The Defense Chronicles

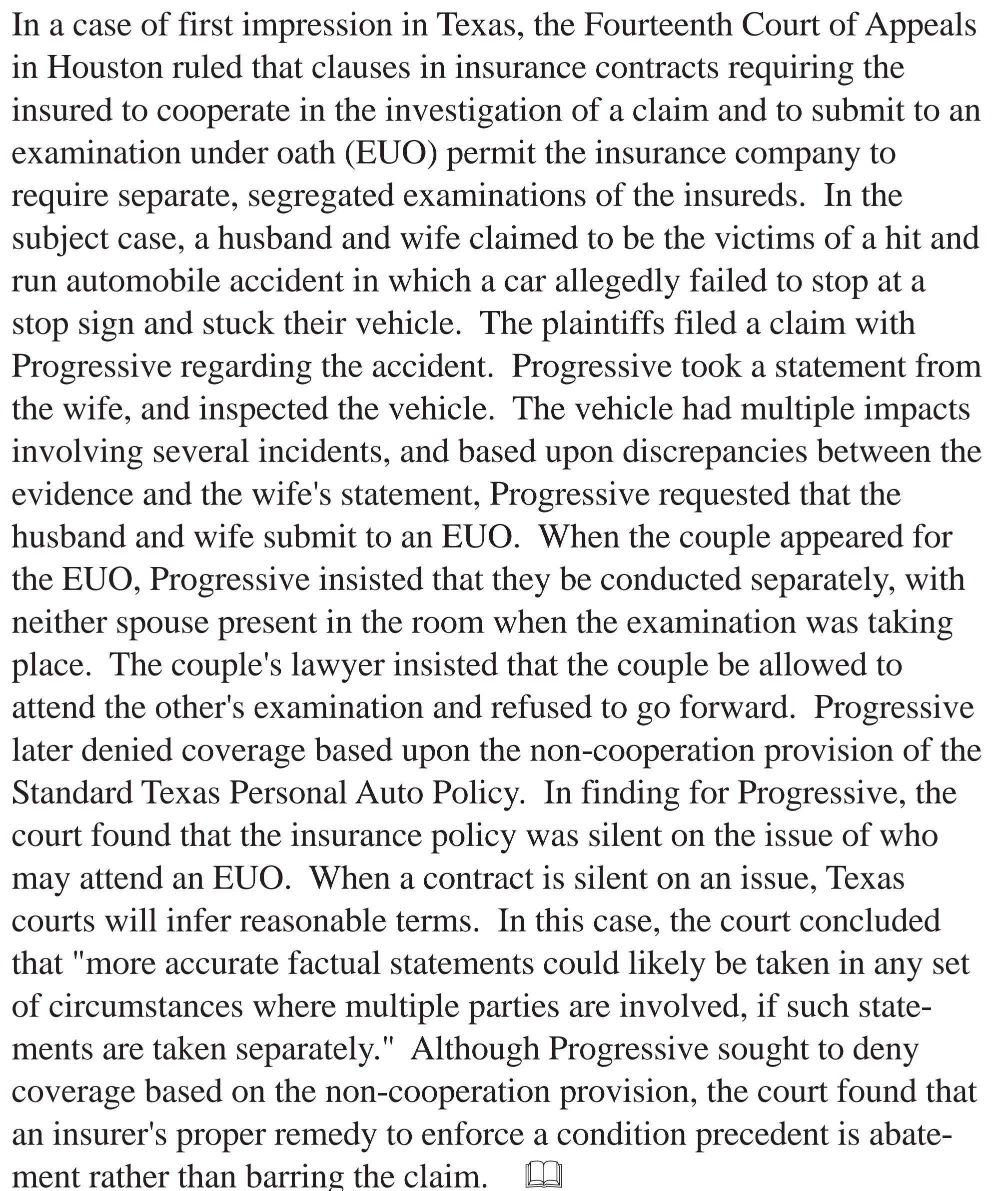
A Newsletter Update from Thornton, Summers, Biechlin, Dunham & Brown, L.C.

Vol. VIII, No.2
Summer 2003

Editor
Edward C. Mainz, Jr.

Contributing Editors
William T. Sullivan
Mary M. Strauss

Till Death... Or An Examination Under Oath... Do Us Part



Mohammed et al. v. Progressive County Mutual Insurance Company, Houston [14th Dist.] Court of Appeals, No. 14-02-00908-CV (2003).

