

## **SPRING 2012 NEWSLETTER**

### **INSURANCE LAW UPDATE**

**By Jennifer Kelley**

#### **THE FIFTH CIRCUIT**

***Gilbane Building Co. v. Admiral Ins. Co.*, No. 10-20817, 2011 U.S. App. LEXIS 24867, \*1 (5th Cir. Dec. 12, 2011); see also *Gilbane Building Co. v. Empire Steel Erectors, LP*, 691 F. Supp. 2d 712 (S.D. Tex. 2010) (providing background information).**

In January 2007, Michael Parr was injured when descending a ladder on a construction site, causing him to be severely injured. Evidence existed that the ladder may have been muddy at the time of the accident. Parr filed suit against Gilbane Building Co., the general contractor for the site, and Baker Concrete, the entity responsible for installing and maintaining the ladders on the site. Parr did not file suit against his employer. Ultimately, Parr settled with both parties, but only the settlement with Gilbane was at issue in the court's opinion.

Parr was an employee of Empire Steel Erectors, which had contracted with Gilbane and contractually agreed to secure insurance coverage for Gilbane as an additional insured under Empire's CGL policy issued by Admiral Insurance Company. When Gilbane first was sued, it tendered the defense of the lawsuit to both Empire and Admiral, but they denied any such obligation. As a result, Gilbane filed a declaratory judgment action, asking the court to declare that Gilbane qualified as an additional insured under the Admiral policy and that the underlying lawsuit triggered such coverage. The Admiral policy contained the following "Additional Insured" provision:

. . . . Any person or organization that is an owner of real property or personal property on which you are performing ongoing operations, or a contractor on whose behalf you are performing ongoing operation, *but only if coverage as an additional insured is required by written contract or written agreement that is an "insured contract,"* . . . .

Defendants Admiral and Empire urged the court to find that Gilbane did not qualify as an additional insured because the Trade Contractor Agreement ("TCA") between Gilbane and Empire was unenforceable under Texas law because the indemnity provision did not satisfy Texas's fair notice requirements and, therefore, the TCA could not satisfy the definition of "insured contract" as required by the additional insured provision. The standard definition for "insured contract" existed in the Admiral policy, but the defendants wanted the court to read in a requirement that the underlying contract or agreement be enforceable under Texas law; "[t]hat is, unless the TCA between Empire Steel and Gilbane meets the express negligence test, the TCA is not an insured contract and Gilbane does not qualify as an additional insured."

On appeal, the Fifth Circuit disagreed, citing established Fifth Circuit precedent. In *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000), the Fifth Circuit rejected a very similar argument finding that even if the Master Services Agreement (“MSA”) before it was invalid, that fact did not preclude the MSA from being an insured contract under the insurance policy at issue. Thus, looking at the TCA, the Fifth Circuit found that while the indemnity provision may not satisfy the express negligence test, Empire agreed to assume Gilbane’s tort liability in the TCA and, therefore, Gilbane qualified as an additional insured under the Admiral policy. In reaching its conclusion, the Fifth Circuit noted that “the additional insured question turns not on enforceability, but on whether Empire Steel agreed to ‘assume the tort liability of another party.’”

***Mid-Continent Casualty Co. v. Leigh Anne Brock*, No. 10-20726, 2011 U.S. App. LEXIS 20625, \*1 (5th Cir. Oct. 11, 2011).**

Leigh Anne Brock’s home was significantly damaged in a fire. John Ashley Strickling, the owner of Restoration Services of Houston and Fire Restoration Services of Houston, approached Brock and offered to restore and remediate her home, and a deal was reached. The job went poorly. Brock brought suit against Strickling, alleging causes of action sounding in negligence, breach of contract, conversion and unjust enrichment, and the Texas Deceptive Trade Practices-Consumer Protection Act (the “DTPA”). The jury rendered a verdict in favor of Brock, answering the following relevant questions affirmatively:

(1) Did John Ashley Strickling engage in any false, misleading, or deceptive act or practice that Leigh Anne Brock relied on to her detriment and that was a “producing cause” of damages to Leigh Anne Brock?

...

(2) Did John Ashley Strickling engage in any unconscionable action or course of action that was a producing cause of damages to Leigh Anne Brock?

...

(4) Did John Ashley Strickling engage in any such conduct knowingly and/or intentionally?

...

