

The Defense Chronicles

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

Vol. VIII, No.3
Fall 2003

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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.

Status of “Innocent” Spouse Does Not Warrant Recovery Where Policy Terms Provide Otherwise

McEwin v. Allstate Texas Lloyds, Amarillo Court of Appeals, No. 07-01-0087-CV (2003).

Kathy McEwin and her husband, James McEwin, owned a house insured by Allstate via a Texas Homeowner’s B Policy, designating Kathy and James McEwin as named insureds. James McEwin, unbeknownst to his wife, intentionally set the home on fire. The McEwins reported the loss to Allstate and subsequently filed a sworn proof of loss. There was no representation in the proof of loss as to the origin of the fire or whether either of the McEwins had any involvement in causation. An investigation was initiated, including the hiring of an investigator and attorneys to take examinations under oath. It was later discovered that Mr. McEwin was involved in the fire. He was ultimately convicted of arson.

The McEwins divorced, and as part of the settlement, Mrs. McEwin was awarded all interest in the Allstate policy as her separate property. Allstate paid to the McEwins monies for covered contents; alternative living expenses; and the mortgage balance. Allstate eventually denied owing remaining payments due to Mr. McEwin’s involvement in the fire, citing the “concealment or fraud” condition in the policy. The condition stated that the policy was voided as to *all* insureds under the policy, if any of the insureds intentionally concealed and misrepresented any material fact or circumstance, or committed fraud relating to the insurance either before or after a loss. Because both James and Kathy McEwin were designated on the declaration page as named insureds, the policy was void as to both because of James McEwin’s actions. Kathy McEwin’s status as an innocent spouse did not affect her right to recover from Allstate because the “concealment or fraud” condition provided otherwise. The trial court determined the language of the “concealment or fraud” condition was not ambiguous, and the Amarillo Court of Appeals affirmed. &

- Mary M. Strauss

Estate Entitled to “Corporate Owned Life Insurance” Proceeds Because an Employer May Not Wager on an Employee’s Life

Joe Torrez, Executor of the Estate of Samuel Torrez v. Winn-Dixie Stores, Inc., Ft. Worth Court of Appeals, No. 02-02-339-CV (2003).

Winn-Dixie purchased life insurance policies on a large number of employees, including Samuel S. Torrez. Winn-Dixie named itself as the beneficiary on these policies, which were purchased for tax benefits. The policies were called “Corporate Owned Life Insurance.” Torrez was an employee for more than thirty years when he retired. Two years after retirement Mr. Torrez died. Winn-Dixie filed a claim under the policy and received \$38,000 in life insurance proceeds. Joe Torrez, the executor, first learned of the life insurance policy in 2001 – five years after Samuel Torrez’s death. Torrez brought suit seeking a declaration that Winn-Dixie did not have an insurable interest in the life of Samuel Torrez, and requested a constructive trust be imposed. Winn-Dixie moved for summary judgment on the sole ground that the estate’s claims were barred by statute of limitations. Winn-Dixie’s motion was granted.

The Ft. Worth Court of Appeals noted that traditionally Texas courts prohibited a person from purchasing an insurance policy on the life of another, without an insurable interest, for a number of policy concerns. The court agreed that a company may insure the life of essential personnel, specifically those whose death would cause a financial hardship to the company, but a company may not insure employees whose termination through sickness, death, or other manners of employment cessation would cause no financial hardship to the company whatsoever. The court noted that Torrez died two years after re-

tiring, thereby finding Winn-Dixie lacked any evidence of financial hardship. Because the insurable interest was lacking, the benefits were placed in a constructive trust. Winn-Dixie argued that plaintiff’s action was barred by the statute of limitations. The court noted that corporate owned life insurance policies are formed for the benefit of the company and cannot be defined as an employee benefit. Therefore, an executor of an estate would not necessarily learn of the existence of such a policy when making a simple inquiry of the decedent’s employee benefits. Because the existence of a corporate owned life insurance policy was inherently undiscoverable, the court determined that the discovery rule applied in deciding the statute of limitations issue. The Ft. Worth Court then reversed the trial court’s judgment. &

Insurer Blasted for Failure to Defend and Indemnify Insured Against Limestone Mining Claim

Hallman v. Allstate Insurance Company, Dallas Court of Appeals, No.05-02-00962-CV (2003).

