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Highlights

New Developments in Insurance Law 2

Internet Updates

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

Interpretation of the Words "Any" and "The" Cost Plaintiffs $1 Million

Bituminous Casualty Corporation v. Kathy Maxey Individually and as Next Friend of Kristin Tucker, Tex.App.-Houston [1st Dist.], No. 01-01-1111-CV (2003).

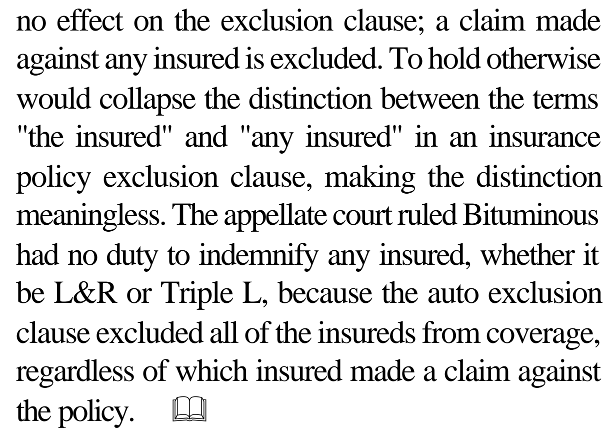
In 1999, Kristin Tucker was turning into a convenience store parking lot when her car was hit from behind by a truck and trailer operated by Terrance Rose. Rose was employed by Triple L Express, Inc. Triple L leased the trailer from L&R Timber Company, Inc. L&R's employee, Wiggins, was responsible for maintenance of the tractor trailer and the brakes. Tucker suffered severe injuries resulting in permanent paralysis of her lower extremities and thereafter sued L&R, Triple L, Rose, and Wiggins. Bituminous issued a commercial lines policy to both L&R and Triple L; said policies, included, among other coverages, general liability coverage. Bituminous sought a declaratory judgment that it had no duty to defend or indemnify Triple L and L&R. The trial court ruled Bituminous had the duty to defend and indemnify L&R, but not Triple L. Settlement was subsequently reached between Maxey and Triple L and its employee Rose, whereby Triple L and Rose were released from liability for payment of the full amount of their automobile liability policy in the amount of $1,500,000.00. Judgment was then entered against L&R and Wiggins, jointly and severally for $1,000,000.00 -- the full amount of coverage under the Bituminous CGL policy. Bituminous appealed.

Bituminous argued that the auto exclusion clause in the CGL policy precluded all coverage for the accident, relying on the following: this insurance does not apply to: "bodily injury" or "property damage" arising out of the ownership, maintenance, or use or entrustment to others of any aircraft, "auto," or watercraft owned or operated by or rented or loaned to any insured...Both Triple L and L&R are identified in the declarations as named insureds on the CGL policy. Under the plain language of the auto exclusion clause and the definitions of "an insured" L&R and Triple L were "any insureds" for purposes of the auto exclusion clause. Under a plain language reading, the court of appeals found the auto exclusion clause applied, excluding coverage for Tucker's injury. Plaintiff Maxey argued,

however, that the "separation of insureds," or severability of interests clause in the CGL policy required that the policy be read as if L&R were the only named insured shown on the declarations page, further noting that when the policy is read as if only L&R were the insured, then damages attributable to Triple L are not excluded by the auto exclusion clause, thereby requiring Bituminous to indemnify L&R for coverage of the damages caused by Triple L.

The court looked to the separation of insureds clause and found each insured against whom a claim is brought is treated as if it was the only insured under the policy; the intent of the severability clause is to provide each insured with separate coverage. The severability clause also serves to provide coverage when there is an "innocent" insured who did not commit the conduct excluded by the policy. Essentially, Maxey asked the court of appeals to find that Triple L did not commit the acts for which L&R was held liable. Bituminous countered that the use of the phrase "any insured" referenced in the exclusions negated coverage for all insureds, despite the inclusion of a separation of insureds clause.

The court of appeals, in a case of first impression, held the only effect of the separation of insureds clause is to alter the meaning of the term "the insured" to reflect who is seeking coverage. Therefore, the effect of the separation of insureds clause on a particular exclusion in an insurance contract depends upon the terms of that exclusion. If the exclusion clause uses the term "the insured," application of the separation of insureds clause requires that the term be interpreted as referring only to the insured against whom a claim is being made under the policy. If, however, the exclusion clause uses the term "any insured," then application of the separation of insureds clause has no effect on the exclusion clause; a claim made against any insured is excluded. To hold otherwise would collapse the distinction between the terms "the insured" and "any insured" in an insurance policy exclusion clause, making the distinction meaningless. The appellate court ruled Bituminous had no duty to indemnify any insured, whether it be L&R or Triple L, because the auto exclusion clause excluded all of the insureds from coverage, regardless of which insured made a claim against the policy.



