Cooper & Scully
A Professional Corporation

# Cover Notes

May 2008

**DALLAS OFFICE**
900 Jackson Street, Suite 100
Dallas, Texas 75202
Phone: (214) 712-9500
Fax: (214) 712-9540

**HOUSTON OFFICE**
700 Louisiana Street, Suite 3850
Houston, Texas 77002
Phone: (713) 236-6800
Fax: (713) 236-6880

**SAN FRANCISCO OFFICE**
100 California Street, Suite 650
San Francisco, California 94111
Phone: (415) 956-9700
Fax: (415) 391-0274

**SHERMAN OFFICE**
250 East Evergreen Street
Sherman, Texas 75090
Phone: (903) 813-3900
Fax: (903) 868-1919



## INSIDE THIS ISSUE...



## *National Union Fire Insurance Company of Pittsburgh, PA, v. Crocker*, 51 Tex.Sup.J. 518 (Feb. 15, 2008)

By: R. Brent Cooper

### A. Facts

In this case, Beatrice Crocker was a resident of a nursing home owned by Emeritus Corporation. She filed suit against Emeritus and one of its employees, a Richard Morris, for injuries she received when she was struck by a door swung open by Morris. Emeritus was insured by a CGL policy issued by National Union. Morris would be an additional insured under the terms of the policy since he was an employee acting within the course and scope of his employment. The evidence was undisputed that Morris did not know he was an additional insured under the policy and did not request a defense. Likewise, the evidence was undisputed that National Union did not inform Morris that he was an insured nor did it offer to defend him. Morris refused to meet with any counsel employed by Emeritus. The trial resulted in a take-nothing judgment against Emeritus. However, the claims against Morris were severed from the trial and a default judgment in the amount of $1 million was entered against him on the severed claims.

Continued on page 2

## "Integral Part" Test: An Accepted Substitute For The Uninsured/Underinsured Motorist Coverage "Actual Physical Contact" Requirement? Not In Texas

By: R. Brent Cooper and Katie McClelland

Should there be uninsured/underinsured coverage for a collision between an axle-wheel assembly separated from an unidentified semi-trailer truck and an insured's vehicle? According to a recent Texas Supreme Court case, the answer in Texas is no. However, other jurisdictions may not agree.

The Texas Supreme Court, as a matter of first impression, examined whether uninsured/underinsured motorist coverage applies to an accident involving something less than the entire unknown vehicle colliding with the insured vehicle. *Nationwide Insurance Co. v. Elchehimi*, No. 06-0106, 2008 Tex. LEXIS 229 (Tex. 2008).

On January 4, 2002, Mohamad Elchehimi's station wagon collided with a drive axle and attached tandem wheels (axle-wheel assembly) from an eighteen wheel semi-trailer truck. *Id.* at *1. The axle-wheel assembly separated from the semi-trailer truck and was carried by momentum across the dividing median where it struck Elchehimi's vehicle, damaging the vehicle and injuring the occupants. *Id.* at *1-2. Elchehimi purchased a standard personal auto policy from Nationwide, including the statutorily defined unidentified motorist coverage. *Id.* at *2. Nationwide denied the claim for uninsured motorists benefits alleging the impact between Elchehimi's vehicle and the axle-wheel assembly was not "actual physical contact" with an unknown "motor vehicle" as needed by the terms of the policy and the Texas Insurance Code. *Id.*

The court of appeals determined that Texas's uninsured/underinsured motorist statute required only that there be actual physical contact with an "'integral part'" of an unidentified motor vehicle as a "'result of an unbroken chain of events with a clearly definable beginning and

Continued on page 3

*National Union Fire Insurance Company of Pittsburgh, PA, v. Crocker* continued from page 1

Suit was brought by Crocker against Morris to recover under the judgment. National Union asserted that Morris had failed to comply with the notice provision. Crocker asserted that there was no prejudice from failure to comply with the notice provision because National Union was aware of the lawsuit and National Union had a duty to inform Morris of the existence of coverage available to him as an additional insured. The Federal District Court agreed with Crocker and concluded that Texas law required National Union to show prejudice and that National Union had breached a duty to defend Morris by failing to notify him that it would defend him and a judgment was entered in the amount of $1 million against National Union. National Union appealed to the Fifth Circuit and certified three questions to the Texas Supreme Court. The three questions certified were as follows:

1. Where an additional insured does not and cannot be presumed to know of coverage under an insurer's liability policy, does an insurer that has knowledge that a suit implicating policy coverage has been filed against its additional insured have a duty to inform the additional insured of the available coverage?