In a case of first impression in Texas, the Fourteenth Court of Appeals in Houston ruled that clauses in insurance contracts requiring the insured to cooperate in the investigation of a claim and to submit to an examination under oath (EUO) permit the insurance company to require separate, segregated examinations of the insureds. In the subject case, a husband and wife claimed to be the victims of a hit and run automobile accident in which a car allegedly failed to stop at a stop sign and stuck their vehicle. The plaintiffs filed a claim with Progressive regarding the accident. Progressive took a statement from the wife, and inspected the vehicle. The vehicle had multiple impacts involving several incidents, and based upon discrepancies between the evidence and the wife's statement, Progressive requested that the husband and wife submit to an EUO. When the couple appeared for the EUO, Progressive insisted that they be conducted separately, with neither spouse present in the room when the examination was taking place. The couple's lawyer insisted that the couple be allowed to attend the other's examination and refused to go forward. Progressive later denied coverage based upon the non-cooperation provision of the Standard Texas Personal Auto Policy. In finding for Progressive, the court found that the insurance policy was silent on the issue of who may attend an EUO. When a contract is silent on an issue, Texas courts will infer reasonable terms. In this case, the court concluded that "more accurate factual statements could likely be taken in any set of circumstances where multiple parties are involved, if such statements are taken separately." Although Progressive sought to deny coverage based on the non-cooperation provision, the court found that an insurer's proper remedy to enforce a condition precedent is abatement rather than barring the claim. 📖

- William T. Sullivan

Highlights

New Developments in Insurance Law 2

Internet Updates

Be sure to check our website at:

http://www.thorntonsummers.com

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

Texas Supreme Court Rules That Permission Is Required to Get Insurance Coverage on Borrowed Auto.

Progressive County Mutual Insurance Company v. Sink, 107 S.W.3d 547 (Tex.2003).

The Texas Supreme Court, in a case involving insurance coverage under a standard Texas Personal Auto Policy, has ruled that in order for a driver to have coverage on a "temporary substitute" vehicle, that driver must have a reasonable belief of entitlement to its use. In this suit, the plaintiff was involved in an auto accident with Joshua McAuley, an individual whose truck had become disabled. McAuley was employed at Alamo Rent-A-Car at the time and borrowed one of the rental cars without permission so that he could get tools to repair his truck. While returning to work in Alamo's car, McAuley was involved in an automobile accident with the plaintiff. After a judgment was entered in favor of the plaintiff, McAuley filed bankruptcy. The plaintiff initiated a proceeding against McAuley's insurance carrier under it's policy insuring McAuley's truck. The trial court interpreted the policy and held that there was no coverage because McAuley borrowed his employer's vehicle *without permission.* The court of appeals reversed. The Texas Supreme Court, by considering the ordinary, everyday meaning of the words used in the policy, held that the generally accepted meaning of "temporary substitute" vehicle does not include taking a vehicle without at least a reasonable belief of entitlement to its use. Accordingly, the plaintiff was unsuccessful in recovering from McAuley's insurance carrier. 📖

Insurance Coverage For Punitive Damages Not Always Void as Against Public Policy.

Westchester Fire Insurance Company v. Admiral Insurance Company, Ft. Worth Court of Appeals, No.0 2-01-227-CV (2003).

A nursing home owner had a primary policy of professional medical liability insurance with Admiral with limits of $1,000,000 per occurrence, and an excess policy with Westchester with limits of $10,000,000 per occurrence. A resident of the nursing home and her family brought suit against the nursing home for negligence and gross negligence. After a bench trial in which the judge awarded compensatory damages in excess of Admiral's limits, and before the hearing on punitive damages, both carriers tendered their policy limits. Westchester then filed suit against Admiral alleging that Admiral negligently failed to settle the case within the limits of the primary insurance policy. Before trial, the trial court granted a summary judgment in favor of Admiral, holding that "[I]nsurance coverage for punitive damages, now and at the time in question, violates the public policy of the State of Texas. Accordingly, coverage for punitive damages under the Admiral insurance policy is void..." The Ft. Worth Court of Appeals, in reversing the trial court's decision, found that neither the Texas Legislature not the Supreme Court of Texas has addressed whether insurance coverage for punitive damages violates the public policy of Texas. Some courts, in analyzing coverage in a standard form liability policy providing coverage for "sums" or "all sums" an insured becomes required to pay as a result of bodily injury or property damage covers punitive damages if not otherwise excluded. Some individuals have argued that public policy dictates that if a corporation is able to insure against losses from punitive damage awards, punishment and deterrence is not achieved against the wrongdoer. However, the Ft. Worth Court of Appeals held that absent a clear indication from the Legislature or the Supreme Court on the issue, insurance coverage under the facts of the case was not against public policy. 📖

My Car is Smashed, But There Was No Physical Contact!

