

Hanna & Plaut Insurance Brief

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Appealing News About Hanna & Plaut

Hanna & Plaut is pleased to report that it has had several appellate victories since the last issue of this newsletter. On May 16, 2007, the San Antonio Court of Appeals issued its opinion in *Mills v. Fletcher*, 2007 WL 1423883 (Tex. App.—San Antonio May 16, 2007, n.p.h.), holding that section 41.0105 of the Texas Civil Practice and Remedies Code limits recovery of medical or health care expenses to the amount “actually paid or incurred by or on behalf of the claimant.” In other words, defendants are not obligated to pay the amounts that plaintiff’s health care providers have written off, pursuant to PPO contracts and the like. We are very pleased to have been a part of this important reform to damages recovery in Texas.

On August 9, 2007, the Houston Court of Appeals decided *Amine v. Liberty Lloyds of Texas Insurance Company*, 2007 WL 2264477 (Tex. App.—Houston [1st Dist.] August 9, 2007, n.p.h.), holding that a homeowner’s insurance carrier who complies with the appraisal provision of the policy cannot be held liable for breach of contract. This holding means that carriers who comply with appraisal cannot be held liable for attorneys’ fees and late payment penalties under the contract. While there have been recent appellate developments limiting the use of appraisal (see story on Page 8), the *Amine* opinion ensures that appraisal continues to be a very useful tool for dispute resolution.

Finally, the Dallas Court of Appeals issued its opinion in *Healthsouth v. Wausau Insurance Company*, 2007 WL 2380253 (Tex. App.—Dallas August 22, 2007, n.p.h.), holding that a medical provider’s claim for additional reimbursement for services provided to workers compensation claimants is subject to the mandatory administrative remedies of the Texas Workers’ Compensation Act. This case should help put the brakes on recent attempts by medical providers to make an end run around the dispute resolution process of the Division of Workers’ Compensation by suing in district court and claiming that they are suing pursuant to a contract.

Introducing Robert Josey

We are pleased to introduce Robert Josey, who recently joined the firm. Robert’s main practice area is workers’ compensation.

He focuses on the defense of enforcement issues, audit violations and Performance Based Oversight. He also has over a decade of experience with SOAH cases, Stop-Loss and Ambulatory Surgery Center / outpatient surgery matters, and medical litigation (both in district court and before the Texas Department of Insurance).

Robert has extensive experience in compensability

issues as well. He has represented a wide range of self-insured entities and private insurance carriers in hundreds of Contested Case Hearings and Benefit Review Conferences before TDI at every field office throughout the state.

Robert also conducts CE-approved client seminars on various workers’ compensation issues, including ODG and MDA matters.

Robert is a Baylor Bear (BA 1992) and a Texas Longhorn (JD 1995). Prior to joining Hanna & Plaut, Robert was a partner in a boutique workers’ compensation law firm in Austin, Texas, and was the long-

time manager of its Medical & Compliance section.

Robert’s depth of knowledge and experience in the workers’ compensation arena, particularly with regard to medical disputes, is a great asset to our firm and clients.

We are pleased to have Robert here and want you to feel free to contact him with any questions and concerns that you might have.

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Lamar Homes, Inc. v. Mid-Continent Casualty Co., 2007 WL 2459193 (Tex. Aug. 31, 2007) - A Bleak Day for Liability Insurers

Contractor's Defective Construction Constitutes an "Occurrence" and "Property Damage" Under the CGL Policy and the Duty to Defend is a First-Party Claim for Statutory Prompt Payment Penalties.

In a long-awaited opinion, the Texas Supreme Court recently resolved three issues that had caused consternation and inconsistency among the intermediate state courts of appeals and the federal bar. *Lamar Homes* arose out of claims that Lamar Homes and its subcontractor failed to properly design and construct a foundation for homeowners Vincent and Janice DiMare and that this negligence caused further problems with the home. Mid-Continent denied defense and indemnity to Lamar Homes in the underlying suit and Lamar Homes sued for a declaration that the CGL policy provided coverage and that Mid-Continent was also liable for penalties and attorney's fees under the prompt payment statute. The federal district court granted summary judgment for Mid-Continent, concluding that it had no duty to defend Lamar Homes for construction errors that harmed only Lamar Homes' own product. On appeal, the Fifth Circuit submitted three certified questions to the supreme court: (1) Do a general contractor's construction defects that cause damage to or loss of use of a home constitute an "accident" or "occurrence" under a CGL policy that triggers a duty to defend or indemnify? (2) Do a general contractor's construction defects that cause damage to or loss of use of a home constitute "property damage" under a CGL policy that triggers a duty to defend or indemnify? (3) If the answers to the first two questions are affirmative, does the prompt-payment statute apply to a CGL insurer's breach of the duty to defend? The supreme court, in a 6-3 decision, answered "yes" to each question.