Ruth Hallman owned property which she leased to certain companies to mine for limestone. Neighboring property owners sued Hallman for damages related to blasting and transporting of the stone. Hallman submitted a claim to Allstate under her homeowner’s insurance policy, requesting that Allstate defend and indemnify her in the mining litigation. Allstate filed a declaratory judgment action asserting that the allegations in the underlying suit were not covered because they did not state a claim for bodily injury or property damage caused by an “occurrence” as defined by the policy. In the alternative, Allstate noted that if coverage were triggered, coverage was barred by the “business pursuits” exclusion. The trial court granted

Allstate's motion for summary judgment and Hallman appealed.

The Dallas Court of Appeals, utilizing the eight corners doctrine, examined the underlying lawsuit's petition in light of the policy provisions. In particular, the court took note of the fact that plaintiffs in the underlying suit alleged that if Hallman's intentional act of leasing her property had been performed non-negligently, the property damages claimed would not have resulted. The court further observed there is an accident where an action, although taken intentionally, is performed negligently and the effect is not what would have been intended or expected had the deliberate action been performed non-negligently. In short, the allegations in the underlying suit were that Hallman negligently leased her property. The effect of the lease, i.e., the alleged damage to the neighboring properties from blasting and dust, was not the intended result of leasing the property. The court further found that the "business pursuits" exclusion did not apply, primarily because the terms of the "business pursuits" exclusion were ambiguous. Because the petition in the underlying suit did not allege that Hallman regularly engaged in leasing her property as her livelihood or means of earning a living, the court could not conclude, by construing the language of the policy with the petition, that the definition of the business pursuits exclusion were met. The court of appeals reversed and rendered in favor of Hallman. &

Electrocution of Employee Sparks Controversy Between Insurer and Insured Over the Right to Employ/Assign Attorney for Defense

Forex Ltd. v. U.S. Specialty Insurance Company, San Antonio Court of Appeals, No.04-02-00406-CV (2003).

A Forex employee, Troy Fielding, was electrocuted and died while working for Forex. Forex provided worker's compensation and employer's liability benefits to its employees, including Fielding, through U.S. Specialty Insurance. U.S. Specialty began to pay statutory death benefits to Fielding's legal beneficiaries, but ultimately the beneficiaries filed a wrongful death suit against several parties, including Forex. U.S. Specialty hired counsel to represent Forex in the wrongful death case. Counsel met with Forex to discuss the facts. The attorney was also supposed to represent U.S. Specialty in any potential subrogation claims the insurer might have against all defendants in the underlying case, possibly including Forex. Forex voiced its concerns to U.S. Specialty about the potential conflict of interest, but U.S. Specialty refused to allow Forex to select its own counsel. However, soon thereafter, U.S. Specialty elected to have a new attorney, from another firm, defend Forex in the Fielding suit, while retaining the original counsel and firm as attorneys of record for U.S. Specialty in any worker's compensation or subrogation proceedings.

Forex retained a third law office as its counsel and filed a declaratory judgment action seeking a declaration as to the right to decide who would represent them in the Fielding wrongful death suit and any subsequent suits arising from the same incident. Forex further asked that any fees incurred from such representation be paid by U.S. Specialty. Shortly thereafter, Forex filed a suggestion of bankruptcy, and sought the assistance of the U.S. Bankruptcy Court in having law firm no. 3 appointed as special counsel for the bankrupt estate. Notwithstanding the suggestion of bankruptcy, U.S. Specialty filed a motion for summary judgment in the declaratory judgment action. Despite the Bankruptcy Court's order and appointment of law firm no. 3 to represent Forex in the bankruptcy matter, the trial court ruled in favor of U.S. Specialty, granting

its motion for summary judgment — giving U.S. Specialty the right to choose counsel for Forex in the underlying lawsuit and absolving U.S. Specialty of any duty to pay for legal fees incurred by Forex in the retention of law firm no. 3. Forex appealed.

