Texas Supreme Court Update: 2019-2020 Term

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Questions?

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About the Court

- New Justice: Hon. Jane Bland appointed to the Court and sworn in on Sept. 11, 2019 (formerly First Court of Appeals)
- Departing Justice: Hon. Paul Green announced his retirement effective Aug. 31, 2020, after 15 years on the Court
- Fun fact: Chief Justice Nathan Hecht is the longest-serving member of the Court in Texas history, and the longest-tenured Texas judge in active service

Statistics

- For Fiscal Year 2019 (previous term)
- 981 petitions for review filed
- Granted review in only 93 cases (down from 135 last yr)
  - 9% grant rate for PFR (down from 10-12% in prior yrs)
  - 3% grant rate for mandamus petitions
- Action taken in cases granted:
  - 50% reversed
  - 21% affirmed
  - 17% modified in some way
  - 12% were “other” (dismissed, some combination)

- 109 opinions issued
  - 65% were majority opinions
  - 14% were “per curiam” opinions (no author listed)
  - Rest were concurring or dissenting or “other”
- On average, 11.5 months from filing to disposition in case where review granted
- Most opinions: Justice Boyd (18)
- Fewest opinions (full-time Justice): Justice Lehrmann (10)

COVID-19 Emergency Orders

- Texas Supreme Court – 24 Emergency Orders
- Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant's consent:
- modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than September 30, 2020

- Limitations:
  - Deadline for filing or service of cases falling between March 13 and Sept. 1 is extended through Sept. 15
- Requires Courts Follow OCA's Recommendations for Court Proceedings During COVID-19 Pandemic
  - No jury proceedings prior to Oct. 1
  - Limited in-person jury trials between 10-1 and 12-31
  - Virtual trials: must ensure prospective jurors have required technology (OCA to provide guidance)

Insurance – TSC

Richards v. State Farm (TSC)

- Claim under homeowners' policy for death of insureds' grandson in ATV accident
- N.D. Tex. held: eight-corners rule does not apply unless policy includes language requiring insurer to defend "all actions against its insured no matter if the allegations of the suit are groundless, false or fraudulent"
- Fifth Circuit certified question to TSC:
  - Is "policy-language exception" to eight-corners rule permissible under Texas law?

- TSC answer: "No"
- State Farm defended mother's lawsuit under ROR
- SF filed dec. suit against grandparents, asserting "motor vehicle" exclusion applied because child was using ATV on public trail, not family's property, and asserting "insured" exclusion
- SF submitted police report to prove location of accident and court order showing grandparents were joint managing conservators of child (an "insured")
- Grandparents argued extrinsic evidence prohibited

- Federal district court considered extrinsic evidence and granted summary judgment to SF
- TSC held that determination of duty to defend and application of eight-corners rule has never depended upon presence of groundless claims clause
- Eight-corners rule merely acknowledges that, under common duty-to-defend clauses, only petition and policy are relevant to initial inquiry into whether *petition's* claim fits within *policy's* coverage
- No opinion on whether extrinsic evidence can be used for deciding duty to defend

State Farm v. Richards (5th Cir.)

- Fifth Circuit applied TSC ruling to hold:
  - Plaintiff's allegations possibly implicated coverage, meaning State Farm had duty to defend
  - District court erred in applying "policy language exception" to eight–corners rule
  - "*Northfield* exception" (allowing extrinsic evidence) also did not apply to show motor vehicle exclusion or insured exclusion negated duty to defend, because evidence contradicted allegations in petition and was too intertwined with merits/facts to be decided in PI suit
  - Reversed on duty to indemnify (not ripe)

Loya Ins. Co. v. Avalos

- Texas Supreme Court, May 1, 2020
- Court adopts an exception to eight-corners rule:
  - Courts may consider extrinsic evidence regarding whether the insured and a third party suing the insured colluded to make false representations of fact in that suit for the purpose of securing a defense and coverage where they would not otherwise exist
- Guevara, Flores, and Hurtados in accident; all agreed to say Guevara was driving
- Flores was expressly excluded from coverage under Guevara's policy

- Petition alleged Guevara was driving at time of accident
- Guevara recanted story in depo, admitted Flores was driving
- Loya sought summary judgment on coverage based on fraud, and trial court granted SJ
- Court of Appeals reversed, holding Loya had duty to defend based on eight-corners rule
- Texas Supreme Court reversed

