Mid-Continent Casualty Company v. Global Enercom Management, Inc.

R. Brent Cooper
Timothy Micah Dortch
Cooper & Scully, P.C.
900 Jackson Street, Suite 100
Dallas, TX 75202
Telephone: 214-712-9501
Telecopy: 214-712-9540
Email: brent.cooper@cooperscully.com

Factual Background

- In December 2001, Global Enercom Management, Inc. ("Global") transmitted a proposed subcontract to Allstates Construction Company ("Allstates") for repair work to be performed on a cellular telephone tower in Forrest City, Arkansas.
- On December 27, 2001, Allstates signed the subcontract and returned it to Global. Allstates' employees commenced work on the tower project prior to Christmas Day, 2001.

Factual Background

- After the Christmas vacation, the Allstates workers returned to the project on January 2, 2002.
- As part of the repair project, the Allstates workers installed a pulley and rope system on the tower. One end of the pulley system was attached to a headache ball, which consists of a heavy weight. The other end was attached to a pick-up truck, which would provide the power to raise and lower the headache ball. An equipment building on the tower site was between the headache ball end of the pulley system and the pick-up truck.

Factual Background

- During the afternoon of January 2, the job site foreman, Forester Barnes, instructed three workers, John Seabolt, Jamie Anders, and Brian Barnes, to climb to the 280 foot level of the tower to take measurements.
- Approximately ten minutes later, Barnes heard the signal to raise the headache ball. Barnes then went to the pick-up truck, started it, and started slowly backing the truck up to raise the headache ball.
- Barnes did not know where the three workers were or that they had attached themselves to the headache ball. When the headache ball had been raised fifteen to twenty feet, the headache ball moved above the equipment building and Barnes was able to see the three men attached to the headache ball.

Factual Background

- When they came into view, Barnes exchanged hand signals with the workers asking what was going on? The men signaled for Barnes to continue raising them to the top of the tower. Barnes then continued slowly backing the truck up until the men had reached about the eighty foot elevation level.
- At that point, the rope broke and the men fell to their deaths.

Factual Background

- Allstates performed no further work under the subcontract after January 2, 2002.
- On January 3, 2002, Global signed the subcontract

Insurance

- Mid-Continent Casualty Company is Allstates' insurer, and it issued both a commercial general liability policy (CGL) and a commercial auto policy (CAP) to All States.
- The CGL policy has a limit of $1,000,000 per occurrence, and the CAP has a limit of $100,000 per occurrence. Each policy also provides coverage extending to additional "insured contracts" when All States enters into contracts "pertaining to [its] business" in which All States "assume[s] the tort liability of another to pay for 'bodily injury' or 'property damage' to a third party or organization," so long as the liability occurred "subsequent to the execution of the contract or agreement."

Trial Court

- On August 12, 2002, Anders' and Seabolts' heirs filed suit against Global in federal district court in Mississippi.
- Global sought defense and indemnification from Mid-Continent, Allstates' insurer, pursuant to an indemnity clause found in the subcontract.
- Mid-Continent had insured Allstates with both a commercial general liability policy (ACGL policy") and a commercial automobile policy (“auto policy").
- Mid-Continent denied coverage.
- Global then filed a declaratory judgment action in Texas state court. Mid-Continent counterclaimed for declaratory judgment as well.
- While the declaratory judgment action was pending, Global settled the Mississippi lawsuit.

Declaratory Judgment Action

- Eventually, the two sides narrowed the issues in the declaratory judgment action down to whether two exclusions of coverage applied. Both exclusions are found in section I, part 2 of the CGL policy:

Declaratory Judgment Action

- Exclusion b:

  This insurance does not apply to:

  b. Contractual Liability

  "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

  ** *

- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement.

  Exclusion g:

  "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

Declaratory Judgment Action

- The same contractual liability exclusion is also found in the auto policy. Both sides filed competing traditional motions for summary judgment on the applicability of the exclusions. The trial court ultimately granted Global's and denied Mid-Continent's motion. The appeal followed.

Mid-Continent's Position in Court of Appeals

- Mid-Continent raised two issues on appeal.
  - First, Mid-Continent contended Exclusion g in the CGL policy, the auto exclusion, applied to the Arkansas accident because a pick-up truck was used to power the pulley system.
  - Next, Mid-Continent asserted the contractual liability exclusion precluded coverage under both the CGL and auto policies because Global did not sign the subcontract until the day after the Arkansas accident.