Smith v. Nationwide Insurance Company, San Antonio Court of Appeals, No. 04-02-00646-CV (2003).

Leo Smith's car was damaged after it hit a metal loading ramp that detached and fell from a tractor-trailer rig traveling beside Smith on a San Antonio freeway. The truck driver did not stop and Smith was unable to obtain identifying information about the truck. Smith filed a claim for uninsured motorist (UM) benefits with Nationwide, his insurer. Nationwide denied the claim based on *Article 5.06-1(2)(d)* of the *Texas Insurance Code*, which requires "actual physical contact" between the insured vehicle and the unknown or uninsured vehicle or trailer. The trial court granted summary judgment in favor of Nationwide. Smith appealed, and the court of appeals, in upholding the decision of the trial court, noted that it is the court's duty to follow the law, even when that application results in a harsh outcome. The court reviewed *Article 5.06-1* of the *Texas Insurance Code*, which requires actual physical contact with a land motor vehicle or trailer. The requirement of actual physical contact has been interpreted as providing two methods of covered contact: indirect contact and direct contact. Indirect contact occurs between car A and car C when car A strikes B and propels it into car C. Direct contact occurs when Car A strikes car B or its trailer. In this case, the court of appeals held that Smith struck a "component" of the trailer, which is not a covered loss. 🕮

Multiple Liability Insurance Policies Covering the Same Insured, Who Pays?

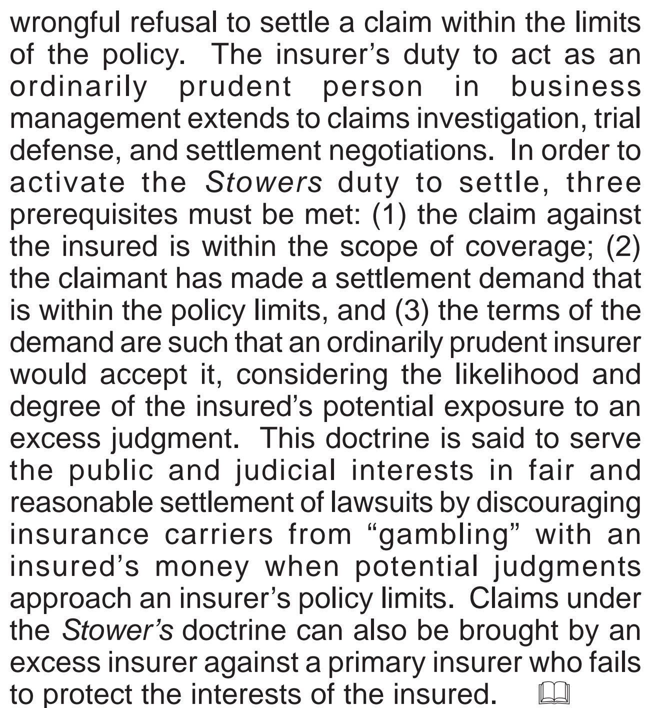
American Indemnity Lloyds v. Travelers Property & Casualty Ins. Co., Fifth Circuit, No. 02-40524 (2003).

In a case of first impression, the Fifth Circuit Court of Appeals "guessed" what rule the Texas Supreme Court would adopt in the situation where each of two liability insurance policies issued by different insurers provides primary coverage to the same insured in respect to the claim in question and contains mutually consistent "other insurance" provisions, but one party has a separate agreement to indemnify the other. In *American Indemnity Lloyds*, AIL sought to recover one-half of the sums AIL paid in settlement and expended in defense of a personal injury damage suit against a contractor who was both the named insured in Texas Property & Casualty's (TPC) policy and an additional insured in AIL's policy. The named insured in AIL's policy was the subcontractor whose employee had brought the underlying suit for on-the-job injuries. Those injuries were also within the scope of the subcontractor's agreement to indemnify the contractor, TPC's named insured. After AIL settled the claim for nearly a million dollars, it sought recovery of one-half of the amounts paid from TPC, who issued a policy that also covered the same claim. The general rule is that where two primary insurers provide coverage to the same insured in respect to the claim in question and contains mutually consistent "other insurance" provisions, the insurer paying more than its fair share is ordinarily entitled to recover from the other insurer for the excess paid. The Fifth Circuit, in the subject case, "guessed" that the Texas Supreme Court would find an exception to the general rule, and determined that the indemnity obligation of one insured to another controls over "other insurance" provisions, relieving the insurance carrier for the indemnified party (TPC) of liability for one-half of the settlement payment. 🕮

Stowers Demand, Going Strong at 74 Years of Age.