2. If the above question is answered in the affirmative, what is the extent or proper measure of the insurer's duty to inform the additional insured, and what is the extent or measure of any duty on the part of the additional insured to cooperate with the insurer up to the point he is informed of the policy provisions?

3. Does proof of an insurer's actual knowledge of service of process in a suit against its additional insured, when such knowledge is obtained in sufficient time to provide a defense for the insured, establish as a matter of law the absence of prejudice to the insurer from the additional insured's failure to comply with the notice-of-suit provisions of the policy?

The Fifth Circuit answered the first and third questions "no" and did not answer the second question.

**B. Holdings**

The supreme court answered the first question in the negative based upon its 1978 decision in *Weaver v. Hartford Accident & Indemnity Co.*, 570 S.W.2d 367 (Tex. 1978). In *Weaver*, the court held that an insurer was not liable to an additional insured's judgment creditor when the additional insured failed to notify the insurer that he had been served with process, even though the insurer knew about the suit, and the additional insured knew nothing about the policy. The court noted five similarities between the *Crocker* case and the *Weaver* case. First, both Morris and the employee in *Weaver* were additional insureds under the liability policies at issue. Second, the injured party in each case sued both the named insured and the additional insured but did not recover anything from the named insured. Third, both additional insureds failed to forward suit papers to the insurers, so neither was defended by the insurer. Fourth, both additional insureds lacked knowledge of the existence of their status as additional insureds under the employers' policies. Fifth, both insurers argued that they had no duty to inform the additional insured of the possibility of coverage. The supreme court held that a request for coverage is a *sine qua non* to the duty to provide a defense. However, the court noted that:

> Of course, an insurer that is aware an additional insured where an additional insured has been sued may, and perhaps should, choose to inform the insured that a defense is available; in this case, had National Union done so, a judgment against Morris and years of subsequent litigation would have been avoided. But an insurer that has not been notified that a defense is expected bears no extra-contractual duty to provide notice that a defense is available to an additional insured who has not requested one.

The last quote no doubt will result in continued litigation in the future. If an insurer "should" inform the insured that a defense is available, then what are the consequences? Clearly there would be no extra-contractual consequences; however, can there be recovery under the policy.

The third certified question that was posed was whether there was prejudice if the insurer had actual knowledge of the lawsuit in sufficient time to provide a defense. The court noted that notice of service of process lets an insurer know that the insured is subject to a default and expects the insured to impose a defense. The court noted that an insurer cannot necessarily assume that an additional insured who has been served but has not given notice to the insurer is looking to the insurer to provide a defense. The court addressed several reasons why the insured may choose not to seek a defense and as a result, it would be improper on the part of the insurer to impose a defense without one being requested.

## UPCOMING EVENTS...

**Transportation Seminar - June 20, 2008 Dallas, Texas**

**Appellate Seminar - September 19, 2008, Dallas, Texas**

**Cooper & Scully, P.C. is pleased to offer private seminars to your company on cutting edge topics relating to insurance law. Please contact Courtney Butler at Courtney.butler@cooperscully.com or (214)712-9425 for more information.**

*"Integral Part" Test* continued from page 1

ending, occurring in a continuous sequence'" rather than an actual physical contact with a motor vehicle. *Id.* at *3 (quoting 183 S.W.2d 833, 839). The Texas Supreme Court examined the unidentified motorist statute that governs in Texas which states as follows:

> [F]or the insured to recover under the uninsured motorist coverage if the owner or operator of any motor vehicle that causes bodily injury or property damage to the insured is unknown, actual physical contact must have occurred between the motor vehicle owned or operated by the un-known person and the person or property of the insured.

*Id.* at *3-4 (citing TEX. INS. CODE § 1952.104(3)).

Nationwide obtained a summary judgment on a motion that there was no physical contact between Elchehimi's vehicle and the axle-wheel assembly. The court of appeals reversed in favor of Elchehimi concluding that there was a question of fact whether actual physical contact occurred. 183 S.W.2d 833, 839.

The Texas Supreme Court concluded that there was actual physical contact between Elchehimi's vehicle and the axle-wheel assembly. 2008 Tex. LEXIS 229, at *4. The Court then examined whether the axle-wheel assembly constituted a "motor vehicle" under the Texas Insurance Code § 1952.104(3). *Id.* The Texas Insurance Code does not define "motor vehicle." The Texas Insurance Code did expressly incorporate the Texas Motor Vehicle Safety Responsibility Act, Chapter 601 of the Transportation Code. *Id.* (citing TEX. INS. CODE § 1952.101(a)). Under Chapter 601, a motor vehicle is defined as "a self-propelled vehicle designed for use on a highway, a trailer or semi-trailer designed for use with a self-propelled vehicle, or a vehicle propelled by electric power from overhead wires and not operated on rails." *Id.* (citing TEX. TRANSP. CODE § 601.002(5)).

