history behind the statute does not provide any grant of statutory parens patriae authority. The Court explained that section 18 plainly requires that all class actions brought pursuant to section 17 by the Attorney General are subject to the same prerequisites as those brought by individual class members. And, the language of section 18 mirrors that of rule 23(a) of the Texas Rules of Civil Procedure governing class actions which required a class representative. Moreover, the Court rejected the Attorney General’s argument that the Attorney General need not comply with the class representative prerequisite because the Attorney General will adequately represent class members. &

- Rebecca A. Copeland

TEXAS CONSTITUTION REQUIRES NOTICE TO SURETY UNDER FINANCE CODE SECTION 153.402(c) BEFORE STATE MAY COLLECT AN ADMINISTRATIVE PENALTY

Hartford Casualty Insurance Company v. State, 2005 WL 366867 (Tex. App.—Austin, Feb. 17, 2005).

In this case, the Austin Court of Appeals concluded that a surety’s right to constitutional due process is violated if administrative penalties are assessed against it pursuant to the Texas Finance Code Section 153.402(c) unless the surety first receives notice and opportunity for hearing.

Section 153.402(c) of the Texas Finance Code grants the State discretionary authority to collect from a surety an administrative penalty assessed against the surety’s principal; the penalty may be paid and collected from the proceeds of a bond.

In 1997, Ernesto and Aida Bolmey requested and obtained a license authorizing their company, Airport Exchange, to operate four currency exchange shops at various locations in Texas. As required for licensing, Airport Exchange posted a \$300,000 bond with the Commissioner. Hartford Casualty Insurance Company agreed to furnish the bond and act as surety for Airport Exchange. In December 2001, the Commissioner and Hartford were informed that Airport Exchange had ceased doing business, failed to transmit funds that it had received from customers, and that Hartford would have to fulfill the unmet obligations. After issuing a cease and desist order, the Commissioner filed an action with the

Finance Commission seeking an administrative penalty against Airport Exchange and the Bolmeys. Hartford was not notified of the hearing on this action.

Neither Airport Exchange, the Bolmeys, nor Hartford appeared at the hearing. The Administrative Law Judge concluded that the Commissioner had discretion to impose a \$37,200 penalty. On January 27, 2003, the State sent a demand letter to Hartford to pay the penalty. This was the first notice Hartford received regarding the administrative penalty. Hartford refused to pay and the State commenced this action seeking payment.

In construing section 153.402(c) of the Finance Code, the Austin Court of Appeals held that although this section of the code is silent regarding the procedural due process rights of a surety, the due process guarantees of notice and opportunity for a hearing are implied. Moreover, although the liability of a surety is determined by the language of a bond, the Court concluded that section 153.402(c) does not by itself, or in conjunction with the bond agreement, provide a surety with adequate notice to protect its procedural due process rights to notice and opportunity for a hearing.

The Court was likewise unpersuaded by the State's contention that Hartford's presence at the hearing was useless because the statute imposed the administrative penalty without regard to the surety's wrongdoing. According to the Court, the surety has an economic right directly affected by the outcome of the hearing and a lack of notice deprives the surety of the opportunity to protect that interest.

Finally, the Court also concluded that Texas case law holding that a surety that provides a "particular judgment bond" is not entitled to notice does not apply to a surety that provides a "general undertaking bond." In so holding, the Court reasoned that the justification behind the redundancy of notice applied to a "particular judgment bond" surety did not apply to this situation because the statute does not impose liability for all administrative penalties. &

- Rebecca A. Copeland

INSURER MUST SHOW PREJUDICE BEFORE DISMISSAL IS APPROPRIATE EVEN IF NOTICE OF CLAIM IS GIVEN SIX YEARS AFTER DAMAGE OCCURRED

Ridglea Estate Condominium Association v. Lexington Insurance Company, 398 F.3d 332 (5th Cir. 2005).

In this case, the Fifth Circuit concluded that although the insured submitted a claim six years after property damage occurred, the insurance company was required to show that the late notice prejudiced its defense before dismissal was appropriate.

In May 1995, a hail storm damaged property owned by Ridglea. Over six years later, in July 2001, a roofing inspector informed Ridglea that the roofs of its property had suffered significant hail damage. Ridglea submitted a claim to Lexington, its insurer as of the date of the damage. In December 2001, Lexington denied the claim. Subsequently, Ridglea filed suit and both parties moved for summary judgment. The district court granted Lexington's motion, holding that Ridglea's claim was barred because it had failed to comply with the policy's notice requirement. The policy between Ridglea and Lexington required "prompt notice of the loss or damage" to covered property.

