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Internet Updates

Be sure to check our website at www.thorntonfirm.com for the most recent significant changes in the law that affect you.

TEXAS SUPREME COURT TO REVISIT LANDMARK DECISION IN FRANK'S CASING

Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc., 2005 WL 1252321 (Texas May 27, 2005) (NO. 02-0730), rehearing granted (Jan. 6, 2006).

In a move that has the insurance bar, insurers, and the business community on the edge of their proverbial seats, the Texas Supreme Court on January 6, 2006, agreed to rehear ***Frank's Casing***, setting oral argument for February 15, 2006. In the Supreme Court's May 2005 opinion in the case, which has yet to be formally released for publication and was authored by former Justice Priscilla Owen (now at the U.S. Court of Appeals, Fifth Circuit), a 7-0 Court fundamentally changed insurer-insured dynamics in settlement negotiations by holding that, in certain situations, an excess insurer that disputes coverage but settles a third-party's claim against its insured has an "implied" right of reimbursement from its insured if it turns out there is no coverage for the third-party's claim. According to the Supreme Court, that right would exist for the insurer if it has reserved its rights and has notified the insured that it will seek reimbursement from the insured and: (1) the insured has demanded the insurer accept the claimant's offer to settle within policy limits; or (2) the insured has agreed the claimant's settlement offer should be accepted.

As it stands right now, ***Frank's Casing*** reduces the risk of an insurer presented with a Stowers demand because the insurer faced with a questionable coverage situation can reserve its rights, pay the less-than-policy-limits demand to settle the claim, and then litigate its right to recoup what it paid on the claim. **Frank's Casing** *implies* the insurer's right to seek reimbursement from its insured by virtue of the insured's agreement that the settlement is reasonable, regardless of whether consent to the settlement or right to reimbursement is given by the insured. Previously, under ***Texas Association of Counties County Government Risk Management Pool v. Matagorda County***, 52 S.W.3d 128 (Tex. 2000), the Texas Supreme Court held that an insurer only had a right to reimbursement from its insured where the insured had given "clear and unequivocal" consent to the settlement and consent to the insurer's right to reimbursement – and as long as the insurer ultimately prevailed on its coverage defense.

With Justice Owen's departure and other changes in the composition of the Texas Supreme Court, it is anyone's guess what the Supreme Court will do following rehearing of ***Frank's Casing***, but the possibility exists that the Court is giving itself an opportunity to back off the groundbreaking decision it made last year. &

"PHYSICAL CONTACT" REQUIREMENT FOR UNINSURED MOTORIST COVERAGE MET WHERE, IN UNBROKEN CHAIN OF EVENTS, INSURED'S VEHICLE WAS HIT BY "INTEGRAL PART" OF UNIDENTIFIED VEHICLE, AS DISTINGUISHED FROM "CARGO" FALLING FROM UNIDENTIFIED VEHICLE

Elchehimi v. Nationwide Insurance Company, 2005 WL 3544692 (Tex. App. – Waco Dec. 28, 2005).

This case considers the question of what constitutes "physical contact" for purposes of uninsured motorist coverage, and reveals a conflict between the Texas intermediate courts of appeals.

Mohamad Elchehimi filed suit against his automobile insurer, Nationwide, to recover under the uninsured motorist provisions of his policy for injuries he and his children suffered after his car was struck by an axle and attached wheels that broke away from a truck tractor traveling in the opposite direction on a divided highway. The trial court granted summary judgment to Nationwide, and Elchehimi appealed, contending that a genuine issue of material fact existed on the question of whether the collision was sufficient to constitute "actual physical contact" with the semi-tractor as required for uninsured motorist coverage under the Texas Insurance Code.

The appeals court reversed and remanded. Recognizing the well-settled rule under Texas case law that the Texas Insurance Code excludes from uninsured motorist coverage a collision with cargo that has fallen from a vehicle – the owner of which is unknown – the appeals court reviewed decisions from other states and determined that "a majority of these states which have addressed this issue have concluded that the requisite contact is established when an integral part of an unidentified vehicle collides with an insured's vehicle in an unbroken chain of events." In this case, the Waco Court of Appeals identified one Texas case on point – ***Smith v. Nationwide Mutual Insurance Company***, 2003 WL 21391534 (Tex. App. – San Antonio June 18, 2003) – but refused to follow it. ***Smith*** involved a collision between an insured's vehicle and a component of a semi-trailer that had detached from the trailer immediately before colliding with the insured's vehicle and, in that case, the San Antonio Court of Appeals found the necessary physical contact for UM coverage lacking. About ***Smith***, the Waco Court of Appeals stated, "the San Antonio Court did not give adequate weight to the distinction between cargo which has fallen from an unidentified vehicle and an integral part of an unidentified vehicle which strikes an insured's vehicle in an unbroken chain of events." **&**

INSURER WHO RELIED FOR ITS DENIAL OF CLAIM ON ENGINEER WHO TYPICALLY FAVORED INSURERS WAS NOT IN "BAD FAITH"

Travelers Personal Security Insurance Company v. McClelland, 2006 WL 133509 (Tex. App. – Houston [1st Dist.] Jan. 19, 2006).

After Travelers denied the McClellands' homeowners policy claim for water-related foundation damage to their home, they filed suit against Travelers on contractual and extra-contractual grounds. The policy excluded coverage for foundation damage due to "natural causes," but excepted from this exclusion damage from foundation movement caused by plumbing leaks. A leak detection test had revealed plumbing leaks under the foundation, so Travelers hired a structural engineer to determine whether the plumbing leaks caused the foundation movement. The engineer concluded the leaks had not caused foundation movement, so Travelers denied the claim.