The appellate court first observed the insurance policy provisions with respect to providing a defense under both the worker's compensation insurance as well as the employer's liability insurance. Next, the court examined the language from the United States Bankruptcy Code, 11 U.S.C. §327(e), concerning the power of a bankruptcy trustee, with the court's approval, to employ an attorney for a debtor, if it is in the best interest of the estate. Noting the legislative history behind the statute, the San Antonio Court of Appeals observed that Congress intended for trustees to use said provision to avoid the interruption and delay that could occur if a debtor were required to switch attorneys during an active lawsuit because of an intervening bankruptcy filed by said party in the capacity of a debtor. The San Antonio Court of Appeals was not influenced by the appointment of law firm no. 3 as special counsel for Forex in the bankruptcy proceeding, because the retention of law firm no. 3 actually caused, rather than prevented, delay in litigation due to Forex's refusal to accept the attorney hired by U.S. Specialty. Furthermore, the San Antonio Court of Appeals noted that while the bankruptcy court appointed law firm no. 3 as counsel for Forex in the bankruptcy matter, it did not actually decide the issues raised in the declaratory judgment action with respect to whether an insured has the right to choose its own counsel in a claim brought under a policy of insurance. The San Antonio Court of Appeals affirmed the trial court's decision.

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The Guarantee Association is Not Responsible to Bear All of the Defense Costs if a Solvent Insurer Owes a Duty to Defend

Utica National Insurance Company of Texas v. Texas Property and Casualty Insurance Guarantee

Association and American Indemnity Company, Austin Court of Appeals, No.03-01-00045-CV (2003).

Forty-four plaintiffs were exposed to Hepatitis C as a result of contaminated anesthesia administered to them by Anesthesiology Group during outpatient procedures. The plaintiffs alleged that an employee of the hospital, who had been previously infected with Hepatitis C, caused the contamination in his attempts to steal drugs from the Anesthesiology Group for his personal use. Plaintiffs filed suit. Anesthesiology Group had obtained professional liability insurance coverage from Insurance Corporation of America ("ICA"). In addition, Anesthesiology Group purchased general liability insurance coverage from Utica and from American Indemnity Company. ICA began to defend the Anesthesiology Group, and was able to secure settlement with forty plaintiffs, before becoming impaired. The Texas Property and Casualty Insurance Guarantee Association ("Association") stepped in and assumed ICA's defense obligations. Subsequently, the four remaining plaintiffs amended their petition alleging additional claims implicating the general liability coverage. The Association tendered the defense of the lawsuit to American Indemnity and Utica. Although all four remaining plaintiffs received the contaminated anesthesia during the period of Utica's policy, Utica denied a duty to defend or indemnify. American Indemnity eventually assisted the Association in settling the remaining four claims, splitting evenly the settlement amounts between the two companies. After disposition of the underlying suit, American Indemnity filed a declaratory judgment action for determination of the rights and obligations of each insurance carrier in addition to seeking subrogation damages. The Association and Utica answered and filed counter and cross claims. Each party then filed a motion for summary judgment on the duty to defend issue. Utica's

summary judgment motion on the duty to defend was denied. American Indemnity and the Association thereafter shifted their attention to whether Utica had a duty to indemnify. After considering all motions, the district court declared that Utica had both a duty to defend and a duty to indemnify, further finding that Utica breached both duties. The trial court ordered Utica to pay defense costs and all attorney's fees. Both Utica and the Association appealed.

In applying the eight corners rule, the appellate court recognized the allegations by plaintiffs included twenty-one antecedent acts; a single injury-causing act (i.e., administering the contaminated anesthesia), and five subsequent acts. The court examined all twenty-seven acts despite Utica's choice to focus upon the administration of the anesthesia/the single injury-causing event. Due to the antecedent allegations of negligence, the court determined there was sufficient information to trigger coverage and a duty to defend, noting the professional services exclusion in the Utica policy, though applicable, did not preclude coverage because the remaining twenty-six acts included administrative and ministerial tasks, as opposed to professional duties. Said twenty-six remaining acts did not require any professional judgment, education, or training; each antecedent act, for example,

required custodial, administrative, or ministerial skills, with respect to proper storage of drugs; and screening employees with access to drugs. The court was content the "occurrence" requirement was satisfied, triggering coverage, and thereafter affirmed the trial court's declaration and order. On the Association's cross appeal, claiming the trial court erred in granting a pro rata reduction in the amount of defense costs Utica was ordered to pay, the court observed that the underlying case involved three insurers, only one of which had been declared impaired. As such, the remaining two insurers had a duty to provide a complete defense, but neither insurer was required to pay all of the defense costs because the duty is shared until one has either exhausted its policy limits or is itself declared impaired. The court of appeals agreed that, while the Association should not bear all of the defense costs if a solvent insurer owes a duty to defend, the trial court was within its discretion in awarding attorneys' fees pro rata because the multiple insurers remained solvent and both shared the duty to defend. &

- Mary M. Strauss

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.

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