On appeal, Ridglea argued, unsuccessfully, that Lexington waived any defense it might have had under the policy's prompt notice provision because it originally denied the claim on the sole basis that the damage did not occur during the policy period. However, the Fifth Circuit agreed with the district court that delaying inspection six years is unreasonable as a matter of law. And, the Fifth Circuit concluded that because Ridglea gave notice after the period of prompt notice had expired, Lexington's subsequent denial letter came after the time limited for giving notice, and thus did not constitute waiver.

Ridglea also argued that the policy's prompt notice provision violated public policy, relying on Texas statutory law that provides that a contractual stipulation that requires notification of claims for damages within less than 90 days is void. Again, the Fifth Circuit disagreed, distinguishing the language in Ridglea's policy that required notice of "an event of loss or damage" rather than of "claims for damages."

Then, Ridglea contended that the notice provision was ambiguous and should have been interpreted to require notice only once the insured discovers the loss. However, the Fifth Circuit noted that Texas case law has interpreted "prompt" as meaning "within a reasonable amount of time." And, six years was not a reasonable amount of time.

Nevertheless, the Fifth Circuit agreed with Ridglea's argument that Texas law required Lexington to show that it was prejudiced by Ridglea's breach of the policy's prompt notice provision. In so doing, the Fifth Circuit disagreed with Lexington's argument that prejudice is only required for certain types of insurance policies, including general liability and automobile insurance policies. Instead, pursuant to general principles of contract interpretation, for a breach of an insurance contract to excuse non-performance, the breach must prejudice the non-breaching party in some way. Therefore, the Fifth Circuit reversed the district court's decision and remanded for a determination of whether Lexington was prejudiced by Ridglea's breach of the property insurance policy's prompt notice provision.

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- Rebecca A. Copeland

TEXAS SUPREME COURT ADOPTS STANDARD FOR APPLICABILITY OF "BUSINESS PURSUITS" EXCLUSION IN HOMEOWNERS' POLICY

Allstate Insurance Company v. Hallman, 2005 WL 563110 (Tex. March 11, 2005).

In this case, and as a matter of first impression, the Texas Supreme Court adopts a two-part standard to determine the applicability of the "business pursuits" exclusion to a liability claim under a homeowners' policy.

In 1995, Ruth Hallman leased property she owns in rural Kaufman County to Norton Crushing, Inc., for limestone mining. In 1996, neighboring landowners sued Hallman, Norton, and all subcontractors involved in the mining project, alleging that the blasting from the mining damaged their property and their health. Hallman sought coverage under her homeowners' policy with Allstate, requesting that Allstate defend and indemnify her in the lawsuit. Allstate defended Hallman under a reservation of rights. Allstate and Hallman both sought a declaratory judgment to determine whether the policy covered the underlying litigation.

In the declaratory judgment action, Allstate moved for summary judgment, arguing that the injuries and damages relating to the limestone mining did not constitute an "occurrence" as required for coverage under the policy, and alternatively, that the mining operations were excepted from coverage under the policy's "business pursuits" exclusion. The policy specifically excluded from coverage: "bodily injury or property damage arising out of or in connection with a business engaged

in by an insured. But this exclusion does not apply to activities which are ordinarily incidental to non-business pursuits." "Business" was defined as "includ[ing] trade, profession or occupation."

The trial court granted summary judgment in Allstate's favor. The Dallas Court of Appeals reversed the trial court's judgment, and remanded for further proceedings, holding that Allstate had a duty to defend and indemnify Hallman in the limestone mining litigation because: (1) the mining damages constituted an "occurrence;" and (2) the business pursuits exclusion did not apply. Allstate appealed and the Texas Supreme Court granted its petition for review.