Accident or Occurrence

With regard to whether defective construction can constitute an accident or occurrence, Mid-Continent argued that defective work which causes damage only to the project itself is not accidental because the contractor should expect and foresee this result. Mid-Continent also argued, as it did with regard to "property damage," that extending CGL coverage in this instance transforms the

policy into a performance bond that protects the contractor from contractual economic loss rather than tort liability. In rejecting these arguments the court noted that the policy does not define "occurrence" in terms of either property ownership or the legal theories under which damages are sought. The court also found the possibility of overlapping coverage with a performance bond insignificant and held that "[n]o rule of construction operates to eliminate coverage simply because similar protections may be available through another insurance product." Finally, the court held that "foreseeability" was not the boundary between accidental and intentional conduct. Only in cases of intentional tort, in which the intent to injure is presumed, and cases in which "the resulting damage . . . was highly probable whether the insured was negligent or not" would the injury not be considered an "accident." The court opined that Mid-Continent's argument included the false assumption that the failure to perform under a contract was always intentional. Because no one asserted that Lamar intended or expected its work or its subcontractor's work to damage the DiMares' home, the "occurrence" condition was satisfied.

Property Damage

As with the "occurrence" requirement, the court rejected Mid-Continent's argument that damage to the insured's own work is not "property damage" but contractual economic loss. The court concluded that the economic loss rule is a liability defense or remedies doctrine that restricts contracting parties to contractual remedies, not a test for insurance coverage. The court further noted that the policy definition of "property damage" does not exclude the insured's work and that the underlying plaintiffs' allegations of cracking sheetrock and stone veneer constitute "physical injury to tangible property" as required by the definition. In support of its holding, the court also relied on an analysis of the so-called "business risk" exclusions and their history. Noting that these exclu-

sions eliminate coverage for many construction-related losses, the court also agreed with Lamar Homes that the "subcontractor exception" to the "your work" exclusion – which reinstates coverage for the general contractor for damage caused by or liability that arises from a subcontractor's work – would be superfluous if defective workmanship were not "property damage" caused by an occurrence in the first place.

Prompt Payment

After holding that the allegations of defective construction constituted both an "occurrence" and "property damage" sufficient to invoke Mid-Continent's duty to defend, the court turned to the question of whether Mid-Continent's breach of that duty was a "first-party claim" to which the prompt payment statute applied. Breaking rank with the majority of Texas appellate courts to consider the issue, the supreme court held that the duty to defend was a "first-party claim" under the statute because the loss "belongs only to the insured and is in no way derivative of the any loss suffered by a third party." The court also rejected as a "distinction without a difference" the notion that defense benefits are not a first-party claim because they are typically paid directly to the attorney noting that other first-party claims are also often assigned or paid to service providers. The court further noted that "first-party claim" as used in the statute was not synonymous with a claim under a first-party policy and rejected the contention that the statute was unworkable in the context of defense benefits. The court held that the receipt of invoices for the legal services would be the last piece of information needed to value the claim and trigger the payment deadlines of the statute.

The Dissent

While the dissent conceded that the CGL policy does not distinguish between contract and tort claims or mention "economic loss," it still concluded

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Uninsured Motorist Coverage: The Challenge of Putting Third-Party Coverage in a First-Party Box

By: Catherine L. Hanna and Eric Peabody, Hanna & Plaut, LLP

We recently analyzed a trio of Texas Supreme Court cases for the Summer Newsletter of the Automobile Law Committee of the American Bar Association's Tort and Insurance Practice Section. We discussed how *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006); *State Farm Mut. Auto. Ins. Co. v. Nickerson*, 216 S.W.3d 823 (Tex. 2006); and *State Farm Mut. Auto. Ins. Co. v. Norris*, 216 S.W.3d 819 (Tex. 2006) illustrate the unique tension created by a first-party insurance that depends on third-party tort principles for coverage. We looked at the way individual jurisdictions approach these issues – particularly the question of prejudgment interest – as we believe this says a lot about the jurisdiction's view of UM insurance as a strict first-party or hybrid third-party coverage, which can have an impact on the insurer's extra-contractual duties.