- Mary M. Strauss

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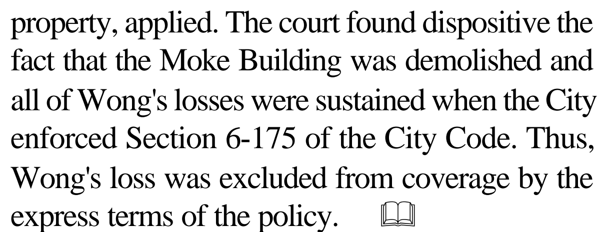
City's Decision to Demolish Building Does Not Entitle Restaurant Owner to Compensation Under the Insurance Policy.

Wong v. Monticello Insurance Company, Tex.App.-San Antonio, No. 04-02-00142-CV (2003).

Plaintiff Wong appeals the summary judgment in her suit to recover insurance proceeds under a commercial lines policy issued by Monticello Insurance Company. Wong operated a restaurant out of the Moke Building in San Antonio, Bexar County, Texas. The building was ordered demolished by the City, due to damages sustained by the Moke Building from an explosion in an adjacent building, as well as high winds. Wong argued that the Moke Building was ordered demolished because of covered perils, for which she was entitled to policy proceeds. Monticello Insurance Company argued the exclusion under the policy, with respect to no monies paid when an ordinance or law regulates the construction, use or repair of any property or demolition of any

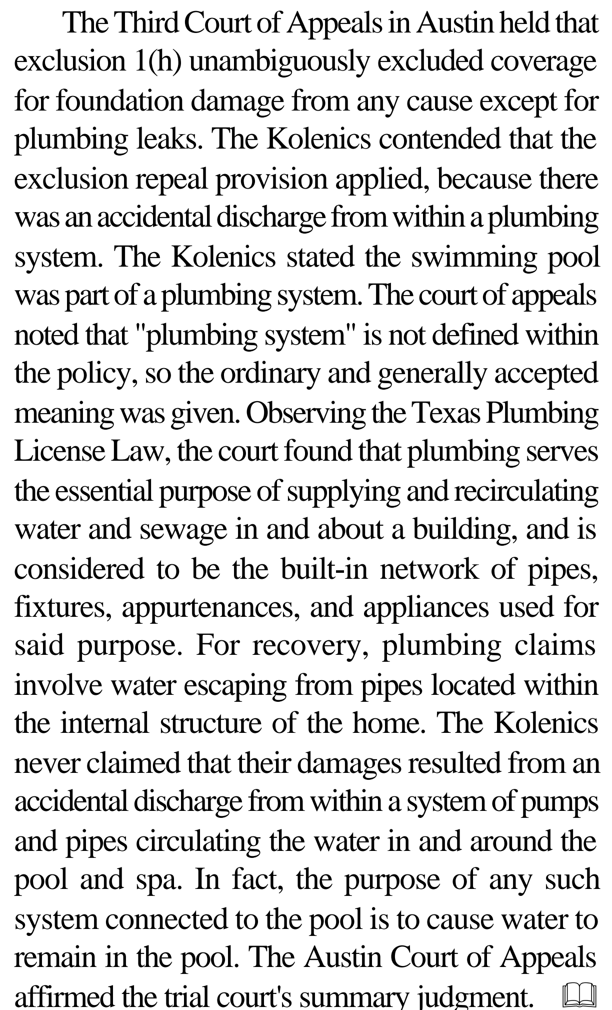


property, applied. The court found dispositive the fact that the Moke Building was demolished and all of Wong's losses were sustained when the City enforced Section 6-175 of the City Code. Thus, Wong's loss was excluded from coverage by the express terms of the policy.

Leaking Swimming Pool Adjacent to Home's Foundation Problems Not Covered Under the Standard Texas Home Owner's Policy Form HO-B.

Kolenic v. The Travelers Lloyds of Texas Insurance Company, Tex.App-Austin, No. 03-02-00366-CV (2003).