G.A. Stowers Furniture Co. v. American Indemnity Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929); American Centennial Insurance Company v. Canal Insurance Company, 843 S.W.2d 480 (Tex. 1992).

Who knew back in 1929, when the case of *G.A. Stowers Furniture Co. v. American Indemnity Co.* was decided, that the term "Stowers demand" would still be used in the insurance industry and in the litigation of insurance claims some 74 years later. The "*Stowers* doctrine" vests a clear right in an insured to sue the primary carrier for a

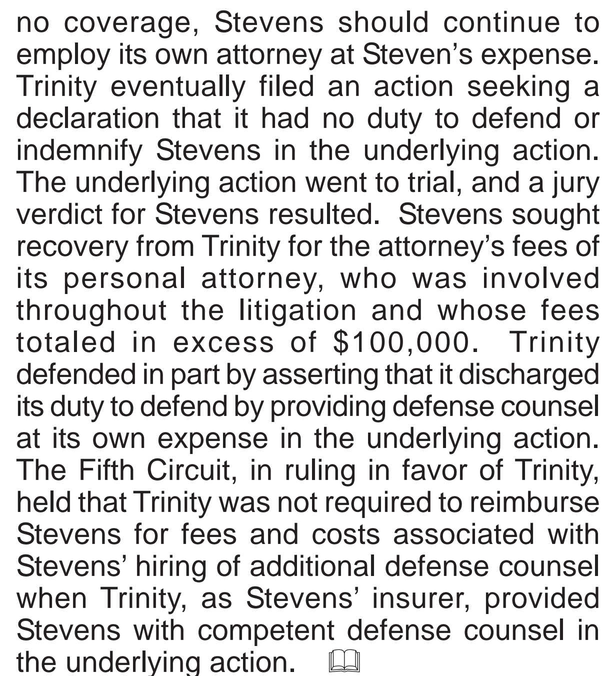


wrongful refusal to settle a claim within the limits of the policy. The insurer's duty to act as an ordinarily prudent person in business management extends to claims investigation, trial defense, and settlement negotiations. In order to activate the *Stowers* duty to settle, three prerequisites must be met: (1) the claim against the insured is within the scope of coverage; (2) the claimant has made a settlement demand that is within the policy limits, and (3) the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. This doctrine is said to serve the public and judicial interests in fair and reasonable settlement of lawsuits by discouraging insurance carriers from "gambling" with an insured's money when potential judgments approach an insurer's policy limits. Claims under the *Stower's* doctrine can also be brought by an excess insurer against a primary insurer who fails to protect the interests of the insured.

How Many Lawyers Does It Take to Defend a Lawsuit?

Trinity Universal Insurance Co. v. Stevens Forestry Service, Inc., Fifth Circuit, No. 02-30442 (2003).

Stevens, a forestry consulting firm received a letter from a client expressing concern over Stevens' management of the client's timber. Upon receipt of the letter, Stevens retained an attorney to assist in responding to the claim and preparing for a meeting with the client. Months later, the client demanded in excess of one million dollars from Stevens. Upon receipt of the demand, Stevens tendered the claim to its insurer, Trinity. Trinity responded by agreeing to provide defense counsel and began investigation of the claim, but Trinity expressly reserved its right to deny coverage, and encouraged Stevens to continue to employ counsel because of policy provisions that might limit coverage. Stevens was then sued by its client. Trinity sent a letter to Stevens again stating that it would continue to provide Stevens with an attorney at Trinity's expense, however Trinity stated that because Trinity reserved the right to deny coverage, and because a related entity might have no coverage, Stevens should continue to employ its own attorney at Steven's expense.