Auto Exclusion

- Exclusion “g," the Auto Exclusion

  The trial court, by granting Global's motion for summary judgment, decided Exclusion g did not apply. The parties agree the resolution of this issue is guided by the test found in *Mid-Century Ins. Co. of Texas v. Lindsey*, 997 S.W.2d 153 (Tex. 1999).
  There, the Supreme Court held:

  For an injury to fall within the “use" coverage of an automobile policy,

  (1) the accident must have arisen out of the inherent nature of the automobile, as such,

  (2) the accident must have arisen within the natural territorial limits of an automobile, and the actual use must not have terminated,

  (3) the automobile must not merely contribute to cause the condition which produces the injury, but must itself produce the injury.

Auto Exclusion

- In *Mid-Continent v. Global*, the pick-up truck did not cause the deaths of the three workers, the defective rope did.
- Instead, the pick-up truck simply provided the power for the pulley system, which is not enough to constitute "use" under the CGL policy.
- Therefore, even assuming the facts of this case meet the first two *Lindsey* requirements, we hold they do not meet the third requirement, that the vehicle actually produce the injury rather than merely contribute to it. Because the workers' deaths did not arise out of the use of a motor vehicle, we overrule Mid-Continent's first issue.

Contract Exclusion

- In its second issue, Mid-Continent contended the contract exclusion precluded coverage because only one party, Allstates, had actually signed the subcontract prior to the underlying incident. According to Mid-Continent, to meet the execution requirement found in the insurance policies, both Global and Allstates had to physically sign the subcontract prior to the incident. The court disagreed.
- Initially, Global forwarded the subcontract to Allstates and Allstates signed the subcontract on December 27, 2001 and returned it to Global.

Contract Exclusion

- Because (1) the term "execution" is not defined in either the CGL policy or the auto policy, (2) there is no language in the policies requiring both parties to sign the contract, (3) Texas law does not require the parties to a contract to actually sign for a contract to be valid and enforceable, and (4) there was no summary judgment evidence raising a fact issue of the parties' intent to require both signatures as a condition precedent, in fact the evidence established the exact opposite, the 14th Court of Appeals concluded Mid-Continent's construction of the insurance policies is incorrect. See *Travelers*, 442 S.W.2d at 890-91. Accordingly, the court held that under Texas law, the subcontract was executed prior to the January 2, 2002 incident and the Court of Appeals overrule Mid-Continent's second issue.

Dissent

- Hon. J. Seymore dissenting in part and concurring in part.
  - The majority opines that Exclusion g does not preclude coverage because "the workers' deaths did not arise out of the use of a motor vehicle."
  - First, the majority fails to incorporate all of the Exclusion g in its interpretation of the policy. To "arise out of" simply means that a causal connection or relation exists between the accident or injury and the use of the motor vehicle. . . . In other words, whether an injury arises out of the use of a motor vehicle is determined by a "but for" test, not direct or proximate cause.

Dissent

- Hon. J. Seymore dissenting in part and concurring in part.
  - Second, I disagree with the majority's application of case precedent. The majority suggests the result in this case is controlled by *Brown v. H.I.S.D.*, 123 S.W.3d 618 (Tex.App.—Houston [14th Dist.] 2003, pet. denied), the line of drive-by shooting cases distinguished by the Supreme Court in *Lindsey* and *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139 (Tex. 1997).

Dissent

- Hon. J. Seymore dissenting in part and concurring in part.
  - Here the majority fails to acknowledge that the pick-up truck was operated in such a manner as to create the chain of causation. Without the pick-up truck, the workers would not have been pulled high into the tower, and there would not have been tension on the rope. The pick-up truck could not have been "standing still and accomplished the same result." *Id.* Consequently, I disagree with the majority's assertion in the supreme court's reasoning relative to the drive-by shooting cases determines the result in this case.