The Kolenic's property included a swimming pool with spa. Upon purchase, the home's foundation had some cracks. Over time, the Kolenics began experiencing more problems with cracking around the foundation of their home, as well as along the walls of the pool and spa. After a number of tests, the cracks in the swimming pool and spa were found to be leaking, and the Kolenics' expert concluded that moisture from the leaks was the ultimate source of the foundation problem, due to the swelling of the soil. The Kolenics made a claim, which Travelers denied, based in part upon Travelers' conclusion that several factors, but not the water from the pool, were responsible for the foundation problems. While the Kolenics attempted to collect under their Texas Home Owners Policy Form HO-B, Travelers concluded that policy exclusion 1(h) B pertaining to loss caused by settling and cracking of foundations or swimming pools, applied. At the trial court level, Travelers was successful on summary judgment. The Kolenics appealed.



The Third Court of Appeals in Austin held that exclusion 1(h) unambiguously excluded coverage for foundation damage from any cause except for plumbing leaks. The Kolenics contended that the exclusion repeal provision applied, because there was an accidental discharge from within a plumbing system. The Kolenics stated the swimming pool was part of a plumbing system. The court of appeals noted that "plumbing system" is not defined within the policy, so the ordinary and generally accepted meaning was given. Observing the Texas Plumbing License Law, the court found that plumbing serves the essential purpose of supplying and recirculating water and sewage in and about a building, and is considered to be the built-in network of pipes, fixtures, appurtenances, and appliances used for said purpose. For recovery, plumbing claims involve water escaping from pipes located within the internal structure of the home. The Kolenics never claimed that their damages resulted from an accidental discharge from within a system of pumps and pipes circulating the water in and around the pool and spa. In fact, the purpose of any such system connected to the pool is to cause water to remain in the pool. The Austin Court of Appeals affirmed the trial court's summary judgment.

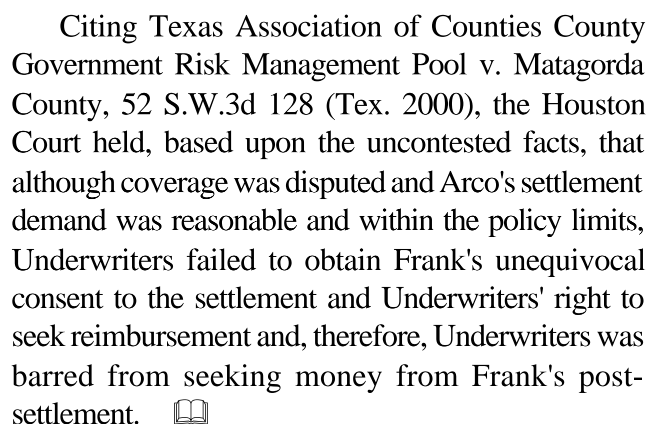
An Excess Insurer is Not Entitled to Reimbursement from its Insured Unless it Obtains Clear and Unequivocal Consent from the Insured.

Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc., Tex.App.-Houston [14th Dist.], No. 14-01-00349-CV (2002).

Frank's Casing Crew installed a drilling platform in the Gulf of Mexico for Arco Oil. The

platform collapsed several months after installation, whereupon Arco and related entities sued Frank's in Harris County District Court. Frank's promptly notified its primary insurers as well as its excess insurer, Excess Underwriters. Frank's primary insurers provided defense counsel, while Underwriters sent Frank's a reservation of rights letter contesting coverage. Settlement negotiations were active. At one point Frank's asked Arco for a settlement demand within the excess policy limits, and thereafter Frank's forwarded Arco's $7.5 million demand to Underwriters. Frank's demanded that Underwriters pay the full amount, asserting the demand was reasonable and covered by the policy. Underwriters decided to fund the entire $7.5million settlement, without any contribution from Frank's or agreement by Frank's to resolve coverage issues later. On the same day Underwriter's settled Arco's claims, they informed Frank's they intended to seek reimbursement and filed the subject declaratory judgment action. Frank's never agreed that Underwriters had a right to seek reimbursement.

Citing Texas Association of Counties County Government Risk Management Pool v. Matagorda County, 52 S.W.3d 128 (Tex. 2000), the Houston Court held, based upon the uncontested facts, that although coverage was disputed and Arco's settlement demand was reasonable and within the policy limits, Underwriters failed to obtain Frank's unequivocal consent to the settlement and Underwriters' right to seek reimbursement and, therefore, Underwriters was barred from seeking money from Frank's post-settlement.