The Texas Supreme Court reversed, holding the business pursuits exclusion applied to preclude coverage for Hallman. Stating that "[a]lthough the business pursuits exclusion is a fairly common provision of insurance policies," the Texas Supreme Court "has never directly addressed its application." The Texas Supreme Court adopted the standard applied by the San Antonio Court of Appeals in *United Services Automobile Association v. Pennington*, 810 S.W.2d 777, 778-80 (Tex. App. – San Antonio 1991, writ denied), a case involving an identical business pursuits exclusion, which applied the exclusion where the following two elements are present: (1) continuity or regularity of the activity; and (2) a profit motive, usually as a means of livelihood, gainful employment, earning a living, procuring subsistence or financial gain, a commercial transaction or engagement. While the Dallas Court of Appeals had applied the *Pennington* test, it concluded there was no "continuity or regularity of the activity" because Hallman had executed only one lease with Norton, the limestone mining company. Disagreeing, the Texas Supreme Court observed, "the pleadings establish the mining activity conducted on Hallman's property pursuant to the lease began in 1995, was ongoing at the time the

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plaintiffs initiated their suit in 1996, and remained ongoing at the time the plaintiffs filed their sixth amended petition in 2001.” Further, “[a]lthough Hallman only executed one lease, until that lease expires, she is perpetually engaged in the continuous act of leasing her property to the mining company.” And with regard to the second element of the test, the Texas Supreme Court found “a profit motive can be inferred from the nature of the activity,” that “[o]ne generally does not allow limestone mining with dynamite blasting to occur on his or her property without some expectation of remuneration or monetary gain.” &

- Richard C. Harrist

DENIAL LETTER COMMUNICATED DECISION TO DENY CLAIM, AND STATUTE OF LIMITATIONS BEGAN TO RUN AT THAT POINT, NOTWITHSTANDING THAT LETTER INVITED INSURED TO PROVIDE ADDITIONAL INFORMATION ABOUT CLAIM

Pace v. Travelers Lloyds of Texas Insurance Company, 2005 WL 425484 (Tex. App. – Houston [14th Dist.] February 24, 2005).

Under his Travelers homeowners’ policy, Ronald Pace made a claim for damage to the foundation of his home, asserting the damage was caused by a plumbing leak. In a letter dated April 26, 2000, the Travelers claims adjuster stated, “we have determined that the damage to your property is not afforded coverage under the insurance policy,” that “[o]ur investigation indicates that the damage has resulted from settlement and/or movement of the structure due to causes that are not attributable to accidental leakage from the plumbing system.” The letter concluded, “[i]f you have additional information that you feel may have an impact on this coverage decision or should you have any questions concerning this claim please forward same to me . . .” (emphasis added.)

Following the April 26 letter, Pace hired an engineer who concluded that the foundation damage had been caused by plumbing leaks, and Pace forwarded a copy of his engineer’s report to Travelers. In a letter dated September 24, 2001, the Travelers adjuster replied, “[i]n a continued effort to determine if there is coverage for the damage being claimed . . . we requested [an engineer to] reinspect and reevaluate the information you submitted . . . [but] . . . we regret our position remains the same . . . [and] . . . we are unable to issue claim

payment for the loss caused by foundation settlement that is not the result of a leaking plumbing system.” (emphasis added.)

More than two years after the April 26 letter, on January 8, 2003, Pace sued Travelers for denying his claim. Travelers moved for summary judgment based on the applicable two-year statute of limitations, asserting that the limitations period began to run when Travelers denied Pace’s claim in its April 26, 2000 letter. The trial court granted Travelers’ motion for summary judgment. Pace appealed, claiming the italicized portions of the letters he got from Travelers (see above) made ambiguous the point at which his claim was actually denied, and his claim was actually in an ongoing state of evaluation during that time. Travelers argued April 26, 2000 was the date Pace’s claim was denied, as per the clear language in the letter of that date. The appeals court agreed with Travelers, and affirmed the trial court’s grant of summary judgment against Pace on limitations grounds. Notwithstanding the fact that the Travelers letters invited Pace to provide any additional information, the appeals court held the plain language of the April 26 letter “unequivocally” communicated a decision to deny coverage. “The April 26 letter plainly stated, ‘we have determined that damage to your property is not afforded coverage under the insurance policy,’ provided a reason for the decision, then reiterated that ‘we will be unable to make payment . . .’” &

- Richard C. Harrist

FIFTH CIRCUIT CERTIFIES IMPORTANT QUESTION TO TEXAS SUPREME COURT – WHETHER CO-PRIMARY INSURER HAS A DUTY TO REIMBURSE OTHER PRIMARY INSURER WHO HAS PAID MORE THAN THEIR PRO-PORTIONATE SHARE OF SETTLEMENT

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- Richard C. Harrist

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