Dissent

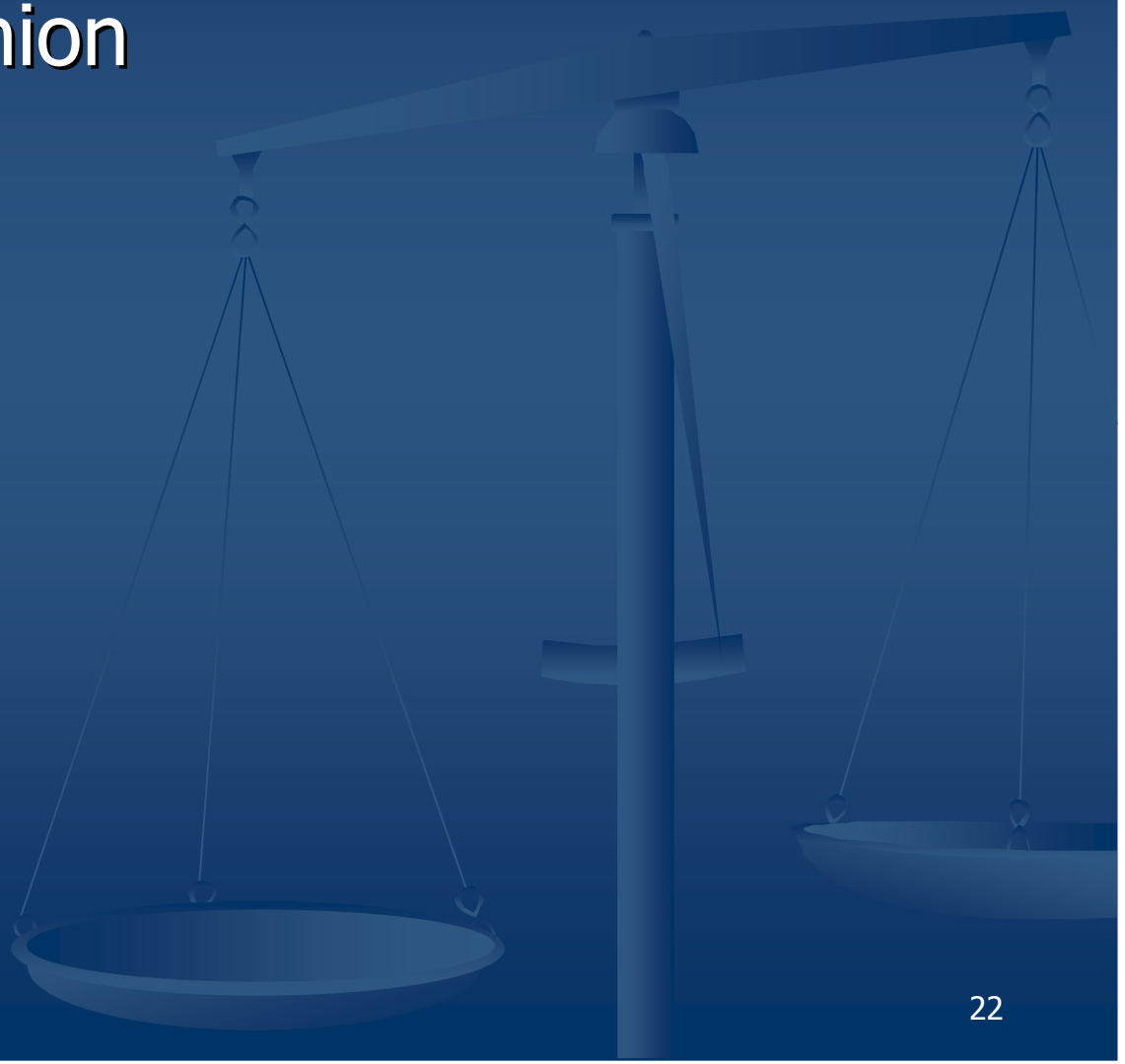
- Hon. J. Seymore dissenting in part and concurring in part.
  - Third, the majority concludes that the CGL policy provides coverage for the incident if operation of the pick-up merely "contributed to" rather that "itself produce" the injuries and deaths. Under the majority's holdings, there is coverage under the CGL and the CAP for same occurrence. This result is inconsistent with other authority involving concurrent causation. In cases involving concurrent causation, the excluded and covered events combine to cause the plaintiff's injuries. If the two causes cannot be separated, the exclusion is triggered. [Citations omitted.]