We concluded that cases on the recovery of attorneys' fees and prejudgment interest in UM actions provide a bar-

ometer of the jurisdiction's treatment of UM claims as first-party or third-party coverage. This treatment can have significant consequences, particularly for extra-contractual "bad faith" or "prompt payment" liability. In Texas, these extra-contractual causes of action are generally limited to first-party insurance. Based on *Brainard*, one intermediate appellate court has subsequently rejected the application of the Texas prompt payment statute to UM claims. *Mid-Century Ins. Co. v. Daniel*, 223 S.W.3d 586 (Tex. App. – Amarillo 2007, pet. denied). *Brainard* may also have an effect on the viability of bad faith causes of action in UM cases. Since the Texas Supreme Court first recognized a common-law bad faith cause of action in a case for UM benefits in *Arnold v. National County Mut. Ins. Co.*, 725 S.W.2d 165 (Tex. 1987), the court has refined the law of bad faith for failure to pay or delaying benefits to require an accompanying breach of contract. Because *Brainard* holds that the carrier has no contractual duty to pay until the insured satisfies the conditions precedent to coverage, bad-faith-

failure-to-pay principles now appear incompatible with UM claims in Texas. States that take a similarly strict view of the condition precedent appear to preclude or severely limit the availability of bad faith causes of action for UM claims. *See, e.g., Pontius v. State Farm Mut. Auto. Ins. Co.*, 915 So.2d 557, 564-65 (Ala. 2005); *Allstate Ins. Co. v. McCall*, 305 S.E.2d 413, 414-15 (Ga. App. 1983) (holding that subjecting UM insurer to bad faith before condition precedent is satisfied "defies logic"). In sum, the hybrid nature of UM coverage provides a challenge to courts and fertile ground for argument on almost every topic that depends on a contract/tort or first-party/third-party distinction for its resolution. Holdings on prejudgment interest and attorneys' fees may serve as an indicator of the jurisdiction's view of UM coverage on the first-party/third-party continuum and a possible predictor on extra-contractual issues the jurisdiction has yet to address.

For the full text of this article, please see the Publications Section of our website at www.hannaplaut.com.

Fifth Circuit Seeks Clarification on "Trigger" for Coverage of Property Damage

In *OneBeacon Ins. Co. v. Don's Building Supply, Inc.*, 2007 WL 2258192 (5th Cir. Aug. 8, 2007), various homeowners sued Don's Building Supply and other defendants for allegedly defective Exterior Insulation and Finish Systems ("EIFS") that allowed water to leak into their homes and cause damage between 2003 and 2005. The homeowners alleged that the damage began to occur shortly after application of the EIFS but was not discoverable until later. The homeowners alleged "continuous and repeated" water intrusion and damage to their properties.

Don's sought a defense from OneBeacon under the CGL policies in effect from 1993-1996 when the EIFS was applied. Because the first suit was filed in August 2003, the homeowners pled that the damage could not have been discovered prior to August 2001, long after OneBeacon's policies expired.

OneBeacon sought a declaration that it had no duty to defend or indemnify Don's and the district court granted summary judgment in OneBeacon's favor, holding that none of the underlying suits alleged property damage that manifested during OneBeacon's policy periods so as to trigger coverage.

The Fifth Circuit concluded that Texas appellate courts have split on the issue of when property damage occurs or when that damage triggers coverage of an occurrence-based liability policy. While some courts have applied the manifestation trigger to property damage claims, the Houston Courts of Appeals have applied the exposure trigger for property damage in certain cases. The court also noted that the discovery rule could influence the scope of the trigger. Because the Texas Supreme Court has not addressed these issues, the Fifth Circuit certified the following

[paraphrased] questions:

1. Which is the proper rule under Texas law for determining the time at which property damage occurs for purposes of an occurrence-based commercial general liability insurance policy?
2. Under the rule identified, is the duty to defend and indemnify triggered when the pleadings allege that actual damage was continuing and progressing during the policy period, but remained undiscoverable and not readily apparent for purposes of the discovery rule until after the policy period ended?

Comment

The supreme court will likely accept the certified questions and its answers will affect not only which carriers are on the hook for a particular loss, but also, how many. We will continue to watch this important case.

Workers' Compensation Update: Medical CCHs and Performance Based Oversight

As of September 1, 2007, there have been a number of significant changes in the workers' compensation system.

Medical Contested Case Hearings: Simply put, disputes over medical care will now be heard in the field offices of the TDI-DWC. These hearings will be conducted like normal CCHs, complete with attorneys, Hearing Officers and members of the Office of Injured Employee Counsel.

