

What Has Been Happening in Insurance and Construction Law?

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Outcome of *In re Deepwater Horizon?*

- *In re Deepwater Horizon*, ___ S.W.3d ___, No. 13-0670, 2015 WL 674744 (Tex. February 13, 2015)
- Dispute: whether the insurance policies incorporated the provisions of the drilling contract that contained language limiting when BP would be entitled to coverage as an additional insured?
- The *ATOFINA* Rule: look only at the policy's terms rather than the underlying contract to determine "whether a commercial umbrella policy that was purchased to secure the insured's indemnity obligation in a service contract with a third party also provides direct liability coverage for the third party."

In re Deepwater Horizon

- Fifth Circuit's Certified Questions:
 - Whether *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008) compels a finding that BP is covered for the damages at issue, because the language of the umbrella policies alone determines the extent of BP's coverage as an additional insured if, and so long as, the additional insured and indemnity provisions of the Drilling Contract are "separate and independent"?
 - Whether the doctrine of *contra proferentem* applies to the interpretation of the insurance coverage provision of the Drilling Contract under the *ATOFINA* case, 246 S.W.3d at 668, given the facts of this case?

The Outcome

- Texas Supreme Court:
 - “Thus, while our inquiry must begin with the language in an insurance policy, it does not necessarily end there. In other words, we determine the scope of coverage from the language employed in the insurance policy, and if the policy directs us elsewhere, we will refer to an incorporated document to the extent required by the policy. Unless obligated to do so by the terms of the policy, however, we do not consider coverage limitations in underlying transactional documents.”

Why Look Outside the Policies?

- The policies did not identify BP as an additional insured.
- An additional insured is included only where required by written contract. Thus, the drilling contract must be examined.
- The “only reasonable interpretation of that clause is that the parties did not intend for BP to be named as an additional insured for the subsurface pollution liabilities BP expressly assumed in the Drilling Contract.”
- What about *ATOFINA*?

Contractual Liability Exclusion

- 5th Circuit previously decided *Ewing Constr. Co. v. Amerisure Ins. Co.*, 690 F.3d 628 (5th Cir. 2012) and *Crownover v. Mid-Continent Casualty Co.*, 757 F.3d 200 (5th Cir. 2014).
- *Ewing Constr. Co. v. Amerisure Ins. Co.*, 420 S.W.3d 30 (Tex. 2014).
 - The contractual liability exclusion will only apply when an insured assumes a liability that exceeds the liability it would have under general law.
 - 5th Cir. Reversed its decision in *Ewing. Ewing Const. Co. v. Amerisure*, 744 F.3d 917 (5th Cir. 2014).
- What happened in *Crownover v. Mid-Continent Casualty Co.*, 772 F.3d. 197 (5th Cir. 2014)?

Hail Damage

- *Hamilton Properties v. The American Insurance Co.*, No. 3:12-CV-5046-B, 2014 WL 3055801 (N.D. Texas July 7, 2014)
 - Damage to a building from a July 2009 hailstorm. The insured gave notice of the damage in February or October 2011.
 - Court: Notice was not timely given in 2011.
 - The untimely notice prejudiced AIC's ability to investigate the claim. The late notice compromised the reliability and availability of the evidence necessary to investigate the claim.

Hail Damage and the Concurrent Causation Doctrine

- *Hamilton Properties v. The American Insurance Co.*
 - Court: Policyholder must segregate property damage caused by a covered peril from damage caused by an uncovered peril.
 - Insurer provided evidence that a peril not covered by the policy contributed to the damage.
 - The burden then shifted to the insured to segregate its claim between damage covered by a peril and damage caused by uncovered perils.

The Impact of *Hamilton*?

- Insured needs to be able to:
 - Show the claimed damage occurred on the specified date of loss and
 - Segregate the alleged hail damage from other storms and/or other, prior damage, i.e. wear and tear, deterioration, and other problems.

Nasti v. State Farm Lloyds, No. 4:13-
CV-1413, 2015 WL 150468 (S.D. Tex.
Jan. 9, 2015)

- Burden on the insured to survive summary judgment on bad faith claims: Provide evidence that
 - Shows the existence of covered damage, and
 - Shows the insurer knew its actions were false, deceptive or unfair.
 - A factual dispute over the denial of the claim is not enough.
 - Bad faith arises when the insurer commits acts so extreme that they could cause an injury independent of the policy claim.