The commercial general liability policy issued by Mid-Continent to Strickling covered damages that Strickling was legally obligated to pay for “bodily injury” or “property damage” caused by an “occurrence.” As defined in the policy, “[o]ccurrence” meant “an accident, including continuous or repeated exposure to conditions, which results in Bodily Injury or Property Damage neither expected nor intended from the standpoint of the Insured.” “In other words, an insured’s conduct is an occurrence if it:

(1) qualifies as an accident and (2) results in harm that the insured did not expect or intend.” Like most commercial general liability policies, the Mid-Continent policy did not define the term “accident.”

At issue on appeal, was whether or not the jury verdict supported a finding that Strickling’s faulty workmanship was intended. The Fifth Circuit, applying the *Lamar Homes* test, noted that the jury made no determination as to whether Brock’s damages were the *expected* result of Strickling’s action, much less whether the damages were highly probable. Moreover, the jury verdict, standing alone, did not support the district court’s conclusion that Strickling intended Brock to suffer the alleged injuries, particularly the loss of contents of the residence, the loss of credit, and mental anguish. The Fifth Circuit therefore concluded that the jury verdict did not answer the critical question regarding whether or not Strickling intended that Brock suffer “the damages or injuries which are the subject of the underlying claims.” In reaching its conclusion, the Fifth Circuit emphasized that in order to meet the requirement laid out by the Supreme Court of Texas in *Lamar Homes*, there must be more than a finding that the damages Strickling caused, particularly the loss of the contents of the residence and the loss of credit, were merely natural, probable, or foreseeable. Instead, there must be a determination by the district court as to whether or not the damages were expected or intended.

### **TEXAS COURTS OF APPEALS**

***Liberty Mut. Ins. Co. and Tex. Dept. of Ins., Div. of Workers’ Comp. v. Ricky Adcock*, No. 02-11-00059-CV, 2011 Tex. App. LEXIS 8407, \*1 (Tex. App.—Fort Worth Oct. 20, 2011, no pet.).**

Appellants Liberty Mutual Insurance Co. and the Texas Department of Insurance, Division of Workers’ Compensation (“Division”), argued on appeal that the trial court erred by granting summary judgment for the Appellee, Ricky Adcock. In particular, the Appellants argued that the Division had jurisdiction in 2009 to review a 1997 award of lifetime income benefits (LIBs) to Adcock. The Fort Worth Court of Appeals disagreed, noting that the statutory language at issue stated that LIBs are paid until the death of the employee, and further noting the Legislature’s intent when enacting the TWCA to provide for review under several other circumstances but not once entitlement to LIBs has been established, clearly indicates that the Legislature gave the Division no express or implicit authority for further review of LIBs after eligibility is determined. Thus, the Fort Worth Court of Appeals held that the Division has no implied right to review LIBs under Texas Labor Code §408.161 after the initial administrative and appellate remedies have been exhausted.

***Robert B. Taylor and R.B.T Investments, Inc. f/k/a Gulf Oxygen Co., Inc. v. Allstate Ins. Co. and Allstate Cnty. Mut. Ins. Co.*, No. 01-09-00457-CV, 2011 Tex. App. LEXIS 2418, \*1 (Tex. App.—Houston [1st Dist.] Mar. 31, 2011, pet. denied).**

Robert B. Taylor was involved in an automobile accident in 2005 in which the passenger of the other vehicle was catastrophically injured. The family of the injured passenger brought suit against Taylor. Taylor's insurer, Allstate Insurance Company, retained John Causey, an independent contractor, as counsel for Taylor in the automobile accident suit. At mediation, Taylor settled the automobile accident suit for an amount that exceeded his insurance coverage. Allstate tendered policy limits. Taylor then filed the action giving rise to this appeal against his former legal counsel and various insurance providers, ultimately including Allstate, to recover costs paid by Taylor to settle litigation against him arising out of the automobile accident.

Taylor's initial claim against Allstate was for negligence with respect to Allstate's handling of Taylor's defense in the automobile accident case. Allstate filed special exceptions and moved for traditional summary judgment on the grounds that a *Stowers* claim was the only common law claim cognizable under Texas law for an insurer's alleged mishandling of a third party claim against the insured, and the facts pled by Taylor would not support a *Stowers* claim. Taylor filed a second amended petition to add claims against Allstate for breach of contract, tortious interference with Taylor's contractual and fiduciary relationship with Causey, vicarious liability for Causey's conduct in representing Taylor, and violations of provisions of the Texas Insurance Code and Deceptive Trade Practices Act ("DTPA"). In response to Taylor's new claims, Allstate filed a supplement to its motion for summary judgment. Citing additional authority, the supplement referenced Taylor's new claims and re-urged its argument that a *Stowers* claim was Taylor's exclusive cause of action against Allstate.