The CCHs will cover medical fee disputes exceeding \$2,000, medical necessity disputes exceeding \$3,000, and all preauthorization disputes. There will be no Benefit Review Conferences. At this time, the TDI-DWC has not adopted rules regarding these CCHs. Questions of evidence exchange and discovery remain unanswered.

We anticipate the majority of disputes to revolve around issues of pre-authorization. Bearing in mind that all

care which exceeds, or is not included in, the Official Disability Guidelines requires preauthorization – and as all pre-authorization disputes lie within the purview of the field offices – there is potential for a massive upswing in the number of hearings. Recognizing the likelihood of significantly more medical hearings, the TDI-DWC has expanded the OIEC from 122 to 183 full-time employees.

The fact of the matter is that the majority of the system participants have relatively little experience with medical matters. These matters used to be tried at SOAH before Administrative Law Judges – but in moving them to field offices the legislature has transferred the decision-making authority from ALJs familiar with medical matters to Hearing Officers without a great deal of experience in such issues. This inexperience increases the risk of serious exposure in medical CCHs.

Performance Based Oversight:

Briefly summarized, the TDI-DWC has implemented a three-tiered system allegedly aimed at identifying the Poor, the Average, and the High performers in the system. The ratings will impact frequency of audit, which is important, as TDI-DWC now has a lower standard to find a violation, and amount of penalty (the Division can now impose larger penalties— \$25,000 per instance per day of non-compliance.) Additionally, the results will be published on the TDI's website and the Top Performer logo can be used for advertising.; TDI-DWC is aiming directly at the Carriers' pride and reputation, and indirectly at the carriers' coffers.

Also note that TDI-DWC considers a Carrier's CCH win/loss ratio, which makes a proper and informed evaluation of the case at the outset a priority for Carriers and Self-Insureds.

American Protection Ins. Co. v. Leordeanu, 2007 WL 2214542 (Tex. App. – Austin Aug. 2, 2007, n.p.h.): Austin Court Construes "Dual Purpose" Rule to Preclude

Workers' Compensation Coverage

Leordeanu was a sales rep for pharmaceutical company Shering Plough, which provided her with a car, a storage unit for keeping drug samples and marketing materials, and an expense account for entertaining doctors and their staff. She also maintained a home office at her apartment. Leordeanu was involved in a one-car accident on her way home from a business dinner with a doctor and his staff and sustained serious injury. American Protection denied her workers' compensation claim, and the Division of Workers' Compensation (DWC) concluded that she was not in the course and scope of employment at the time of her injury. On appeal to district court, the jury determined that Leordeanu was in the course and scope of employment. The court of appeals reversed.

Leordeanu testified that she intended to stop at the storage facility and then finish necessary job-related paperwork after returning home. The storage facility was located next to her apartment and Leordeanu therefore traveled the same route that she would have taken to

return home. Applying the "dual purpose" rule of the Workers' Compensation Act, the court held that coverage was excluded because there was no evidence that "the travel would have occurred if the business purpose of the travel were removed from the equation." Disagreeing with an earlier opinion by the San Antonio Court of Appeals – which applied the rule by dividing the dual purpose travel into segments – the court held that the rule required the claimant to show that: (1) the travel to the place of accident would have occurred even without the personal purpose; and (2) she would not have made the travel without the business purpose. Because it was undisputed that Leordeanu was returning home for the evening even if she planned to stop by the storage facility, the second prong of the test was not satisfied. The court noted that a reasonable policy position might be to compensate for injury during travel that has any business purpose at all; however, the statute as drafted reflects a different rational policy to compensate only if the travel is predominantly business-related.

A vigorous dissent argued that the majority's construction ignores the realities of employees with no fixed workplace. Just as the Act contains exceptions to the "coming and going rule" for transportation furnished by the employer and for "special missions," the dual purpose rule must be liberally construed to provide coverage; applying the rule as the majority asserts would penalize salespeople and others who travel as an integral part of their jobs for organizing their travel to "work their way home" over the course of the day. The dissent contends that, under the majority's construction, Leordeanu's travel earlier in the day from Bastrop to Austin would also have been excluded because she was traveling the same route she would have traveled to return home.

Comment: The majority's direct challenge of the San Antonio Court of Appeals' construction of the dual purpose rule and strong dissent by Justice Patterson queues this issue for comment by the Texas Supreme Court. In the meantime, carriers will need to monitor application of this rule by local jurisdiction.