- Evidence conclusively proved that excluded driver (Flores) was driving at time of accident
- Evidence conclusively proved parties conspired to lie to police and insurer to obtain coverage for accident
- Therefore, eight-corners rule does not bar extrinsic evidence to prove collusive fraud by insured in determining duty to defend
- When confronted with conclusive evidence of collusive fraud, the insurer does not have to file a dec. suit on duty to defend and may terminate defense

Insurance – Fifth Circuit

Gonzales v. Mid-Continent

- Fifth Circuit Court of Appeals (pending on rehearing)
- Duty to defend under CGL
- Underlying Facts
  - Hamilton hired Gonzalez to install siding in 2013
  - Fire on December 1, 2016 – home destroyed
  - Hamilton sues Gonzalez claiming Gonzalez negligently installed siding by hammering nails through electrical wiring, which later caused the fire in 2016
  - Liberty Mutual insured Gonzalez at time of fire
  - Gonzalez & Liberty Mutual sue Mid-Continent who insured Gonzalez at time of installation of siding

- Duty to defend
  - Majority Opinion analyzed policy requirements, that:
  - The Policy applies to (1) an accident (2) that causes physical injury to tangible property (3) during the policy period
  - Held: (1) Petition alleges that Gonzalez "improperly hammered nails through electrical wiring," satisfying Policy's definition of "occurrence," which means "an accident"
  - (2) wires are "tangible property", and piercing wires with nails constitutes "physical injury"; the Petition alleges that the accidental piercing of those wires caused the property damage that occurred in the 2016 fire
  - (3) the property damage occurred during the policy period; Gonzalez took all his actions, including hammering the nails in question, during the policy period, meaning alleged damage to the electrical wiring happened during the policy period

- Additionally, Petition alleges that the 2016 fire "relates back to [the] construction and/or installation of siding" in 2013.
  - CGL defines "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property," and expressly states that "[a]ll such loss shall be deemed to occur at the time of the physical injury that caused it"
  - Thus, damage from the 2016 fire "shall be deemed" to have occurred in 2013 when the electrical wires were damaged
  - Because alleged that both damage to the electrical wires and the fire can be traced to 2013, when the policies were in effect, the property damage alleged took place during the policy period

- Dissenting Opinion:
  - When the property damage occurred = when the fire broke out in 2016 because pleadings allege:
  - "The injuries and *damages suffered* by Plaintiffs and made the basis of this action *arose out of an occurrence on or about December 1, 2016*"
  - *VRV Development* dealt with the same definition of "property damage" and concluded property damage to retaining walls did not extend to damage to plaintiffs' backyards; majority holds Gonzalez's alleged negligence caused physical injury to the electrical wiring—thus, "all resulting loss of use of that property" is limited to the electrical wires and does not extend to the entire house

- Dissenting opinion (continued):
  - Petition states that the "damages … arose out of [the fire]" and fire caused damage to Hamilton's entire house, which includes the electrical wires
  - Thus, factual allegations within Petition are that "the time of the 'actual physical damage' " to Hamilton's property was when the fire broke out
- Petition for rehearing filed addressing duty to defend; response requested

Balfour Beatty v. Liberty Mutual

- Fifth Circuit Court of Appeals
- Facts
  - Trammell Crow is developer; Balfour is GC, Milestone is sub responsible for erection of structural steel, stairs, and ornamental steel
  - Milestone performs welding operations to correct another subcontractor's error when slag generated by its welding process dropped onto glass installed by another subcontractor
  - Milestone neither installed nor repaired the glass
  - Milestone and Balfour sought coverage under an all-risks builders' risk policy issued by Liberty Mutual for the damaged glass
  - Liberty denied coverage based on the policy's Defects, Errors, and Omissions exclusion, asserting that the exception to that exclusion for resulting loss or damage does not apply

- The Policy:
- Contains general insuring clause, under which Liberty insures risks of loss or damage, to the extent those losses are not caused by an excluded peril
- Under the exclusionary clause, Liberty will not cover losses "caused by" or "resulting from … act[s], defect[s], error[s], or omission[s] … relating to … construction"
- However, under the exception to this exclusion, Liberty will cover any loss caused by "an act, defect, error, or omission" that "results in a covered peril"; a covered peril is a "risk[ ] of direct physical loss or damage unless the loss is … caused by a peril that is excluded"

- Liberty conceded window damage was “direct physical loss or damage” falling under general insuring clause
- Parties agree that, absent the Exception, the Exclusion would bar recovery because the window damage resulted from Milestone’s construction or installation activity
- “Interpretative dilemma”: whether the Exception applies to reinstate coverage for the claim
- Put differently, whether the “an act, defect, error, or omission” “result[ed] in a covered peril”

- Held: Insurance policy does not provide coverage for Balfour's and Milestone's claims
- An ensuing loss provision like here is only triggered when one (excluded) peril results in a distinct (covered) peril, meaning there must be two separate events for the exception to trigger
- Here, welding operation is inseparable from the falling slag and they are not two separate events. Thus, exception to the exclusion did not reinstate coverage.

