A Definite Maybe – Texas Supreme Court Addresses Insurability of Punitive Damages Awards – Part Two

by David F. Johnson, Winstead PC

(continued from the July issue of the Bar Bulletin)

III. What Is There To Glean From Fairfield?

Over the past year, the Court has generally emphasized several themes in its insurance cases. First, the Court generally does not find much merit in equity or equitable arguments that deviate from the express language of a policy. For example, in one recent case, the Court did not find merit in one insurer's contribution and subrogation claims against a co-insurer for not paying a pro rata portion of a settlement. *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765 (Tex. 2007). In another recent case, the Court found that a policy's express contractual subrogation provision outweighed the equitable made-whole doctrine such that a medical expense insurer could enforce its subrogation claim against its insured's settlement, even though the insured was not made whole by the settlement. *Fortis Benefits v. Cantu*, 234 S.W.3d 642 (Tex. 2007). In another case, the Court found that an insurer wasn't entitled to equitable claims that would allow it to sue for reimbursement for settlement funds after the settlement, when the insured did not expressly allow the insurer to reserve that right. *Excess Underwriters at Lloyd's London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42 (Tex. 2008). In all of these cases, the Court confined its analysis to policy language and was not swayed by other equitable considerations. In *Fairfield*, the Court once again looked to the policy language that it assumed covered punitive damages for gross negligence, and it found that the language trumped other equitable policy considerations in this case. *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 655-70 (Tex. 2008).

Also, the Court's opinions have generally favored business insureds over insurers. For example, in *Frank's Casing*, the insured was a business, and the Court favored the insured over the insurer regarding the issue of reimbursement after settlement. In another case, the Court favored the business insured regarding whether a certain event was covered. *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007).

But, the Court has favored insurers over individual insureds. In *Cantu*, the Court favored an insurer over an individual insured regarding the application of the made-whole doctrine. In another case, the Court held that a plaintiff's injury was not covered by an uninsured-motorist policy. *Nationwide Ins. Co. v. Elchehimi*, 249 S.W.3d 430 (Tex. 2008). In another case, the Court sided with a worker's-compensation insurer over an insured on a subrogation issue. *Tex. Mut. Ins. Co. v. Ledbetter,* 251 S.W.3d 31 (Tex. 2008). In *Fairfield*, the Court once again expressed language that would favor the enforcement of punitive-damage insurance agreements when the insured was a business, but the opinion also contained language that would not have favored the enforcement of the same provisions against individual insureds.

One could glean from all this that the Court has continued to follow its recent trend against equitable/policy arguments trumping express insurance provisions and has continued to side with business insureds against insurers, but not so much for individual insureds.

IV. What Evidentiary Issues Are Raised By Fairfield?

The current state of the law is that evidence of an insurance policy is generally not admissible to prove that a person acted negligently or otherwise wrongfully. Tex. R. Evid. 411. But, evidence of insurance has generally been admissible to prove other issues, such as agency, ownership, or control, if those issues are disputed. *Id.* Accordingly, a plaintiff may not mention whether the defendant is insured in a trial unless some exception to the rule is in dispute. The *Fairfield* case should not change this evidentiary issue.

However, there is a statement in *Fairfield* that may impact evidence in a punitive-damage case in which a punitive-damage insurance agreement is enforceable. The Court discussed the six factors that a jury should consider in awarding an amount of punitive damages: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability involved; (4) the situation and sensibilities of the parties concerned; (5) the extent to which such conduct offends a public sense of justice and propriety; and (6) the net worth of the defendant. 246 S.W.3d at 667-68.

The Court noted that the first, second, and fifth factors raise concerns of an objective nature – how the defendant's actions departed from broad norms or expectations. *Id.* at 668. The Court then noted that the third, fourth, and sixth factors focus subjectively on the defendant and the plaintiff and are relevant to what it would take to punish the defendant in the case. *Id.* The Court stated that "[i]f exemplary damages are to be paid by insurance, it is less relevant to set the amount based on whether the plaintiff was trusting or the defendant calculating or wealthy." *Id.* Accordingly, if insurance is paying for punitive damages, a defendant may want to argue against allowing in evidence of the subjective factors, i.e., its net worth. Further, a defendant may want to fight the discovery of net worth by arguing that it is irrelevant because of insurance coverage. Following the *Fairfield* decision, these defendants will most likely be business insureds.

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