General Contractor/Premises Owner Protected by Exclusive Remedy Provision: *Entergy Gulf States Inc. v. Summers*, 2007 WL 2158027 (Tex. August 31, 2007)

John Summers was injured on the job while working at Entergy's Sabine Station plant as an employee of subcontractor International Maintenance Corp. (IMC). Entergy agreed to provide workers' compensation benefits to IMC's employees at the Sabine plant and obtained an insurance policy for that purpose. After his injury, Summers collected workers' compensation benefits from the Entergy policy and then sued Entergy, as the premises owner, for negligence. Entergy moved for summary judgment on the exclusive remedy defense, arguing that it was a general contractor and thus a deemed employer under the Act. The trial court granted Entergy's motion, but the court of appeals reversed. The Texas Supreme Court reversed the decision of the court of appeals, holding that a premises

owner can also be a "general contractor" under the Labor Code and thus qualify for the exclusive-remedy defense.

The Supreme Court noted that pursuant to the Labor Code a general contractor is defined as a "person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors." A "general contractor" may enter into a written agreement to provide workers' compensation to a subcontractor and its employees and such an agreement makes the general contractor the employer for the purposes of the Workers' Compensation Act. The court rejected the court of appeals' reliance on the previous decision of *Williams v. Brown & Root, Inc.*, 947 S.W.2d 673 (Tex. App. – Texar-

kana 1997, no writ), which held that a premises owner was "arguably" not protected by the exclusive-remedy provision. The Supreme Court pointed out that the court of appeals in *Williams* had not adhered to the Labor Code's specific definition of "general contractor," which does not prohibit a premises owner from also being a general contractor.

Summers maintained that the pre-1993 Labor Code definitions did preclude this dual role. Prior to 1993 a subcontractor was defined as "a person who contracts with a general contractor to perform all or part of the work or services that the general contractor has contracted with another party to perform," but after

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Failure to Exhaust Administrative Remedies Bars Workers' Compensation Bad Faith Claim

In *Pickett v. Texas Mutual Insurance Company*, 2007 WL 2140948 (Tex. App. – Austin, July 26, 2007, n.p.h.), the Austin Court of Appeals reiterated the requirement stated by the Texas Supreme Court in *American Motorists Insurance Co. v. Fodge*, 63 S.W.3d 801 (Tex. 2001), that workers' compensation claimants exhaust the mandatory administrative remedies of the Texas Workers' Compensation Act prior to bringing suit against an insurance carrier for bad faith for delay or denial of medical benefits. In *Pickett*, the claimant alleged that Texas Mutual had wrongfully denied certain medical treatments on the grounds that they were not related to her compensable workers' compensation injury. Pickett and Texas Mutual had entered into a Benefit Dispute Agreement that set forth what conditions were related to the compensable injury. Pickett contended that the medical treatments at issue were related to the conditions addressed in the Benefit Dispute Agreement. Therefore, she argued that she was not required to go back to the Division to have her entitlement to medical treatment determined. However, as the court pointed out, the Benefit Dispute Agreement did not

address the question of medical treatment and Pickett was required to exhaust her administrative remedies before proceeding to court.

The court distinguished the Fifth Circuit Court of Appeals opinion in *Gregson v. Zurich American Insurance Company*, 322 F.3d 883 (5th Cir. 2003), which held that a claimant was not required to exhaust administrative remedies to dispute a carrier's denial of antibiotic medication prescribed to prevent infection after a back surgery because the carrier had specifically agreed to provide the back surgery. Unlike the carrier involved in *Gregson*, Texas Mutual had not agreed to provide any specific medical treatment. The court stated that Texas Mutual was required by the Texas Workers' Compensation Act to approve or deny requests for preauthorization based solely upon the reasonable and necessary medical health care required to treat Pickett's compensable injury and to retrospectively review all complete medical bills and pay for or deny payment in accordance with the Act, rules, and the appropriate Commission fee and treatment guidelines.

The court also held that the exhaustion process required by *Fodge* is constitutional and rejected Pickett's argument that she should be excused from the exhaustion requirement because the large number of medical treatments involved made exhaustion impractical, holding that such an exception would be in direct contravention of *Fodge*.

The claims on which Pickett sought to base her bad faith claims were subject to the exhaustion requirement and the district court did not have jurisdiction to determine her claims of bad faith unless and until the Division had determined her entitlement to benefits.