Trinity eventually filed an action seeking a declaration that it had no duty to defend or indemnify Stevens in the underlying action. The underlying action went to trial, and a jury verdict for Stevens resulted. Stevens sought recovery from Trinity for the attorney's fees of its personal attorney, who was involved throughout the litigation and whose fees totaled in excess of $100,000. Trinity defended in part by asserting that it discharged its duty to defend by providing defense counsel at its own expense in the underlying action. The Fifth Circuit, in ruling in favor of Trinity, held that Trinity was not required to reimburse Stevens for fees and costs associated with Stevens' hiring of additional defense counsel when Trinity, as Stevens' insurer, provided Stevens with competent defense counsel in the underlying action.

Chronic Pain Sufferer Hurt By Ruling.

Smith v. Southwestern Bell Telephone Company, 101 S.W.3d 698, (Tex. App. - Ft. Worth, 2003).

Ramona Smith was involved in a four-vehicle car accident, in which no one appeared to be injured, and the vehicles suffered very little damage. Several hours later, Smith went to the emergency room complaining of a headache and neck and upper back pain. All tests were normal, and the emergency room doctor diagnosed Smith as having acute cervical strain and discharged her in "good" condition. Eventually Smith sought damages from the other drivers for numerous ailments, including depression, anxiety attacks, and stiffness. At trial, Smith considered herself currently disabled. The trial court dismissed Smith's claims by directed verdict, finding that she failed to present any evidence that her alleged damages were caused by the accident. In a personal injury case, a plaintiff must prove the defendant's negligence was the proximate cause of her injuries. To prove causation, the plaintiff must prove that the defendant's conduct caused an event, and that

this event caused the plaintiff to suffer compensable injuries. The causal nexus between the event sued upon and the plaintiff's injuries must be shown by competent evidence — ordinarily, by the testimony of a medical expert. In this case, Smith was shown to have suffered from the same ailments prior to and after the accident. She was diagnosed with fibromyalgia, which her doctor could not say within a reasonable degree of medical probability was caused by the accident. Without expert testimony to support her claims, Smith recovered nothing.

Commercial Insurance Coverage For Property Theft – Make Sure The Address is Correct.

Evergreen National Indemnity Company v. Tan It All, Inc., Austin Court of Appeals, No. 03-02-00426-CV (2003).

Tan It All, Inc. (TIA) had tanning equipment that was stolen from a TIA truck parked in the parking lot of a shopping mall where one of its tanning salons was located. When the insurer refused to pay the claim, TIA sued, asserting that the parking lot was included in the term "described premises" in a commercial property policy which it purchased. The policy covered the theft of business personal property located "within 100 feet" of the described premises. TIA contended that its business premises was any portion of the entire shopping center complex in which TIA leased a suite for its tanning salon. The landlord required TIA to park its company-owned vehicles in a certain area of the common parking lot, which was 280 feet from the entrance to the suite. The district court found that the insurance policy was ambiguous as to the meaning of "described premises," and ruled that TIA was covered for the loss. The Austin Court of Appeals reversed and found in favor of the insurer. In reaching its decision, the Austin Court utilized rules of contract interpretation and construction, and found that insurance policies are subject to the same general rules of interpretation and construction as ordinary contracts. The policy in question covered "business personal property located ...within 100 feet of the described premises." The pertinent premises described in the declarations was "13945 North Highway 183, Suite C-5, Austin, Texas 78717." The Court gave the words used in the premises description their plain, ordinary and generally accepted meaning and found that the policy was not ambiguous. The policy expressly states that it covers business personal property within 100 feet of Suite C-5, and to adopt TIA's construction of the policy would require the words "Suite C-5" to be ignored. The Austin Court refused to engage in policy construction to contrive an ambiguity when the meaning of the policy language was plain and certain.

The contents of this newsletter are presented as general information only and are not intended as legal advice. The reader is invited and advised to consult with an attorney for more specific information regarding the matters and materials addressed herein, or for advice based on the individual circumstances of his or her specific situation.

THORNTON, SUMMERS, BIECHLIN, DUNHAM & BROWN, L.C.

Airport Center, Suite 300
10100 Reunion Place
San Antonio, TX 78216-4128
(210) 342-5555

916 S. Capital of Texas Hwy.
Suite C-100
Austin, TX 78746-6318
(512) 329-6666

1000 Bank of America
500 North Shoreline Blvd.
Corpus Christi, TX 78471-1010
(361) 884-2037

Rio Grande Valley Office
418 East Dove Ave.
McAllen, TX 78504-2240
(956) 630-3080

Thornton, Summers, Biechlin,
Dunham & Brown, L.C.
Airport Center, Suite 300
10100 Reunion Place
San Antonio, Texas 78216-