Texas Supreme Court Heightens The Proof Required To Establish Causation In Failure-To-Procure-Insurance Cases, Holds That There Can Be A Duty To Indemnify Even If There Is No Duty To Defend, And Addresses The Standard Of Review Over Non-Scientific Expert Evidence

I. In A Failure-To-Procure Insurance Claim, A Plaintiff Must Present Evidence That A Policy Could Have Covered The Loss.

In *Metro Allied Insurance Agency Inc. v. Lin*, an individual attempted to procure a CGL insurance policy that covered damages based on nonperformance of a contract. No. 07-1032, 2009 Tex. LEXIS 1043 (Tex. December 11, 2009). The insurance agent represented that the individual had a CGL policy, the agent received premium payments for same, but there was never any such policy. After the individual was sued for nonperformance of a contract, the individual requested a defense and indemnification. The insurance company denied coverage, and the individual sued the agent under theories of negligence and misrepresentation under the Texas Deceptive Trade Practices Act (DTPA) for failing to procure the policy. After a jury returned a verdict in favor of the individual, the trial court entered judgment for the insurance agent because there was no evidence of causation. The court of appeals reversed as to the DTPA claim and affirmed the jury's verdict.

The Texas Supreme Court reversed the court of appeals and held that the "producing cause" standard imposed by the DTPA requires proof that the coverage sought was actually available in a CGL policy. The Court's holding clarifies the heightened proof required by the "producing cause" standard where the DTPA's former "adversely affected" causation standard did not require evidence of a specific policy in order to show that an individual was injured by the insurer's conduct. *See id.* The Court explained:

> Both producing cause and proximate cause contain the cause-in-fact element, which requires that the defendant's act be "a substantial factor in bringing about the injury and without which the harm would not have occurred." In this context, the harm would have occurred only if the CGL insurance that Metro agreed to procure would have actually covered the injury suffered by Lin. Otherwise, Lin would have obtained an insurance policy that did not provide coverage for his surety's claims against him, and the injury would have been the same regardless of whether Metro procured the insurance or not.

Id. The Court then reviewed the evidence admitted at trial and determined that there was no evidence that a CGL policy would have covered the individual's loss. The Court reversed and rendered in favor of the insurance agent. This holding brings Texas in line with authority from other states on the subject of causation for failure to procure insurance cases. Further, this causation requirement should similarly apply for other tort-based claims in failure-to-procure insurance cases.

II. Even If There Is No Duty To Defend, There Can Still Be A Duty To Indemnify Where Evidence Creates A Fact Question As To Coverage.

In *D.R. Horton-Texas Ltd. v. Markel International Insurance Co. Ltd*., homeowners sued the homebuilder for mold damage. No. 06-1018, 2009 Tex. LEXIS 1042 (Tex. December 11, 2009). The homebuilder alleged that the subcontractor was at fault for the mold damage. After settling with the complaining homeowners, the homebuilder sued the subcontractor's insurer for coverage where the homebuilder was listed as an "additional insured" on a subcontractor's policy. The insurance policy entitled an additional insured to coverage for claims against it arising from the subcontractor's work. The insurer moved for summary judgment and claimed that it had no duty to defend or indemnify because the homeowners did not name the subcontractor in their lawsuit. The insurer also argued that the homebuilder could not show that the subcontractor was responsible without extrinsic evidence, which allegedly violated the eight-corners rule. The trial court granted the summary judgment, and the court of appeals affirmed.

The Texas Supreme Court first addressed the duty to defend and the homebuilder's argument that the appeals court erred by not recognizing an exception to the eight-corners doctrine to allow parties to introduce extrinsic evidence relating to coverage-only facts in the duty-to-defend analysis. The Court determined that the homebuilder waived this issue by not raising it in the trial court: "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." *See id.* In the homebuilder's summary judgment response, it argued that the eight-corners doctrine governs the analysis and that the homeowners' petition should be liberally construed. The Court held that arguing for a liberal construction of the plaintiff's pleadings is not equivalent to challenging the eight-corners doctrine or to requesting an exception to it. The Court held that the homebuilder waived its argument concerning the duty to defend and affirmed on that ground.

Turning to the duty to indemnify, the Court held that the duty to indemnify is not dependent on the duty to defend and that an insurer may have a duty to indemnify its insured even if there was not a duty to defend. Generally, a duty to defend is based on allegations in the underlying petition and the language of the policy. But the "facts actually established in the underlying suit control the duty to indemnify." *See id.* Therefore, the parties may introduce evidence during coverage litigation to establish or refute the duty to indemnify.

The homebuilder presented evidence that showed that the subcontractor performed masonry work and repairs allegedly contributing to the defects and that the insurer's policy named the homebuilder as an additional insured. The court determined that this evidence raised a fact question regarding the duty to indemnify and that the trial court erred in granting summary judgment on that ground.

III. The Legal Sufficiency Standard For Reviewing Non-Scientific Expert Evidence Usually Requires That The Party Offering The Expert Admit Evidence That Addresses The *Robinson* Factors As Well As Comply With The Analytical Gap Test.