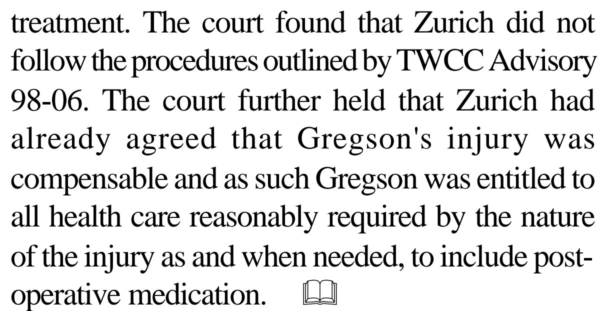


Where a Medical Benefit Sought Does Not Require Preauthorization, an Injured Worker is Not Required to Exhaust an Administrative Remedy Before Pursuing Extra-Contractual Claims in Court.

Gregson v. Zurich American Insurance Company, et al.,Fifth Circuit, No. 02-20169 (2003).

David Gregson suffered an injury while at work, which ultimately required back surgery. Following surgery, Gregson's physician prescribed the antibiotic Levaquin. When Gregson attempted to fill the prescription, Zurich denied coverage. Over the weekend, Gregson repeatedly tried to contact Zurich, to no avail. Soon thereafter, Gregson discovered he was suffering from a staph infection, which necessitated hospitalization and two additional surgeries. While hospitalized, doctors administered Levaquin to Gregson. Gregson filed suit against Zurich seeking to recover damages for both contractual and extra-contractual breaches based upon Zurich's denial of medication. Zurich filed a motion to dismiss, which was granted by the District Court, because Gregson failed to exhaust his administrative remedies before the Texas Workers Compensation Commission.

On appeal, the issue before the court was whether an employee must initiate and exhaust administrative procedures with the TWCC, when a carrier, who has agreed to provide all necessary and reasonable medical coverage, denies coverage of a medical benefit incident to the approved medical treatment. Gregson cited TWCC Advisory 98-06. The Fifth Circuit noted the Advisory sets out that prescription medication is not a medical benefit requiring preauthorization. Therefore, a requestor or employee need not obtain prospective approval from the insurance carrier prior to providing health care treatment or services. The Advisory further states that carriers may not prospectively deny medical benefits that do not require preauthorization based on the reasonableness or necessity of the requested

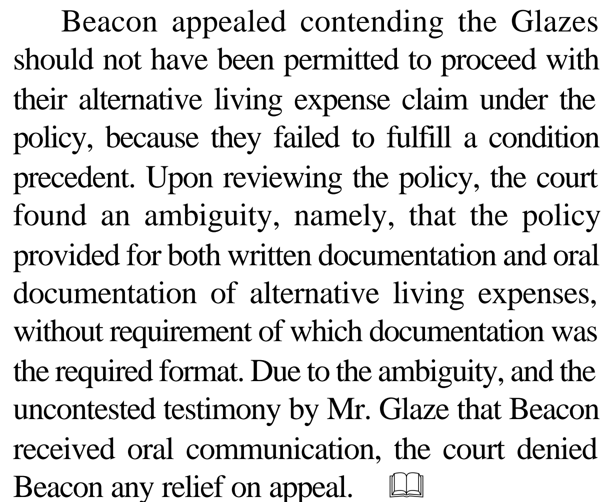


treatment. The court found that Zurich did not follow the procedures outlined by TWCC Advisory 98-06. The court further held that Zurich had already agreed that Gregson's injury was compensable and as such Gregson was entitled to all health care reasonably required by the nature of the injury as and when needed, to include post-operative medication. 🕮

Ambiguity in Insurance Policy Affords Policy Holder Alternative Living Expenses.

Beacon National Insurance Company v. Bob Glaze et. al., Tex.App-Tyler, No. 12-02-00212-CV (2003).

In 1993, the Glazes' home of 33 years burned to the ground. Beacon paid the Glazes the policy limits of $70,000 for the loss of the structure and $42,000 for the loss of personal property. During negotiations, the parties failed to reach an agreement with respect to the amount the Glazes were to be paid under the "alternative living expense" section of their Texas Standard Farm and Ranch Owners Policy. The Glazes filed suit against Beacon alleging causes of action for breach of contract and breach of the duty of good faith and fair dealing. After a bench trial, the trial court awarded the Glazes $4,000 in damages under the alternative living expense section and $1,875 for meals and laundry expenses. The trial court also awarded $4,142.53 in prejudgment interest.



Beacon appealed contending the Glazes should not have been permitted to proceed with their alternative living expense claim under the policy, because they failed to fulfill a condition precedent. Upon reviewing the policy, the court found an ambiguity, namely, that the policy provided for both written documentation and oral documentation of alternative living expenses, without requirement of which documentation was the required format. Due to the ambiguity, and the uncontested testimony by Mr. Glaze that Beacon received oral communication, the court denied Beacon any relief on appeal. 🕮

- Mary M. Strauss

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