



Construction Insurance Law Update

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CONSTRUCTION INSURANCE LAW UPDATE

New cases in the last year, mostly the same law



Great Am. Lloyds Ins. Co. v. Vines-Herrin Custom Homes, LLC.,
-- S.W.3d -- (Tex. App. – Dallas 2020, no pet. h.)

FACTS

- Builder purchased 4 CGL policies from two insurers for consecutive policy years
- Between 1998 and 2002 it built a house, which it sold in 2000
- Homeowner sued for defects in 2003, claiming that in late 2000 the windows in the master bath sank, and in 2001 cracks in other rooms appeared
- Both insurers refused to defend, and builder sued insurers in 2010
- Homeowner's claims were arbitrated and resulted in \$2.5 million award
- After suit was filed, the Texas Supreme Court decided *Don's Building*, and held that the actual injury trigger applies to determine when "property damage" occurs



Vines-Herrin

- * **ISSUE:**
- * Is “time on the risk” theory of allocation correct?
- * **HOLDING:**
- * Dallas court of appeals says yes, at least under the facts before it



Vines-Herrin

- * **Why the Court got it Wrong:**
 - “Time on the risk” is not consistent with other Texas allocation cases



Liberty Ins. Underwriters, Inc. v. First Mercury Ins. Co.
3:17-cv-03029-M

FACTS

- JWCC and Roma ISD entered into a construction contract in April 2005
- JWCC had a primary policy with Travelers from 8/2010 – 8/2013
- JWCC had an excess policy with Liberty from 8/2006 – 8/2007, and a primary policy with First Mercury
- Roma ISD sued in 2014 for various construction defects
- Just before trial Roma made \$3 million demand
- First Mercury paid \$1 mil and Liberty paid \$2 mil.
- Liberty sought to recover \$2 mil from First Mercury, alleging there were multiple “occurrences” and First Mercury owed multiple payments



Liberty Ins. Underwriters

ISSUE:

How many “occurrences?”

Liberty argued that there were multiple “occurrences” and First Mercury should have paid the entire claim. It sought reimbursement from First Mercury

First Mercury argued the defects were one “occurrence” and the payment was appropriate as between the carriers



Liberty Ins. Underwriters

HOLDING:

One occurrence.

Number of occurrences determined by events causing injuries and giving rise to liability. If all injuries stem from continuous cause, there is one “occurrence.” If the injuries stem from multiple causes, there are multiple “occurrences.”

Court noted split authority with respect to multiple construction defects in single project. It determined that here, cause analysis was most appropriate. All property damage was caused by defective construction by JWCC or its subcontractors. Defective construction and delivery of building was event that damaged Roma.



Employers Mut. Cas. Co. v. Amerisure Ins. Co.,
No. 4:18-cv-00330, 2019 WL 3717634 (E.D. Tex. Aug. 7, 2019)

FACTS

- EMC insured Mycon (general contractor) under primary policy
- Amerisure insured Hatfield (subcontractor) under primary policy
- Hatfield was hired by Mycon pursuant to a written contract and work order
- Hatfield agreed in a contract to defend and indemnify Mycon against certain claims and procure liability insurance naming Mycon as an additional insured
- Chavez was injured at the construction site and sued Mycon and Lloyd Plyer Construction Company (a third party). He did not sue Hatfield



Emplrs Mut. v. Amerisure

ISSUE:

How should defense be apportioned?

Amerisure argued that the “other insurance” provisions in the Amerisure and EMC policies were mutually repugnant, and each carrier owed a pro-rata share of Mycon’s defense

Employers Mutual argued that Amerisure owed 100% of Mycon’s defense based on the terms of the agreement between the parties



Emplrs Mut. v. Amerisure

HOLDING:

Each carrier owed a pro-rata share of defense. There was no specific allegation in the underlying petition regarding Hatfield's negligence such to trigger the indemnity agreement.

For additional insured coverage, the subcontract between Mycon and Hatfield did not require Hatfield to obtain primary and non-contributory coverage for Mycon.



Liberty Surplus Ins. Co. v. Century Surety Co.,
No. H-18-1444, 2019 WL 3067504 (S.D. Tex. July 12, 2019)

FACTS

- Dispute arose out of construction of public library in Edinburg
- Descon contracted with McAllen Steel for roofing work. The roof leaked, and damaged interior ceiling tiles
- \$1.5 million awarded to City of Edinburg in arbitration
- Descon sought coverage under 4 policies issued by Liberty, but it declined to pay
- Liberty filed a declaratory judgment action against Descon, the City of Edinburg McAllen Steel, and Century Surety Company, which was McAllen's insurer



Liberty Surplus

ISSUE:

Do the Liberty policies cover only “property damage” caused by the defective roof and stucco, or do they cover “property damage caused by the defective roof and stucco AND the cost to repair the defective roof and stucco?”



Liberty Surplus

HOLDING:

The Liberty policies cover the cost of repairing ceiling tiles. They do not cover the costs associated with removal or replacement of the stucco or the roof, including loss of use and rip and tear damages.



Bitco Gen. Ins. Corp. f/k/a Bituminous Cas. Corp. v. Monroe Guar. Ins. Co., No. 5:18-cv-00325, 2019 WL 3917045 (W.D. Tex. Feb. 7, 2019)

FACTS

- BITCO and Monroe both insured 5D Drilling and Pump Service, Inc.
- In an underlying lawsuit, it was alleged that a drill bit became stuck in an aquifer and that the insured failed to properly case a well, which resulted in additional damage
- Bitco defended 5D in the underlying lawsuit, and Monroe declined. Bitco sought contribution from Monroe after the underlying lawsuit settled



Bitco v. Monroe

ISSUE:

Did Monroe have a duty to defend?

