

The Defense Chronicles

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Highlights

New Developments in
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ACTS OF ALLEGED SEXUAL ABUSE AGAINST SIX CHILDREN CONSTITUTED ONE “SEXUAL ABUSE OCCURRENCE,” BUT OCCURRENCE LIMIT NOT EXHAUSTED BY \$1 MILLION SETTLEMENT OF THE CLAIMS OF THREE CHILDREN -- DUTY TO DEFEND REMAINED AS TO NON-SETTLED CLAIMS, SINCE PETITIONS ALSO ALLEGED ACTS OF PHYSICAL ABUSE UNASSOCIATED WITH SEXUAL ABUSE

TIG Insurance Company v. San Antonio YMCA, 2005 WL 1629801 (Tex. App. – San Antonio July 13, 2005).

TIG, the insurer of the YMCA of San Antonio, filed this declaratory judgment action to determine its liability coverage obligations to a youth camp, arising out of claims based on a series of acts of physical and sexual abuse committed against several children by a camp counselor. The issues included whether the wrongful acts committed by one camp counselor against six different children constituted one “occurrence” – or six “occurrences” under the CGL policy and its sexual abuse endorsement.

The YMCA operates a youth camp in Hunt, Texas, known as Camp Flaming Arrow. In the summer of 1999, Kenneth Trimble, a YMCA counselor, allegedly sexually and physically assaulted six children attending the camp. The parents or guardians of the children sued the YMCA for negligent hiring practices. Three of the six lawsuits were collectively settled for \$6 million, with TIG contributing \$1 million towards the settlement.

To determine whether the YMCA had any coverage under its CGL policy for the remaining three lawsuits, TIG filed a declaratory judgment action, and then moved for summary judgment on the grounds that the policy’s coverage for the acts of sexual abuse was limited to a single occurrence, the incidents of sexual abuse alleged by all six children and the negligent hiring allegations against the YMCA constituted a single occurrence under the policy, the policy limits of \$1 million for each occurrence were exhausted by the settlement payment and, consequently, TIG had no duty to defend the YMCA in the remaining lawsuits.

The YMCA filed a cross-motion for summary judgment, arguing the policy limits had not been exhausted by TIG’s \$1 million settlement payment because a separate new “occurrence” was triggered for each victim of Trimble’s alleged abuse. The YMCA also asserted TIG had a duty to defend based on the allegations of physical abuse that did not involve sexual abuse.

The trial court denied TIG's motion, granted the YMCA's motion, and declared TIG had a continuing duty to defend the YMCA in the remaining lawsuits – and the YMCA was entitled to indemnity in each of the lawsuits, “subject only to the exhaustion of the policy's \$2 million aggregate limit.” TIG appealed.

The San Antonio Court of Appeals affirmed the judgment of the trial court. Relying on the unambiguous language in the sexual abuse endorsement, that “[a]ll acts of ‘sexual abuse occurrence’ by an actual or alleged perpetrator or perpetrators, including ‘negligent employment’ of such perpetrator or perpetrators, shall be deemed and construed as once occurrence,” the court held that all six incidents of sexual abuse constituted one “sexual abuse occurrence.” However, the court also held because the policy distinguishes between an “occurrence” and a “sexual abuse occurrence,” TIG's payment of \$1 million for a “sexual abuse occurrence” did not result in the exhaustion of limits if there were a separate “occurrence.” Accordingly, the appeals court stated, “if the plaintiffs’ petitions allege a claim for bodily injury unassociated with sexual abuse, then TIG has a continuing duty to defend.” Liberally construing the plaintiffs’ pleadings in the remaining three lawsuits, the appeals court determined the allegations in the plaintiffs’ petitions “suggest[ed] the possibility that the children’s injuries may have resulted from physical abuse unassociated with sexual abuse or molestation . . . thus triggering TIG’s duty to defend these [remaining] lawsuits.”



HEALTH INSURER'S RIGHT OF SUBROGATION AND THE “MADE WHOLE” DOCTRINE

Fortis Benefits v. Cantu, 2005 WL 1654594 (Tex. App. – Waco July 13, 2005).

Vanessa Cantu was severely injured in an automobile accident in 1998 when she was a minor, rendering her a paraplegic. She filed suit against the vehicle's driver, the vehicle's manufacturer, and the driver's employer, seeking to recover, among

other things, her actual damages for past and future medical expenses. Vanessa's health insurer, Fortis Benefits, intervened to recover through subrogation and reimbursement the benefits it had paid for Vanessa's health care necessitated by the accident. Before trial, Vanessa settled her claim with the defendants for \$1.4 million, and agreed she would be wholly responsible for Fortis' subrogation claim. Fortis was not involved in the settlement.