***Fortis Benefits v. Cantu*, 2007 WL 1861000 (Tex. June 29, 2007):**

Contractual Right of Subrogation Trumps Insured's Right to Be Made Whole

Vanessa Cantu sued multiple parties for severe injuries she sustained in an automobile accident. Her medical insurer, Fortis, intervened to assert its contractual subrogation rights under the policy. Prior to trial, Cantu settled with the tortfeasors for \$1.445 million. The medical expenses paid by Fortis totaled approximately \$247,500, but Cantu presented evidence that her future medical expenses would amount to at least \$1.7 million. Based on these figures, Cantu's past and future medical expenses alone exceeded the amount of the settlement plus the amounts Fortis had paid. Because she was not "made whole" by the settlement and amounts received from Fortis, Cantu argued that Fortis's claims of subrogation and reimbursement were precluded.

In the earlier case of *Ortiz v. Great Southern Fire & Cas. Ins. Co.*, 597 S.W.2d 342 (Tex. 1980), the supreme court had recognized that the equitable "made whole" doctrine precludes an insurer's right to equitable subrogation (i.e. the right to subrogation that arises by virtue of the insurer's payment without a specific contractual provision) when the insured's total recovery is less

than his or her losses, because "when either the insurer or insured must to some extent go unpaid, the loss should be borne by the insurer for that is a risk the insured has paid it to assume." In contrast, however, the *Cantu* court noted that Fortis's rights of recovery were based on contract, not merely on equitable principles. The Fortis contract contained a section entitled "Subrogation Right" which provided in pertinent part, "We will be subrogated to all rights of recovery a Covered Person may have against any person or organization." Another section entitled "Right of Reimbursement" provided that it applied if Fortis was precluded from exercising its right of subrogation and gave Fortis "a right to recover from that Covered Person an amount equal to the amount We have paid." Neither section expressly addressed a "first money" right to recovery, but the court held that the subrogation provision's "all rights of recovery" was not ambiguous and was sufficient to entitle Fortis to reimbursement despite the fact that Cantu was not "made whole" by her settlement and the monies Fortis paid.

In reaching this holding, the court specifically distinguished and abrogated several earlier decisions of the Texas courts of appeals, which had applied the equitable "made whole" doctrine to both equitable and contractual subrogation. While the *Cantu* court agreed that equitable and contractual subrogation "rest upon common principles," the right to contractual subrogation derives its validity "directly from the parties' agreement." Accordingly, the court held that the contract controls the right to reimbursement when subrogation provisions exist and rejected the idea that "external," "gap-filler" equitable rules trump those provisions. Because Texas has a "strong public policy in favor of preserving the freedom of contract," the court noted that any alteration to or restriction on the contractual subrogation right based on equity should come from either the Legislature or the Department of Insurance. In that regard, the court also noted that the provision was not necessarily unconscionable or void simply because it was contained in a "contract of adhesion" between parties of different bargaining power.

***General Tire & Rubber Co. v. Mayes*, 2007 WL 1713400 (Tex. June 15, 2007):**

No Vicarious Liability for Employee's Personal Errand

Corte Adams worked for Goodyear Tire in Bryan, Texas, but lived in Houston. He used Goodyear vehicles for the commute. Occasionally, he would shuttle tires between the Goodyear stores in Bryan and Houston and was then paid for the travel time on one end or the other depending on when he made the delivery. On the night in question, Adams did not make it to the Houston store before it closed; he then went to his father's house, ate dinner, drank some beer and slept for about five hours. A little before 3:00 a.m., Adams left to purchase cigarettes for his father, fell asleep at the wheel on his way to the store, and had an accident with Patrick Mayes. Mayes sued Adams for negligence and Goodyear for vicarious liability and negligent entrustment. The trial court severed the causes of action against Goodyear and granted summary judgment in Goodyear's favor. The court of appeals reversed, holding that sufficient evidence existed to raise a fact issue on whether Adams was acting

within the course and scope of his employment at the time of the accident. The supreme court reversed the court of appeals and rendered judgment for Goodyear.

The uncontroverted summary judgment evidence showed that Adams drove to the store to purchase cigarettes and planned to return to his father's house. The court held that Adams's possession and use of the truck with Goodyear tires on board and the fact that he was allowed to use the truck for personal errands did not mean that Adams was acting in furtherance of Goodyear's business when he ran the errand. The court of appeals erred in ignoring this undisputed evidence.

Similarly, the court held that disputed evidence that Adams received workers' compensation checks for his injuries and that he completed a workers' compensation form was evidence only that Adams may have received benefits; it was not competent evidence of course

and scope.