A. Background

Beginning with *E.I. du Pont de Nemours & Co. v. Robinson*, the Texas Supreme Court mandated that a scientific expert's opinion must be relevant and reliable before it is admissible. 923 S.W.2d 549, 556 (Tex. 1995). The Court set forth factors that a court must consider in determining whether a scientific expert has used reliable methodologies in arriving at his opinions: 1) the extent to which the theory has been or can be tested; 2) the extent to which the technique relies upon the subjective interpretation of the expert; 3) whether the theory has been subjected to peer review and/or publications; 4) the technique's rate of error; 5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; 6) the non-judicial uses which have been made of the theory or technique; and 7) any other factor which is helpful in determining the reliability of scientific evidence. *See id*. at 557. These factors were implemented for scientific opinions such as whether a chemical could cause cancer.

In *Gammill v. Jack Williams Chevrolet*, the Texas Supreme Court extended *Robinson* to non-scientific experts: "Nothing in the language of the [Rule 702] suggests that opinions based on scientific knowledge should be treated any differently than opinions based on technical or other specialized knowledge. It would be an odd rule of evidence that insisted that some expert opinions be reliable but not others. *All* expert testimony should be shown to be reliable before it is admitted." 972 S.W.2d 727, 726 (Tex. 1998). However, all the factors espoused in *Robinson* cannot always be used with other kinds of expert testimony. *See id*. The Court stated:

> But there must be some basis for the opinion offered to show its reliability. Experience alone may provide a sufficient basis for an expert's testimony is some cases, but it cannot do so in every case. A more experienced expert may offer unreliable opinions, and a lesser experienced expert's opinions may have solid footing. The court in discharging its duty as gatekeeper must determine how the reliability of particular testimony is to be assessed.

Id. The Court held that a trial court may exclude expert testimony if it concludes "that there is too great an analytical gap between the data and the opinion proffered." *Id*. The non-scientific expert's opinion must be evaluated according to the rules governing

that expert's discipline. *See id*. at 724-26. Therefore, a trial court has the responsibility to determine whether any expert used reliable methods in arriving at his or her opinions and conclusions.

For non-scientific experts, one court described the reliability test thusly:

> To guide trial courts in assessing reliability, the supreme court has crafted two tests: the *Robinson*-factor analysis and the "analytical gap" test. Further, the supreme court has determined that expert testimony is unreliable if it fails to rule out other plausible causes. Accordingly, a trial court properly excludes expert testimony as unreliable if: (1) the foundational data underlying the opinion is unreliable; (2) the methodology used by the expert to interpret the underlying data is flawed; (3) notwithstanding the validity of the underlying data and methodology, there is an analytical gap in the expert evidence; or (4) the expert fails to rule out other plausible causes.

Allstate Tex. Lloyds v. Mason, 123 S.W.3d 690, 697-98 (Tex. App.—Fort Worth 2003, no pet.). The issue became to what extent were the *Robinson*-factors relevant to or dispositive of expert opinions in a case where the expert was not offering scientific expert opinions.

B. Facts of *Whirlpool v. Camacho*

In *Whirlpool Corp. v. Camacho*, the plaintiffs sued the manufacturer of a dryer based on a house fire that killed the plaintiff's son. No. 08-0175, 2009 Tex. LEXIS 1041 (Tex. December 11, 2009). The plaintiffs claimed that the defective design of the dryer allowed accumulated lint to be drawn to the heater where it ignited and later spread to the house. The plaintiffs had an electrical engineering expert testify that the dryer was defectively designed and started the fire. The jury returned a verdict for the plaintiffs, and the court of appeals affirmed. The Texas Supreme Court reversed, finding that there was no reliable evidence that the lint in the dryer caused the fire.

C. Standard Of Review Over Legal Sufficiency Challenge To Non-Expert Evidence

The Court held that: "When expert testimony is involved, courts are to rigorously examine the validity of facts and assumptions on which the testimony is based, as well as the principles, research, and methodology underlying the expert's conclusions and the manner in which the principles and methodologies are applied by the expert to reach the conclusions." *Id*. at *12. An expert's opinion might be unreliable if it is based on assumed facts that vary from the actual facts or the opinion may be conclusory because it is based on tests or data that do not support the conclusions reached. Further, each material part of an expert's theory must be reliable.

The Court held that "unlike review of a trial court's ruling as to admissibility of

evidence where the ruling is reviewed for abuse of discretion, in a no-evidence review we independently consider whether the evidence at trial would enable reasonable and fair-minded jurors to reach the verdict." *Id*. at *14. "Further, a no-evidence review encompasses the entire record, including contrary evidence tending to show the expert opinion is incompetent or unreliable." *Id*. The Court determined that in most cases a reviewing court should take the *Robinson* factors into account as well as the expert's experience:

> In determining whether expert testimony is reliable, a court may consider the factors set out by the Court in *Robinson* and the expert's experience. However, in very few cases will the evidence be such that the trial court's reliability determination can properly be based only on the experience of a qualified expert to the exclusion of factors such as those set out in *Robinson*, or, on the other hand, properly be based only on factors such as those set out in *Robinson* to the exclusion of considerations based on a qualified expert's experience.