Unable to reach an agreement with Fortis, Vanessa filed a motion for summary judgment – arguing, because she had not been “made whole” in the settlement, Fortis was not entitled to recover anything on its subrogation/reimbursement claim – which totaled, at that time, \$247,534. Vanessa's summary judgment evidence included her attorney's affidavit, which stated that her past medical expenses totaled at least \$378,000, and which attached two “life care plans” that estimated Vanessa's future medical expenses at \$1.7 million and \$5.3 million, respectively. The trial court granted Vanessa's motion for summary judgment, ordering that Fortis take nothing by its intervention.


The Waco Court of Appeals affirmed. Agreeing with the trial court that Vanessa had established, as a matter of law, that her past and future medical expenses exceeded the amount of her settlement with the defendants, the court of appeals held that Fortis' contractual subrogation and reimbursement rights are subject to the “made whole” doctrine, which states, “if either the insurer or the insured must to some extent go unpaid, the loss should be borne by the insurer for that is a risk the insured has paid it to assume.”

LOWER DEDUCTIBLE APPLIED DUE TO “INARTFUL DRAFTING”

V.L. Properties, Inc. v. Alleghany Underwriting Risk Services Ltd./Lloyd's of London, 130 Fed. Appx. 675 (5th Cir. 2005).

This lawsuit concerns which deductible is applicable to an insurance claim. The insured owned a yacht basin on the Gulf Coast. In 2001, strong winds caused property damage to the facility – estimated at \$64,410.22. While the parties agreed the damage giving rise to the insurance claim was caused by wind, the dispute centered over the weather conditions accompanying the winds and the extent or magnitude of the winds.

As to the amount of the deductible applicable to the claim, the policy provided for a \$50,000 deductible “[i]n respect of Catastrophe *which will include* wind, wave action, earthquake and flood,” and a \$5,000 deductible for “any other loss.” Although the term “Catastrophe” was capitalized, it was not defined in the policy. The insurer moved for summary judgment, arguing that the \$50,000 deductible applied to the loss, construing the policy language to mean that any damage caused by wind was a “catastrophe.” The federal trial court agreed, and granted summary judgment to the insurer.

The Fifth Circuit reversed. Using the “plain and ordinary meaning” taken from *Webster’s Dictionary*, which defined “catastrophe” as “a momentous tragic event or an utter failure,” the appeals court held it was “unreasonable to construe the language to make any wind damage a catastrophe.” Further, the court stated, “if Lloyds as the drafter intended the higher deductible to apply to any event resulting in damages caused by wind, and not otherwise excluded from coverage, it could have used the term ‘any Insured Event caused by [wind]’ instead of ‘Catastrophe which will include [wind].” 


APPLYING “EIGHT CORNERS RULE,” NO DUTY TO DEFEND EXISTED WHERE ALLEGATIONS AGAINST JAILER ASSERTED CRIMINAL ACT THAT FELL WITHIN POLICY’S EXCLUSION

Texas Association of Political Subdivisions – Law Enforcement v. Bernal, 2005 WL 995465 (Tex. App. – San Antonio April 27, 2005).

This lawsuit arose out of injuries suffered by Jesus Munoz, III while he was a prisoner. Munoz

alleged that he fell asleep after being arrested and detained. When he awoke, he was allegedly told by Deputy Bernal and an unidentified jailer to step out of the detox cell. When he complied, Munoz allegedly was confronted and stricken by Deputy Bernal, without provocation, and rendered unconscious. When he regained consciousness, Munoz alleged he “found himself on his hands and knees with blood streaming from his nose and mouth.”

Deputy Bernal’s insurer, the Texas Association of Political Subdivisions – Law Enforcement (“TAPS”), sought a declaratory judgment that it had no duty to defend Bernal pursuant the policy’s exclusion for “any act, error or omission which is dishonest, fraudulent, or criminal.” Bernal argued his actions could not be taken as “criminal” because jailers are justified in using force to maintain security. The trial court held that TAPS had a duty to defend Bernal against the claims of Munoz.

The San Antonio Court of Appeals reversed. Applying the “eight corners rule,” the appeals court held TAPS had no duty to defend Deputy Bernal. Focusing on Munoz’s pleadings, that Bernal’s “actions were unprovoked and that the force used was excessive, undue, and unreasonable,” the appeals court determined “that Munoz’s claims against Bernal [were] within the policy’s exclusion for criminal acts.” 

- Richard C. Harrist

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