

TEXAS SUPREME COURT ISSUES MULTIPLE INSURANCE OPINIONS THAT LITERALLY INTERPRET POLICY LANGUAGE AND DECLINE EQUITABLE THEORIES THAT ALTER EXPRESS RIGHTS OR DUTIES

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Insurance is a very important part of the business and personal lives of Texas citizens. Understanding this importance, the Texas Supreme Court is selective in which insurance cases it decides. The Court has recently delivered five opinions that deal with insurance issues, and those opinions follow two recent trends. First, the Court strictly interprets an insurance policy according to its terms, doesn't read into it any additional language, and takes the policy at its literal language. Second, the Court disfavors any extra-contractual or equitable claims or defenses that would alter the express rights and duties of an insurer under a policy.

In a recent workers'-compensation case, the issue was whether the insurer waived its right to challenge medical expenses by waiting more than sixty days from the date of notice of injury to challenge that additional diagnoses were caused by degenerative problems. *Zenith Ins. Co. v. Ayala*, ___ S.W.3d ___, No. 09-0292, 2010 WL 2332078 (Tex. June 11, 2010) (per curiam). The Texas Supreme Court held for the insurer that the sixty-day deadline of Texas Labor Code section 409.021(c) applied only to compensability disputes, not to disputes over the extent of an injury. Additionally, the Court held that pre-authorization of a treatment did not preclude the insurer via equity from disputing the extent of injury.

In another case decided the same day as *Zenith Insurance Company*, the Court decided whether Texas Standard Homeowner's Policy Form B afforded coverage for mold contamination to real and personal property that resulted from plumbing leaks. *State Farm Lloyds v. Page*, ___ S.W.3d ___, No. 08-0799, 2010 WL 2331460 (Tex. June 11, 2010). The policy provided separate coverage for the dwelling and for its contents. Ultimately, the Court concluded that the insurer was not obligated to pay for losses resulting from mold damage to the dwelling, but it was obligated to pay for losses resulting from mold damage to

personal property. In literally interpreting the language of the policy, the Court stated that to construe an exclusion-repeal provision so as to reinstate coverage for mold damage to the dwelling would ignore the structure of the policy, because the provision appeared only in the coverage for personal property. But the Court also held that to ignore the repeal provision's impact as to the personal-property coverage would be to ignore it altogether.

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In another recent case, the Court strictly construed an insurance policy's exclusion for contractual liability. *Gilbert Tex. Const., L.P. v. Underwriters at Lloyd's London*, ___ S.W.3d ___, No. 08-0246, 2010 WL 2219645 (Tex. June 4, 2010). A contractor who was sued in contract and tort for damaging real property next to a construction site sued its excess insurer for breach of contract and argued that the insurer waived its right to deny coverage. The Court agreed with the excess insurer, which argued that the exclusion precluded coverage, because at the time that the contractor settled, the trial court had already granted summary judgment on all of the statutory and tort claims, and the only remaining basis for liability was breach of contract. The Court held that it would not judicially rewrite the exclusion by inserting the word "another's" into it, as argued by the contractor and as other jurisdictions, including the Fifth Circuit, would have done. Moreover, the Court determined that the excess insurer did not assume control over the defense of the lawsuit by suggesting trial strategy that helped set up its coverage defense, and it was not estopped from denying coverage.

In a fourth case, a wife, after her husband's death, filed a negligence action on behalf of herself, her two minor sons, and the estate against the alleged culpable party, and the

husband's health insurer intervened because it had a contractual, subrogated right to recoup over \$300,000 in medical expenses.

Tex. Health Ins. Risk Pool v. Sigmundik, ___ S.W.3d ___, No. 09-0772, 2010 WL 2136625 (Tex. May 28, 2010) (per curiam). After the wife settled all claims without an allocation, the trial court awarded the entire \$800,000 in settlement funds to the family, finding that they had not been made whole by the settlement. The Texas Supreme Court held that the equitable made-whole doctrine was inapplicable in this case, because there was an express subrogation provision. Additionally, the Court held that the trial court could not completely cut the estate out of the settlement simply because the estate's main beneficiary was an insurance company or, more to the point, because the trial court believed that the surviving family needed the money more than the insurer.

In the final case, the Court decided that a trial court's erroneous dismissal of a suit with prejudice, following the plaintiff's filing of a non-suit in his suit against his insurer under an uninsured/underinsured policy, barred a later suit because of res judicata. *Travelers Insur. Co. v. Joachim*, ___ S.W.3d ___, No. 08-0941, 2010 WL 1933022 (Tex. May 14, 2010). The Court held that the plaintiff should have challenged the dismissal with prejudice in the first suit via appeal or, if the plaintiff did not receive notice of the judgment, via a collateral bill-of-review proceeding.

The Texas Supreme Court has been very active this year in deciding insurance issues and, as outlined above, these precedents have been consistent with several themes from the past several years. A party with an insurance issue in the Texas Supreme Court should be aware of these themes and should attempt to craft its arguments accordingly.