Id. at *14-15.

The Court first addressed whether the court of appeals correctly analyzed the expert's opinions under a legal sufficiency standard. Even though the defendant raised a legal sufficiency objection, the court of appeals solely analyzed the case under an abuse of discretion review for the admissibility of the expert evidence. Under that review, the court of appeals only used the analytical-gap test and did not review the *Robinson* factors. The court of appeals then addressed whether the defendant had conclusively disproved the validity of the plaintiffs' expert's opinions. The Texas Supreme Court held that the court of appeals' review was in error:

> We disagree with the Camachos' assertion that the court of appeals effectively performed a proper legal sufficiency review by determining whether Whirlpool conclusively disproved that the fire occurred as Clayton testified it did. Evaluating whether expert testimony has been conclusively disproved by the opposing party is not the same as considering whether the proponent of the testimony satisfied its burden to prove the testimony is relevant and reliable. The proponent must satisfy its burden regardless of the quality or quantity of the opposing party's evidence on the issue and regardless of whether the opposing party attempts to conclusively prove the expert testimony is wrong.
>
> Witnesses offered as experts in an area or subject will invariably have experience in that field. If courts merely accept "experience" as a substitute for proof that an expert's opinions are reliable and then only examine the testimony for analytical gaps in the expert's logic and opinions, an expert can effectively insulate his or her conclusions from meaningful review by filling gaps in the testimony with almost any type of data or subjective opinions. We have recognized, and do recognize, that some subjects do not lend themselves to scientific testing and scientific

> methodology. But given the facts in this case, the analytical gap test was not the only factor that should have been considered. . . . This is not one of the few cases in which appellate review of expert evidence should be limited to either an analysis focused solely on *Robinson*-like factors or solely on an analytical gap test. We agree with Whirlpool that proper appellate legal sufficiency review pursuant to Whirlpool's challenge requires evaluating Clayton's testimony by considering both *Robinson*-type factors and examining for analytical gaps in his testimony.

Id. at *17-18.

D. Evidence Did Not Establish Reliability Of Expert Under *Robinson* Factors Or Analytical Gap Test

Turning to the application of the facts to the standards, the Court held that the plaintiffs' expert testimony, by an electrical engineer, amounted to no evidence supporting the jury's verdict. The expert testified that lint clogged a corrugated transport tube because of its wrinkled design causing lint to back up and blow through a seal into the heater box where it ignited and shot into the dryer basket, igniting clothes. But the expert basically did no testing to verify his theory, which impacts the first *Robinson* factor. Moreover, the expert's only test on which he founded his theory did not support all the various and critical parts of his opinion. The Court also held that the other *Robinson* factors did not support the reliability of the expert's opinions: the opinions were developed solely for litigation, the opinions had not been published or subjected to peer review, and the opinions had not been accepted as valid in any part of the relevant scientific community. The Court concluded that the facts presented were consistent with and supported a conclusion that fire was in and around the dryer, but not that the fire originated as the expert said it did. The Court reversed and rendered for the defendant.

This case is important because it bridges the *Robinson*-factor test and the analytical-gap test, and holds that in most cases, both tests should be used. The case also illustrates the extreme detail that a reviewing court should undertake in reviewing expert testimony under a legal sufficiency analysis. The scope of review includes all of the evidence in the record and not just the evidence supporting the expert's opinions.

IV. A Worker's Compensation Non-Subscriber Can Enforce An Arbitration Provision With An Employee

In *In re Golden Peanut Co., LLC,* an employer sought to enforce an arbitration clause in a dispute with its employee's survivors who were pursuing a derivative death claim. No. 09-0122, 2009 Tex. LEXIS 968 (Tex. November 20, 2009). The arbitration agreement the decedent executed provided that any personal injury or wrongful death claim filed by him or his spouse, children, parents or estate must be arbitrated. The issue was whether Texas Labor Code section 406.033(e), which bars a waiver of a cause of action by an employee of a non-subscriber to the workers-compensation system, invalidated the arbitration clause. In granting mandamus relief, the Texas Supreme Court compelled arbitration because an agreement to arbitrate is not a waiver of a cause of action nor of rights provided under section 406.033(a). Rather, it is an agreement that those claims should be tried in a specific forum.

Contact: David F. Johnson is one of only fifteen practicing attorneys in Texas that is board certified in civil appellate law, civil trial law, and personal injury trial law by the Texas Board of Legal Specialization. Mr. Johnson is a shareholder in Winstead's Fort Worth and Dallas offices, is a founding member of Winstead's appellate practice group, and is also a member of the insurance industry practice group, commercial litigation group, and torts and insurance group. He can be contacted by emailing dfjohnson@winstead.com or by calling (817) 420-8223.