Using this definition, the Texas Supreme Court determined that the axle-wheel assembly lacked an engine or other means of propulsion and was not a self-propelled vehicle or a vehicle propelled by electric power from overhead wires. *Id.* Further the Court determined that the axle-wheel assembly was not a trailer or semi-trailer designed for use with a self-propelled vehicle. *Id.* at *6. The Texas Supreme Court concluded that "physical contact with a detached axle and tandem wheels is not actual physical contact with a motor vehicle under the unidentified motor vehicle provision." *Id.*

The insured then argued that a substitute for the actual physical contact requirement. In *Latham v. Mountain States Mutual Casualty Co.*, 482 S.W.2d 655, 657 (Tex. Civ. App.-Houston [1st Dist.] 1972, writ ref'd n.r.e.), the court of appeals determined that the physical contact requirement could be satisfied through indirect contact where an unidentified vehicle first impacts an intermediary vehicle that in turn collides with an insured claimant. The court of appeals held that "[w]here a Car A strikes Car B and propels it into Car C, there is physical contact between Car A and Car C" to satisfy the required physical contact with an unidentified vehicle in a standard auto policy. *Id.*

The Texas Supreme Court noted that no Texas court had relied on *Latham* to conclude that the physical contact occurred where there was no "Car B." 2008 Tex. LEXIS 229, at *7. In this case only two vehicles were involved, Elchehimi's vehicle and the unidentified truck. *Id.* The Court then determined that the axle-wheel assembly is not a motor vehicle and thus cannot be an intermediary vehicle to provide indirect contact between the unidentified truck and the insured's vehicle. *Id.* Additionally, the Court noted that *Latham* was distinguishable from this matter because it interpreted insurance policy language, not a statute, and the policy language did not have an actual physical contact requirement. *Id.* The Texas Legislature added the physical contact requirement to the uninsured motorist statute five years after *Latham*.

The Court then examined prior case law which uniformly rejected the contention that a collision with cargo and other objects falling from a car satisfies the requirement of actual physical contact with a motor vehicle. *Id.* at *8 (citing Tex. Farmers Ins. Co. v. Deville, 988 S.W.2d 331, 333-34 (Tex. App.-Houston [1st Dist.] 1999, no pet.) (holding that water pump falling from truck and striking insured was not actual physical contact with a motor vehicle); *Republic Ins. Co. v. Stoker,* 867 S.W.2d 74, 77-78 (Tex. App.-El Paso 1993) (holding that insured rear-ending another car that was trying to avoid furniture dropped on the highway by an unknown driver was not actual physical contact with an unknown vehicle), *rev'd on other grounds*, 903 S.W.2d 338 (Tex. 1995); *Williams v. Allstate Ins. Co.*, 849 S. W.2d 859, 861 (Tex. App.-Beaumont 1993, no writ) (holding that collision between the claimant's vehicle and a steel pipe dropped from an exiting truck was not actual physical contact with a motor vehicle)). The Court concluded that "a collision with a separated piece of a motor vehicle, such as an axle-wheel assembly, is not actual physical contact with the motor vehicle as specifically required by the statute." *Id.* at *9.

The Texas Supreme Court next examined the Court of Appeals' suggestion that Texas adopt the integral part test to determine whether actual physical contact occurred. 183 S.W.3d at 835. The Court declined to adopt the integral part test because the "Legislature did not create an exception to the statute's requirement of actual physical contact with a motor vehicle." 2008 Tex. LEXIS 229, at *10. The dissenting justices only note seven states that have physical contact requirements in their unidentified motorist statutes and have considered the integral part test, two have statutory language different than Texas, four have adopted the test, and one has rejected it.

*"Integral Part" Test* continued from page 3

*Id.* at *10-11 (citing *State Farm Fire & Cas. Co. v. Guest*, 203 Ga. App. 711, 417 S.E.2d 419, 422 (Ga. Ct. App. 1992); *Illinois Nat. Ins. Co. v. Palmer*, 116 Ill. App. 3d 1067, 452 N.E.2d 707, 709, 72 Ill. Dec. 454 (Ill. App. Ct. 1983); *Adams v. Mr. Zajac*, 110 Mich. App. 522, 313 N.W.2d 347, 349 (Mich. Ct. App. 1981); *Allstate Ins. Co. v. Killakey*, 78 N.Y.2d 325, 580 N.E.2d 399, 401, 574 N.Y.S.2d 927 (N.Y. 1991); *Davis v. Doe*, 285 S.C. 538, 331 S.E.2d 352, 353-54 (S.C. 1985)).