After trial, the jury returned a verdict and awarded damages for the McClellands on their contractual claim, finding that the plumbing leaks had caused eighty-percent of the foundation-movement-related damage to the McClellands' home. The jury also awarded extra-contractual damages based on its finding that Travelers had engaged in bad faith by hiring an engineering expert who was biased because he worked almost exclusively for insurance companies, knew that plumbing leaks were covered under the insurance policy, and found no connection between plumbing leaks and foundation problems eighty-five to ninety percent of the time. The trial court entered judgment for the damages awarded for the breach of contract claim, but granted Travelers' motion for judgment notwithstanding the verdict, disregarding the jury's verdict on the extracontractual claims. The McClellands appealed the trial court's grant of j.n.o.v. to Travelers, arguing there was more than a scintilla of evidence for the jury to conclude Travelers engaged in bad faith practices by hiring the expert it hired.

The appeals court affirmed. Acknowledging, "the instant case presents us with a close call," the appeals court nevertheless stated, "standing alone, this type of evidence would not always be evidence of bad faith . . . [and] . . . the [Texas Supreme Court] seems to require that, in order to show bad faith, the evidence must show behavior more egregious than merely hiring a firm whose reports generally feature an outcome favored by its recipient." **&**

AUTOMOBILE LIABILITY INSURER MAY BE ENTITLED TO HELP FROM COMMERCIAL LIABILITY CARRIER IN DEFENDING AND INDEMNIFYING THEIR MUTUAL INSURED

EMCASCO Insurance Company v. American International Specialty Lines Insurance Company, 2006 WL 205099 (5th Cir. Jan. 27, 2006).

This case involves a dispute between two insurers, a commercial automobile

policy carrier and a commercial liability insurer, over which policy should bear the cost of defending and indemnifying their mutual insured.

In February 2001, Jaime Langston was driving down a paved, public, country road with her young son when she skidded on a patch of slick mud, clay, and/or sand. The car swerved off the road, striking a tree, seriously injuring Ms. Langston and killing her son. In state court, Langston sued Wilson-Riley, Inc. ("Wilson-Riley"), the operator of a sand pit immediately adjacent to the accident site, alleging that, as part of its operation of the sand pit, Wilson-Riley hauled sand from the pit in trucks that it owned and operated and, because of heavy rains just before the accident, those trucks had tracked mud onto the roadway when exiting Wilson-Riley's unpaved driveway, the rain had washed mud from the unpaved driveway onto the paved road, and the mud on the road caused the accident.

Wilson-Riley had two insurance policies, a commercial auto policy from EMCASCO and a commercial general liability policy from AISLIC ("American International Specialty Lines Insurance Company"). In the underlying lawsuit, EMCASCO paid the lion's share of the cost of defending Wilson-Riley, and the entire amount of the $350,000.00 settlement with Langston. EMCASCO then filed suit against AISLIC in federal district court – seeking to recover some or all of what it spent defending and indemnifying Wilson-Riley in the Langston lawsuit. AISLIC moved for summary judgment, asserting there was no coverage under Wilson-Riley CGL policy for the accident because of the CGL's exclusion for "[b]odily injury or property damage arising out of the ownership, maintenance, use or entrustment to others of any . . . auto . . . owned or operated by . . . any insured." The federal district court agreed with AISLIC, finding Langston's damages were explicitly excluded by AISLIC's auto exclusion, holding that the mud tracked onto the public road by Wilson-Riley "necessarily involved the use of motor vehicles," and determining that "the washing of the mud from [Wilson-Riley's] unpaved roadway could not have been a 'separate' and 'independent' cause of the accident, which would have indicated that AISLIC's policy also covered the accident."

The Fifth Circuit reversed the trial court. Guided by the "eight corners rule," the appeals court held Langston's petition implicated AISLIC's duty to defend through allegations that the rain had washed mud from Wilson-Riley's unpaved driveway, allegations unrelated to the use of the trucks. The Fifth Circuit remanded the case to the district court to determine whether there was sufficient evidence to declare, as a matter of law, that the heavy rain before the accident could have produced sufficient mud that would have independently caused the accident, or whether that issue should be sent to a factfinder. **&**

- Richard C. Harrist

The Counselor Is In: Robert R. "Rusty" Biechlin

Rusty Biechlin was born and raised in San Antonio, Texas. Upon graduating from St. Mary's University School of Law and passing the bar exam in 1974, he was hired by the firm, and today, he is the most senior partner. For the past three decades, Rusty's practice has covered a wide spectrum of matters, on the defense side, including automobile accidents; slip and fall incidents; complex products liability; construction defects; and medical malpractice. His vast legal knowledge and experience qualify him to speak at seminars across the nation, where he participates in at least two per year.

Outside of the office, Rusty has a number of hobbies, sharing many with his wife, Janet, to whom he has been married for over 30 years. Time permitting, Rusty and Janet play golf; currently, they are attempting to train their yellow Labrador retriever puppy not to eat the patio furniture. A proponent of physical fitness and healthy eating, Rusty also enjoys snow skiing and hunting, counter-balancing a major sweet-tooth--pecan pie and German chocolate cake are his kryptonite. Holiday parties at his home always boast the best desserts. Business and recreational travels, as well as community events sponsored by the firm, provide Rusty with photography opportunities, a creative outlet recently discovered, for which he demonstrates an inherent talent. **&**

- Mary M. Strauss

The Defense Chronicles is proud to introduce this new section, "The Counselor is In." Each quarterly printing will spotlight a different attorney, offering our readership insight into the real people who are the building blocks of our firm.

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