Monroe argued that extrinsic evidence was appropriate for the court's consideration, because the underlying petition did not allege a date the drill bit became stuck. Based upon this date, Monroe argued it had no duty to defend. It also alleged that its duty was precluded by exclusions j.5 and j.6.

Bitco argued that extrinsic evidence was not appropriate, but even if it was considered, it was not dispositive. The date the drill bit lodged in the ground only addressed the issue of negligence with respect to the drill bit, and not the resulting damage and application of exclusions j.5 and j.6.



Bitco v. Monroe

HOLDINGS:

Even if the court considered extrinsic evidence, it would not address all of the issues. The evidence bearing upon the date the drill bit became lodged did not dispense with the issue of the negligently installed casing and whether exclusions j.5 and j.6 applied

It was alleged that damage extended to parts of the aquifer upon which the insured did not work. The damage was not only to “that particular part” of the aquifer upon which the insured performed work. As a result, the court determined that exclusions j.5 and j.6 did not preclude Monroe’s duty to defend



Lloyd's Syndicate 457, et al. v. Floatec LLC,
921 F.3d 508 (5th Cir. 2019)

FACTS

- Chevron contracted with Floatec to engineer tendons for a floating platform called Big Foot. The tendons failed and caused Chevron to sustain massive losses
- Underwriters insured Big Foot, and paid \$500 million. It sought to recover from Floatec – it asserted it was subrogated to Chevron's rights to sue Floatec
- Floatec moved to dismiss the suit and alleged it was an “other insured” under the policy Underwriters issued to Chevron, and the Underwriters' policy waives subrogation for its insureds
- Underwriters argued that the subrogation issue should be decided in arbitration and that in any event, Floatec's interpretation of “waiver of subrogation” was incorrect
- The district court agreed with Floatec on both points



Lloyd's Syndicate 457

ISSUES:

Is the insurer's claims of mandatory arbitration for the court?

Does the policy's anti-subrogation waiver bar underwriter's claims?



Lloyd's Syndicate 457

HOLDINGS:

The insurer's claims of mandatory arbitration are for the court

The insurer's claims against an "other insured" firm were barred by policy's anti-subrogation waiver



Mt. Hawley Ins. Co. v. Huser Constr. Co., Inc., No. H-18-0787, 2019 WL 1255757 (S.D. Tex. Mar. 19, 2019)

FACTS

- Huser was a general contractor for EHP in the construction of an apartment complex. Huser hired several subcontractors
- There were alleged construction defects at the complex after construction was completed and EHP blamed Huser. Huser blamed Schaffer. So EHP sued both
- EHP sued Huser for breach of contract and negligence, and alleged separate causes of action against Schaffer
- Mt. Hawley refused to defend Huser based on the policy's breach of contract exclusion and filed a complaint for declaratory judgment
- Mt. Hawley disagreed that the breach of contract exclusion applied, but argued that even if it did, coverage was reinstated by the policy's "your work" exclusion and subcontractor exception



Huser Constr. Co.

The Breach of Contract exclusion in the Mt. Hawley policy provided that “This Insurance does not apply, nor do we have a duty to defend, any claim or “suit” for “bodily injury,” “property damage,” or “personal and advertising injury” arising directly or indirectly out of:

- a. Breach of express or implied contract;
- b. Breach of express or implied warranty;
- c. Fraud or misrepresentation regarding formation, terms, or performance of a contract; or
- d. Libel, slander, or defamation arising out of or within the contractual relationship.



Huser Constr. Co.

ISSUES:

Does the breach of contract exclusion preclude Mt. Hawley's duty to defend Huser?

Does the "your work" exclusion and separate subcontractor exception reinstate coverage?



Huser Constr. Co.

HOLDINGS:

The breach of contract exclusion precludes Mt. Hawley's duty to defend

Coverage is not reinstated by the "your work" exclusion



AIG Specialty Ins. Co. v. ACE Am. Ins. Co.,
No. 2:18-cv-16, 2019 WL 1243911 (S.D. Tex. Mar. 18, 2019)

FACTS

- Turner contracted with Sherwin to provide services pursuant to an MSA. It agreed to maintain control of the worksite, and make sure the work was done in a safe manner in compliance with the MSA
- AIG insured Sherwin
- ACE insured Turner
- AIG sued ACE and Turner for reimbursement for costs AIG expended defending a personal injury suit brought by one of Turner's employees against Sherwin
- AIG's claims were based on breach of contract and breach of the MSA, in which Sherwin agreed to indemnify Turner, and ACE's responsibility to provide policy proceeds to Sherwin as an additional insured on Turner's policy



AIG Specialty Ins. Co.

ISSUES:

- Do certificates of insurance evidence an intent to limit additional insured coverage?
- Should the court look to an incorporated contract for purposes of limiting coverage when there is no express provision?



AIG Specialty Ins. Co.

HOLDINGS:

Certificates do not evidence the scope of disputed insurance coverage

Although terms of external contracts can modify the terms of insurance policies, courts look to the language of the policy and then look elsewhere to the extent required by the policy. If the policy does not limit coverage, an insurer is not given the benefit of a limitation



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