The Texas Supreme Court rejected the creation of an integral part test because it would "force courts to draw lines in each case along a continuum, to determine whether a particular part was large or important enough to be 'integral,' whether the part was a piece of the vehicle or merely cargo, and whether the part was contemporaneously separated from the vehicle or had lain in the roadway long enough to become debris." *Id.* at *12. The Texas Supreme Court refused to "fuzz" up a relatively bright line drawn by the Texas Legislature. *Id.* at *12-13. The Court held that the "salient factor here is that the insured's vehicle did not make actual physical contact with the unidentified vehicle." *Id.* at *13.

Next we examine the integral parts test urged by the dissent and the court of appeals. *Id.* at *14 (O'Neill dissenting). "[W]hen an integral part of an unidentified vehicle is propelled by the vehicle's momentum and, in a continuous and unbroken sequence of events, collides with an insured's vehicle, 'actual physical contact' with a 'motor vehicle' has occurred and coverage is afforded under the statute." *Id.* The dissent noted the purpose of Texas's UM/UIM statute, "[t]he statute protects motorists by requiring that all Texas automobile insurance policies provide coverage to the insured when the insured is hit by a motorist who is uninsured, underinsured, or unidentified." *Id.*

The integral parts test requires "'actual physical contact' with a 'motor vehicle' for purposes of the UM statute when the insured is struck by an integral part of another vehicle and there is a temporal continuity between the part's detachment from the unknown vehicle and collision with the insured." *Id.* at *19. The dissent argued that the Court's holding requires contact with the entire motor vehicle for UM/UIM coverage. *Id.* The dissent argues the purpose of the statute would be frustrated with this "whole vehicle" requirement. *Id.*

The dissent argues that the substantial majority of jurisdictions that have UM statutes similar to Texas have determined that coverage exists in situations even more attenuated than the facts in the present case. *Id.* at *23. There are eleven states that require "physical contact" or "actual physical contact" with a "motor vehicle," "vehicle" or "automobile" to trigger UM coverage. *Id.* (citing CAL. INS. CODE § 11580.2(b)(1) (Deering 2007); FLA. STAT. ANN. § 627.736(4)(e)(1) (West 2008); GA. CODE ANN. § 33-7-11(b)(2) (2007); 215 ILL. COMP. STAT. ANN. 5/143a(2)(i) (West 2007); MICH. COMP. LAWS SERV. § 257.1112 (Lexis Nexis 2008); MISS. CODE ANN. § 83-11-103(c)(v) (2008); NEV. REV. STAT. ANN. § 690B.020(3)(f)(1) (LexisNexis 2007); N.C. GEN. STAT. § 20-279.21(b)(3)(b) (2007); N.Y. INS. LAW § 5217 (Consol. 2008); W. VA. CODE ANN. § 33-6-31(e)(iii) (Lexis Nexis 2007); WIS. STAT. ANN. §§ 632.32(2)(a), (4)(a)(2)(b) (West 2007)). Five other states require either physical contact with the other motor vehicle or if no physical contact, the insured must meet additional evidentiary burdens to prove the accident was caused by another vehicle. *Id.* at *24 (citing ARIZ. REV. STAT. § 20-259.01(M) (2007); LA. REV. STAT. ANN. § 22:680(1)(d)(i) (2008); S.C. CODE ANN. § 38-77-170(2) (2007); TENN. CODE ANN. § 56-7-1201(e)(1)(B) (2008); WASH. REV. CODE ANN. § 48.22.030(2), (8) (West 2008)).

The dissent argues that seven of the sixteen states with statutes similar to Texas have "considered whether the requirements of the statute are met when a vehicle part becomes detached from an unidentified vehicle and makes contact with the insured's vehicle." *Id.* at *27. However, there is no trend from which to glean a majority rule as noted by the Texas Supreme Court. *Id.* at *10 (stating "Of the four states with cases adopting the integral part test, three have done so only at the intermediate appellate court level. At best, there is guidance from the highest courts of two states, New York and South Carolina, and they reach opposite conclusions on the issue.). The dissent argues that the majority opinion requires that a motor vehicle as a whole must strike the insured's vehicle for coverage under the UM statute and thus frustrates the overarching purpose for the statute. *Id.* at *28 (O'Neill dissenting).

In conclusion, the Texas Supreme Court has declined to "fuzz" a relatively bright line test designed by the Texas Legislature when it declined to adopt the "integral parts test" for determining UM coverage. What are drivers to do if the "vehicle" that strikes them had broken into several parts or is broken in half? The Texas Supreme's ruling may leave some drivers frustrated at the result.