Worker's Comp. – TSC

Mo-Vac Serv. Co. v. Escabedo

- Feb. 2020
- For the intentional-tort exception to the Workers' Compensation Act's exclusive-remedy provision to apply (*i.e.*, to allow a suit against employer for intentional tort), employer must believe that its actions are substantially certain to result in a particular injury to a particular employee, not merely highly likely to increase overall risks to employees in the workplace
- Held: there was no evidence that Mo-Vac believed it was substantially certain that Escabedo would fall asleep from overwork (too many hours driving) and crash; thus, intentional-tort exception did not apply to survival claim

Orozco v. County of El Paso

- March 2020
- Uniformed deputy sheriff's authorized use of county patrol car to travel to extra-duty assignment qualified as official use of government vehicle, and it satisfied Worker's Comp Act's test for being in course and scope of employment at time of accident (widow's lawsuit)
- "Coming and going" to work rule applied but exceptions to it applied (county provided car and controlled its use, so part of course and scope)
- "Dual purpose" exception (personal and business travel) did not apply

Others

- *W&T Offshore v. Fredieu* (June 2020)
  - Involves logistics of how to try federal admiralty claim under Longshoreman's and Harbor Workers' Compensation Act in Texas state court
- *Tex. Mut. Ins. v. PHI Air Medical* (June 2020)
  - Held: the ADA does not preempt Texas's general standard of fair and reasonable reimbursement as applied to air ambulance services, nor does it require that Texas compel private insurers to reimburse the full charges billed for those services

More Insurance – TSC

Farmers Texas v. Beasley

- Texas Supreme Court, March 27, 2020
- Issue was whether insured had standing to sue his PIP insurer for not paying him the "list prices" for his medical expenses after an auto accident, rather than the insurer's lower, negotiated rates
- List price was $2,662.54, BCBS negotiated price was $1,068.90
- Medical providers did not hold insured liable for difference between providers' list rates and negotiated rates BCBS actually paid
- Farmers paid lower amount to insured under PIP

- Insured sued Farmers to recover difference ($1,431.10)
- PIP coverage applied to "reasonable expenses incurred for necessary medical services"
- Farmers argued medical expenses "incurred" were not the providers' list rates, but were what the providers accepted as full payment from BCBS
- Trial court held: insured had no standing (not personally aggrieved, no concrete injury)
- TSC affirmed: insured suffered no out-of-pocket loss and, thus, lacked standing to sue for difference

Cases Applying Barbara Tech. and Ortiz

- *Barbara Technologies* held that payment of an appraisal award does not foreclose an award of damages under the PPCA; but, payment is not an admission or determination of PPCA liability
- *Ortiz v. State Farm* held that payment of an appraisal award forecloses an insurer's liability for breach of contract and common-law and statutory bad faith, unless the insured suffered an independent injury

- Since then, TSC has enforced *Barbara* and *Ortiz* and has reversed numerous times:
  - *Biasatti v. GuideOne* (however, involved unilateral appraisal clause, which Court said could affect analysis)
  - *Alvarez v. State Farm*
  - *Marchbanks v. Liberty Ins.*
  - *Perry v. USAA*
  - *Lazos v. State Farm*
- We will see if any of these cases returns to TSC

Coverage: Covid-19 Claims

Diesel Barbershop v. State Farm

- W.D. Tex. (San Antonio), 8-13-2020
- Issue: coverage for loss of income resulting from closures of "nonessential" barbershops in compliance with Texas and Bexar County pandemic orders
- Commercial property policies insured for "accidental direct physical loss to Covered Property" unless loss excluded under Section I–Exclusions
- Policies had "Fungi, Virus, or Bacteria" exclusion precluding coverage if loss caused by "virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease"

- Held: no allegation of direct physical loss to the business premises (only loss of use, loss of income)
- Even if alleged, the virus exclusion applied because Plaintiffs pleaded that COVID-19 was the reason for the Orders being issued and underlying cause of Plaintiffs' alleged losses
- "Civil authority" provision (if civil authority prohibits access to business premises under specified conditions, will pay lost income) did not apply because Plaintiffs did not alleged a Covered Cause of Loss