Finally, the court held that the following evidence did not raise an issue of fact that Adams was or that Goodyear knew or should have known that Adams was an incompetent or reckless driver for purposes of negligent entrustment: two prior citations at the time of hiring for driving without insurance and for a rear-end collision at a stoplight; a ticket for exceeding the speed limit by five miles per hour in a Goodyear vehicle; Goodyear's knowledge of Adams's long work week, lengthy commute, and work schedule. **Comment:** When the errand is clearly personal and not connected in any way to the employer's business or even the employee's commute, the employer has no vicarious liability. The supreme court made clear that it will not allow claimants to "plead around" this result by raising fact issues on negligent entrustment for drivers with only a few prior minor traffic violations.

***United National Ins. Co. v. Hydro Tank, Inc.*, 2007 WL 2319109 (5th Cir. August 15, 2007): Fifth Circuit Affirms Broad Sweep of Umbrella Policy's Pollution Exclusion**

Three Hydro Tank workers were injured while removing petroleum by-product sludge from a mixing tank owned by Motiva. Two of the workers were overcome by fumes and fell face down in the sludge; the third worker rescued them, but all sustained serious injury. Motiva settled the workers' lawsuit and then sought indemnity and coverage from Hydro Tank and its insurers. Hydro Tank had agreed to indemnify Motiva and also to procure CGL and umbrella policies naming Motiva as an additional insured.

Hydro Tank's umbrella carrier, United National, sought a declaration that coverage was precluded by the policy's absolute pollution exclusion. That provision excluded bodily injury and property damage "which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." "Pollutants" were further defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes material to be recycled, reconditioned or reclaimed." The district court granted summary judgment in favor of United National. The Fifth Circuit af-

firmed.

The Fifth Circuit first noted that the pollution exclusion precluded coverage if the injury was caused "in whole or in part" by the alleged release of pollutants. Thus, Motiva's arguments that ambiguities in the underlying pleadings, which could be read to suggest that a non-pollutant (i.e. heatstroke or non-pollutant chemical) contributed to the injury, were unavailing. Similarly, because the pleadings alleged that any covered cause of injury acted concurrently with the excluded pollutants to cause the injury, the concurrent causation doctrine triggered the exclusion and precluded coverage.

The court also rejected Motiva's arguments that the properly stored sludge could not be a pollutant. Because pollutant is defined so broadly and because a "substantial body of case law" holds that pollutants need not be released into the surrounding environment to qualify as a pollutant for purposes of the exclusion, "fortuity that the locus of storage and injury happen to coincide" did not preclude coverage. Rather, the court held that "a pollution exclusion clause applies whenever a pollutant causes harm by a physical mechanism enumerated in the policy, irrespective of where

the injury took place or whether the pollutant was released into the environment." The court also distinguished cases in which a small amount of toxic material causes injury for reasons other than its toxic properties (e.g. a slip-and-fall on spilled Drano) because the underlying plaintiffs suffered significant exposure to high levels of toxic substances.

Finally, the court dismissed Motiva's argument that the "Contractor's Limitation Endorsement" (CLE) to the policy created coverage. The CLE endorsement precludes contractually assumed liability unless such coverage is available to the insured "in valid and collectible" underlying insurance. United National stipulated that Hydro Tank's CGL coverage was valid and collectible. As a result, Motiva argued that the pollution exclusion was irrelevant; United National asserted that the CLE did not nullify the exclusion. The court agreed with United National and held that exceptions to exclusions cannot override or neutralize all other policy provisions or exclusions.

***Cain v. Safeco Lloyds Insurance Company*, 2007 WL 2460074 (Tex. App. – Dallas August 31, 2007, n.p.h.): No Cause of Action for Negligent Defense**

Shannon Cain was seriously injured while a passenger in a car that was involved in a single car accident. The car was driven by Safeco's insured, Wesley McNew. Safeco repeatedly offered Cain the policy limits of the McNew policy in settlement of his claim, but he rejected those offers and sued McNew for negligence. Safeco provided a defense for McNew, who was found liable for the accident. The jury awarded Cain over \$4 million in damages. Cain then filed suit as an assignee of McNew against Safeco asserting causes of action for negligent defense, negligence, bad faith, and violation of the Insurance Code. The trial court granted summary judgment in favor of Safeco and the Dallas Court of Appeals affirmed.