Taylor filed a response to Allstate's motion for summary judgment, in which he disputed that a *Stowers* claim was his exclusive remedy under Texas law, distinguishing some of the cases relied on by Allstate and pointing out that the Texas Supreme Court had remanded certain insured-insurer claims in one of the cases relied on by Allstate. Taylor then filed a supplement to his second amended petition to add claims against Allstate for additional violations of the DTPA and Insurance Code and asserting that Allstate breached the standard of care implicit in its contractual duty to defend. The trial court rendered summary judgment in Allstate's favor.

On appeal, the Houston (First) Court of Appeals concluded that the trial court properly rendered summary judgment with respect to Taylor's claims against Allstate for negligence, vicarious liability, and tortious interference, but that the trial court had erred in determining that no cause of action exists with respect to Taylor's breach of contract and statutory claims. In reaching its conclusions, the appellate court noted:

- (1) as to vicarious liability, that "an insured cannot bring a claim against his insurer on the basis of vicarious liability for the conduct of the insured's attorney in a third party action";
- (2) as to negligence, that Texas law does not "recognize a negligence claim against an insurer where the insurer does not refuse to defend or

settle but, rather, the insured is dissatisfied with the quality of the defense provided”;

- (3) as to tortious interference, that under current Texas Supreme Court authority, Texas law does not recognize a cause of action by an insured against his insurer for tortious interference with the insured’s relationship with his attorney arising out of the insured’s handling of the defense of a third party claim (the appellate court also declined to recognize a cause of action for tortious interference with a fiduciary duty);
- (4) as to DTPA and Texas Insurance Code violations, that Allstate failed to cite to any authority supporting its position that the *Stowers* doctrine supplants all statutory causes of action; and
- (5) as to breach of contract, that *Cain*, *Duddleston*, and *Methodist* do not hold that Texas law does not recognize a cause of action for breach of contract. Allstate failed to offer a copy of the policy and provided no analysis of the contract terms, and therefore did not meet its burden of proof entitling it to summary judgment.

***Memorial Hermann Hosp. System v. Progressive Cnty. Mut. Ins. Co.*, No. 01-10-00408-CV, 2011 Tex. App. LEXIS 1978, \*1 (Tex. App.—Houston [1st Dist.] Mar. 17, 2011, pet. denied).**

On October 29, 2007, Carlos Martinez was injured in a motor vehicle accident caused by another person’s negligence. Martinez received treatment for his injuries at Memorial Hermann Hospital, totaling \$130,365. On November 20, 2007, Progressive County Mutual Insurance Company, who insured the alleged negligent driver, settled the case with counsel for Martinez for \$100,007. Progressive made the initial check payable to Martinez, his counsel, and Memorial Hermann Hospital. Counsel sent the check back to Progressive as Memorial had not filed a hospital lien at that point.

On December 12, 2007, at 3.23 p.m., Progressive issued a new check to Martinez without Memorial as a payee. Prior to issuing the check, Progressive had conducted a lien search. The search did not reveal any liens. Unbeknownst to Progressive, thirty minutes before it issued the new check, Memorial had filed notice of a hospital lien with the Harris County Clerk’s Office. The Harris County Clerk indicated that it usually takes two business days for liens to be indexed after filing.

At trial, Memorial argued that their hospital lien was perfected (secured) once it was filed, not when it was indexed, and therefore they were entitled to an allocation of the settlement proceeds. Progressive disagreed, arguing that the hospital lien law requires indexing, and therefore the lien was secured once it had been indexed and not before.

Section 55.005 of the Texas Property Code provides that a hospital has to file notice with the county clerk prior to payment to the entitled party in order to perfect its lien. The trial court interpreted the statute as requiring indexing prior to payment, which did not occur in this case.

The Houston (First) Court of Appeals disagreed with the trial court, recognizing that the statute did not require indexing but rather filing of the notice of the lien prior to payment. Moreover, the appellate court noted that Progressive's interpretation, that indexing is required prior to the lien being secured, would expose the county clerk to liability for failure to index a lien quick enough. The appellate court concluded that this would likely go against the Legislature's intent. Finally, the Houston (First) Court of Appeals noted that other Texas statutes addressing the indexing issue conclude that indexing does not affect the filed record itself. Thus, the Houston (First) Court of Appeals ultimately concluded that the "lien is secured when the lienholder properly files with the county clerk a written notice of lien that complies with the statutory requirements."