Health Care Liability Claims

In re Turner

- HCLC filed against Hospital
- After party discovery, Ps requested additional time to depose non-party fact witnesses to address gap in medical records and determine whether to add as Ds to lawsuit
- Physician treater (Dr. Sandate) objected to deposition and SDT notice because no expert report served (74.351)
- Ps argue no report necessary because "non-party" exception 74.351(s)(3)

- Held: Ps' request to investigate potential HCLC against Dr. Sandate: non-party exception does NOT apply; Ps must first serve Dr. Sandate with an expert report
- Held: Ps' request to depose Dr. Sandate as to facts regarding HCLC pending against Hospital: non-party exception does apply
- Ps may depose Dr. Sandate as fact witness regarding HCLC against hospital
- Relevant: Testimony about his recollection of the circumstances surrounding Hospital's employees' acts and omissions, including his own conduct as it relates to those actions
- Irrelevant: Ps may not engage in fishing expedition by requesting information from Dr. Sandate shedding no light on what the Hospital's employees did and why

Regent Care v. Detrick

- HCLC asserting challenges to formation of judgment
  - Settlement Credit
  - Future Damages Paid in Periodic Payments
- Settlement Credit Properly Applied
  - Held: Reduction by dollar-for-dollar settlement credit should be made BEFORE applying non-economic damages limitations found in section 74.301, *et. seq.*
  - Computed by applying settlement credit first to accrued prejudgment interest, then pro-rata to economic and non-economic damages (per jury award)
  - Then applying cap to remainder of non-economic damages

- Periodic Payments for Future Damages Not Abuse of Discretion
  - Held: $256,000 of $3 million awarded to be paid in periodic payments in equal amounts over 24 months was not supported by sufficient evidence, but Regent Care failed to show abuse of discretion
  - Life expectancy evidence during trial 6-8 years
  - No evidence $256,000 would be incurred periodically
  - Even reducing for attorney's fees, no evidence that $1 million would need to be paid immediately
  - BUT, Regent Care failed to point to evidence that entire $3 million should be paid in periodic payments, nor any specific dollar amount that would be incurred periodically

- Parties presented evidence in present value without evidence detailing discounting for future damages
- Jury question awarded future damages in amounts "if now paid in cash"
- No jury question asking jury to award damages in amounts if paid periodically
- No post-verdict evidence regarding amounts to be paid periodically
- Ordering present-value damages award be paid in periodic installments—whether in whole or in part—would be an abuse of discretion because it would effectively "double discount" the award

- Court announced burdens and procedures related to Subchapter K:
  - Party requesting order for periodic payments has burden to identify evidence from trial (or present evidence post-trial if the evidence was not provided during trial) regarding each of the findings required by section 74.503, and the findings must be supported by sufficient evidence, including:
  - 74.503(c) requires: The court shall make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages

- Unclear whether party has burden to present/identify evidence regarding 74.503(d) requirements to be included in any judgment awarding periodic payments:
  - (1) recipient of the payments;
  - (2) dollar amount of the payments;
  - (3) interval between payments; and
  - (4) number of payments or the period of time over which payments must be made.
- Pending on Rehearing

TSC Quick Hits

- <u>Responsible Third Party:</u> *In re Mobile Mini*, March 2020 – court held:
  - Where disclosure responses first became due after limitations expired, disclosure of RTP was timely and not subject to striking (plaintiff waited two years to sue MM, so did not request disclosures until close to limitations deadline)
  - Former named party could be designated as RTP for purposes of personal injury claim, even if former party had obtained summary judgment on warranty and indemnity claims and was dismissed from suit

- Covid-19: *In re State of Texas*, May 2020 – lack of immunity to Covid-19, by itself, is not a "disability" as defined in Election Code that would permit a person to request mail-in ballot; however, voters may consider other physical conditions that affect them in deciding whether to apply to vote by mail because of "disability"
- Ferae Naturae Doctrine: *Hillis v. McCall*, March 2020 – impact of *ferae naturae* doctrine on premises liability claim involving brown recluse spider bite

- Sanctions: *Brewer v. Lennox Hearth Products*, April 2020 – manufacturer's attorney did not act in bad faith by conducting pretrial telephone survey of community from which jurors would be summoned; thus, sanctions improper
- Summary Judgment Orders: *B.C. v. Steak & Shake*, Mar. 2020 – summary judgment order stating trial court considered "evidence and arguments of counsel," without any limitation, established trial court considered non-movant's late-filed response to no-evidence MSJ; thus, court of appeals also should have considered response when reviewing trial court's ruling

The End – Thank You!

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