Duty to Conduct a Reasonable Investigation

- *Santacruz v. Allstate Tex. Lloyd's, Inc.*, No. 13-10786, 2014 WL 5870429 (5th Cir. Nov. 13, 2014)
 - Fifth Circuit reversed a summary judgment in favor of the insurer on bad faith. It found the insurer failed to make a reasonable investigation before denying the claim.
 - Allstate adjuster inspected the house after repairs had been made. He only took pictures of the roof and interior. Nothing else was done.
 - Insurer must conduct a reasonable investigation and have a reasonable basis for the denial of a claim.

Economic Loss Rule

- *Chapman Custom Homes, Inc. v. Dallas Plumbing Co.*, 445 S.W.3d 716 (Tex. 2014)
 - A plumbing contractor assumes an implied duty to not flood or otherwise damage a home while performing its contract with a builder.
 - Damages caused by a breach of this duty extend beyond the economic loss of any anticipated benefit that comes from the contract.
 - The economic loss rule did not apply.
 - A non-contracting person's property was damaged.
 - Negligent performance of a contract.

Economic Loss Rule

- *LAN/STV v. Martin K. Eby Constr. Co.*, 435 S.W.3d 234 (Tex. 2014)
 - Economic loss rule precludes direct claims against architects by contractors.
 - It is more likely that a contractor will look to its agreement with the owner for damages if the project is not as represented or for any other type of breach.
 - The availability of contractual remedies with the owner precludes tort recovery in this situation.

Workers Compensation: How Expansive is *Ruttiger*?

- *In re Crawford & Company*, __ S.W.3d __, No. 07-14-00013-CV, 2014 WL 1024075 (Tex.App.—Amarillo March 17, 2014)
 - Look at the substance of the claim, not the label placed on the cause of action.
 - The Texas Division of Workers' Compensation Act is the exclusive jurisdiction for dealing with and responding to claims arising out of the investigation, handling and settling of workers' compensation claims.
- A party subject to the Act will not have success in state court unless one can first show invocation of the Act's administrative procedures to resolve claims and disputes for medical and income benefits.

Discovery of Other Insureds' Claim Files

- *In re Nat'l Lloyds Ins. Co.*, 449 S.W.3d 486 (Tex. 2014)
 - Plaintiff sought discovery of all claim files for the past year for properties in Dallas and Tarrant Counties that involved the two adjusting firms that handled her claims.
 - She wanted to compare the carrier's evaluation of the damage to her home with its evaluation of damage to other homes in the area.
 - Court: "impermissible fishing expedition"

No Direct Action Rule

- *In re Essex Ins. Co.*, 450 S.W.3d 524 (Tex. 2014)
 - Plaintiff sued a third-party tortfeasor's insurer seeking a declaration that the carrier had to indemnify its insured for its liability to plaintiff.
 - Plaintiff's argument: only seeking a declaration of the carrier's coverage obligation to its insured, not seeking monetary damages for himself.
 - Court: upheld the "no direct action" rule.

What Is Next?

- Fifth Circuit certified four questions to the Texas Supreme Court in *U.S. Metals, Inc. v. Liberty Mut. Group, Inc.*, 589 Fed.Appx. 659 (5th Cir. 2014)
- In the “your product” and “impaired property” exclusions, are the terms “physical injury” and/or “replacement” ambiguous?
- If yes as to either, are the aforementioned interpretations offered by the insured reasonable and thus, must be applied pursuant to Texas law?

Fifth Circuit's Certified Questions

- If the above question one is answered in the negative as to “physical injury,” does physical injury occur to the third party’s product that is irreversibly attached to the insured’s product at the moment of incorporation of the insured’s defective product, or does “physical injury” only occur to the third party’s product when there is an alteration in the color, shape or appearance of the third party’s product due to the insured’s defective product that is irreversibly attached?
- If the above question one is answered in the negative as to “replacement,” does replacement of the insured’s defective product irreversibly attached to a third party’s product include the removal or destruction of the third party’s product?