Dissent

- Hon. J. Seymore dissenting in part and concurring in part.
  - Considering the undisputed summary judgment evidence and GEM's judicial admissions, an inseparable chain of causation which included operation or use of the Allstates pick-up truck combined to cause the injuries and deaths. Accordingly, applying the plain language in Exclusion g, and the supreme court's analysis in *Lindsey*, there is no coverage under the CGL for the occurrence in question.

Supreme Court

- Per Curiam Opinion



Supreme Court

- The leading case from this Court regarding "auto-use" exceptions or inclusions to coverage is *Mid-Century Insurance Co. of Texas v. Lindsey*, 997 S.W.2d 153 (Tex. 1999). In *Lindsey*, a boy attempted to access a locked pickup truck through its back window, but in the process accidentally touched a shotgun mounted over the window, causing it to discharge and injure a person sitting in an adjacent vehicle. Id. at 154. The injured party settled with the owners of the first vehicle for an amount less than his total injuries and then sought underinsured motorist coverage from the insurer of the vehicle in which he was sitting. Id. That insurance company denied coverage, arguing, among other things, that the vehicle owner's policy did not provide coverage because the accident did not "arise out of" the "use" of a motor vehicle. *Id.* at 155.

Supreme Court

- The Court used the factors announced in two insurance treatises to focus the analysis in determining whether an automobile's "use" clause applied to a particular claim.
  - For an injury to fall within the "use" coverage of an automobile policy (1) the accident must have arisen out of the inherent nature of the automobile, as such, (2) the accident must have arisen within the natural territorial limits of an automobile, and the actual use must not have terminated, (3) the automobile must not merely contribute to cause the condition which produces the injury, but must itself produce the injury.

Supreme Court

- The Court held that the factors were satisfied because the child was attempting to gain entry into the truck through the back window and the child did not stray from that purpose by playing with the gun or trying to shoot it. *Id.* at 158. The "injury producing act and its purposes are an integral part of the use of the vehicle as such," and therefore the injury caused by the discharging gun arose out of the use of the vehicle. *Id.* at 161.

Supreme Court

- The court of appeals erred in disregarding *Lindsey.* Although the Court in *Lindsey* discussed the nuances of different claims involving the discharge of firearms in or near motor vehicles, nothing in the language of the opinion, or its subsequent application by this Court, suggests that *Lindsey*'s holding or reasoning is limited to gun rack or firearms cases. Additionally, *Lindsey* has been compared to or relied on by this Court in other types of auto-coverage cases that do not involve firearms.

Supreme Court

- *E.g.*, *U.S. Fid. & Guar. Co. v. Goudeau*, 272 S.W.3d 603, 606 (Tex. 2008) (concerning a "Good Samaritan" who was hit by a passing car and sustained injuries after he exited his employer's insured vehicle to assist a stranded motorist); *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004) (concerning an insurer's duty to defend where an insured doctors' employee allegedly administered contaminated anesthetics); *see also Lincoln Gen. Ins. Co. v. Aisha's Learning Ctr.*, 468 F.3d 857, 859–60 (5th Cir. 2006) (declaring that *Lindsey*'s test for "use" is to be interpreted broadly and holding that an auto exclusion provision in a CGL policy applied when a child was left in a daycare van during extreme heat).

Supreme Court

- Using the Appleman/Couch factors elucidated in *Lindsey* as a framework, we conclude that the exclusion applies to this case as a matter of law. First, it is in the inherent nature of a 2000 Ford F-250 Super Duty pickup truck on a cell tower job site that it will be used to haul and tow materials. The truck was leased for the specific purpose of completing work under the insured contract, and it was equipped with eye hooks on the front bumper, to which the pulley was attached for that type of use. Using an F-250 truck in this way "was not an unexpected or unnatural use of the vehicle," given the vehicle's location on the job site and its specifications for this type of work. *Lindsey*, 997 S.W.2d at 158.

Supreme Court

- Second, the accident was within the "natural territorial limits" of the truck. In *Lindsey*, this factor was met even though the injury occurred in an adjacent vehicle. Significantly in this case, the CGL policy defines "auto" to include "attached machinery and equipment." Even though the workers were on the other side of a building and not inside the vehicle, the workers were still attached to the pulley system, which was part of the vehicle, which was in use at the time of the accident.

Supreme Court

- The third factor is a causation analysis. The parties recognize that some formulation of "but-for" or "producing cause" causation applies, but Global argues that the truck was not a "substantial factor" causing the injury.

Supreme Court

- In *Lindsey*, the Court acknowledged that the third factor may be difficult to define because it is not always clear how the vehicle contributed to an accident. *Id.* at 157. This Court later clarified that "'arise out of' means that there is simply a 'causal connection or relation,' which is interpreted to mean that there is but for causation, though not necessarily direct or proximate causation."

Supreme Court

- There is a greater causal relationship in this case than existed in *Lindsey*. Global asserts that it was the defective rope, not the truck, that caused the injuries, but the rope would not have broken if the truck was not used to hoist the headache ball. The court of appeals held that the pickup truck simply "provided the power for the pulley system," but here, the workers could not have been raised on the rope through the pulley system without the use of mechanical assistance. 293 S.W.3d at 327.

Supreme Court

- This is not the case where "the [negligent actor] could be standing still and accomplish the same result." *Lindsey*, 997 S.W.2d at 158. The accident did not merely happen because the rope broke; the accident did not merely happen in or near the truck; the workers could not have accomplished the same result without the truck; and one of the expected purposes of this particular truck was to perform towing and lifting activities. The "auto-use" exclusion in Allstates's CGL policy precludes coverage for the accident under that policy, and the trial court and court of appeals erred in holding otherwise.

Supreme Court

- The second exclusion Mid-Continent cites to deny coverage to Global is the "subsequent-to-execution" exclusion found in both the CGL and CAP policies. These clauses prohibit [sic] coverage for a claim under an "insured contract" if the incident "occurs subsequent to the execution of the [insured] contract or agreement." "Execution" is not defined either in the insurance policies or in the subcontract.

Supreme Court

- Mid-Continent agrees that the subcontract between All States and Global would be an "insured contract" if it were "executed" prior to the incident and concedes that the contract signed by All States and remitted back to Global is probably valid and enforceable. Yet Mid-Continent claims that the contract did not meet the definition of "insured contract" as defined by the policies because Global did not sign the subcontract with All States prior to the accident.

Supreme Court

- Mid-Continent alleges that result is dictated if the Court gives the term "execute" its "ordinary and accepted meaning." But the word "execute" has several definitions and is not constrained by Mid-Continent's argument that "to execute" may only mean "to sign." Black's Law Dictionary defines "execute" as "[t]o perform or complete (a contract or duty) . . . [t]o change (as a legal interest) from one form to another . . . [or] [t]o make (a legal document) valid by signing; to bring (a legal document) into its final, legally enforceable form . . . ." BLACK'S LAW DICTIONARY (8th ed. 2004). Further, Texas law recognizes that a contract need not be signed to be "executed" unless the parties explicitly require signatures as a condition of mutual assent.

Supreme Court

- If a written draft of an agreement is prepared, submitted to both parties, and each of them expresses his *unconditional* assent thereto, there is a written contract . . . . [I]f there is a writing, there need be no signatures unless the parties have made them necessary at the time they express their assent and as a condition modifying that assent. . . . An unsigned agreement all the terms of which are embodied in a writing, *unconditionally* assented to by both parties, is a written contract. . . .

Supreme Court

- Global offered the contract to All States, and All States accepted not only by signing and faxing the agreement back to Global, but also by beginning performance on the contract work. *United Concrete Pipe Corp. v. Spin-Line Co.*, 430 S.W.2d 360, 364 (Tex. 1968) ("[P]erformance of that act which the offeree was requested to promise to perform may constitute a valid acceptance."). Further, there was mutual assent to Allstates's work by Global.

Supreme Court

- Although not signed by Global until after the accident, the subcontract with All States was nonetheless "executed" before the accident. There is no language in the policies requiring both parties to sign the insured contract, and there was no evidence raising a fact issue of the parties' intent to require that all parties to the subcontract sign it as a condition precedent to the subcontract's validity. The evidence shows just the opposite. Therefore, the "subsequent-to-execution" exclusions in both CGL and CAP policies do not bar coverage, and that portion of the court of appeals' opinion is affirmed

Lessons Learned

- *Lindsey* applies to all auto cases—not just firearms cases
- "Arising out of" language
- Insurers should define terms if they want specific definition
- If not defined, will use plain language (meaning the dictionary)
- If want "execution" to mean "Signed," need to draft an endorsement

THE END

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