The court of appeals noted that Texas

law recognizes only one tort duty in third-party insurance cases, that being the duty stated in *Stowers*, i.e., to exercise the degree of ordinary care and diligence which an ordinary, prudent person would exercise in the management of his own business in responding to settlement demands within policy limits. Cain never made a settlement demand which would have triggered the *Stowers* duty. Cain argued that the *Stowers* doctrine has been expanded to include the duty to provide a reasonable defense to the insured, citing *Ranger County Mutual Ins. Co. v. Guin*, 723 S.W.2d 656 (Tex. 1987). The court of appeals pointed out that the supreme court later clarified that its discussion of defense duties in *Guin* (including a duty of ordinary care in the investigation, preparation for defense, trial of the case

and attempts to settle) was *dicta*. See *American Physicians Ins. Exchange v. Garcia*, 876 S.W.2d 842 (Tex. 1994). Safeco conclusively demonstrated that it met its obligations with respect to settlement of a covered claim and summary judgment was properly granted.

Certainly, this case is a reminder to plaintiffs' lawyers to make sure that they have made a proper *Stowers* demand prior to trial. Although the Texas Supreme Court handed insureds the gift of late payment penalties for a failure to defend in the *Lamar Homes* decision (see p. 2), it has repeatedly made clear that it is unwilling to significantly expand the scope of duties in third-party cases to allow insureds and their assignees to sue carriers for what would essentially be a malpractice claim.

Appraisal: An Effective Tool When Used Correctly

As discussed on page 1, the Houston Court of Appeals recently held that an insurance carrier's prompt compliance with an appraisal award means the carrier cannot be held liable for attorneys' fees or late payment penalties in connection with a breach of contract. *Amine v. Liberty Lloyds of Texas Insurance Company*, 2007 WL 2264477 (Tex. App.—Houston [1st Dist.] August 9, 2007, n.p.h.). *Amine* was a victory for insurance companies and follows a line of appraisal cases that illustrate that appraisal can be an effective tool for resolving disputes regarding value and avoiding attempts by plaintiffs' lawyers to escalate such disputes into extra-contractual jackpots.

We have, however, recently seen some limitations regarding appraisal as the plaintiffs' bar recognizes what appraisal can do. *Richardson v. Allstate Texas Lloyds*, 2007 WL 1990387 (Tex. App.—Dallas July 11, 2007, n.p.h.) involved a "pressurized infusion of raw sewage" through the plumbing openings into

plaintiff's home. Allstate accepted coverage of the claim, but disputed the amount of the loss and invoked the appraisal provision of the insurance policy. Plaintiff filed suit to set aside the appraisal award and for breach of contract and breach of the common-law and statutory duties of good faith and fair dealing. The trial court granted Allstate's motion for summary judgment, but the court of appeals reversed, finding that the appraisal award did not comply with the terms of the policy. The appraisers did not confer regarding their estimates or try to resolve their differences before submitting estimates to the umpire, and the award was not itemized as required by the policy. Based on these defects, the court reversed and remanded. This case illustrates the importance of your choice of appraiser. You need somebody who will pay attention and will provide good ongoing information.

The Amarillo Court of Appeals recently found a waiver of the appraisal process

in *In re Acadia Insurance Co.*, 2007 WL 1976111 (Tex. App.—Amarillo, July 9, 2007, n.p.h.). Acadia had denied the insured's claim for hail damage, asserting that the loss predated the inception of the Acadia policy. Acadia declined to participate in the appraisal process prior to suit being filed. Acadia's counsel told the insured that Acadia could not be compelled to participate in the appraisal process because the claim was not covered. Acadia then filed a motion to compel appraisal after suit was filed. The court found that Acadia had intentionally and unequivocally relinquished the right to appraisal. The takeaway point from this case is that appraisal is a useful tool, but not a magic bullet. Adjusters should not expect to deny coverage and then rely on the appraisal clause to avoid litigation.

As the case law supports the effectiveness of the appraisal provision for carriers, we can expect to see more litigation about whether the appraisal was "done right."

CPRC Section 41.0105 Developments

In a recent opinion, the Texas Supreme Court essentially affirmed the reasoning of *Mills v. Fletcher* and the meaning of Tex. Civ. Prac. & Rem. Code sec. 41.0105. See *Daughters of Charity Health Servs. v. Linnstaedter*, 226 S.W.3d 409 (Tex. June 1, 2007). In *Linnstaedter*, workers' compensation patients sued the hospital that provided their care for a declaration that the hospital's charges in excess of amounts reimbursed pursuant to workers' compensation guidelines did not constitute a valid lien. The hospital filed its lien for the excess charges, which the tortfeasor's liability carrier paid as part of its settlement of the patients' tort suit. Because the Labor Code prohibits liens against workers' compensation patients, the supreme court held that the hospital's lien violated the Labor Code provisions. In reaching this holding, the court also noted that allowing the patients to recover from the tortfeasor "the full medical charges billed by the hospital rather than the reduced amount paid by their compensation carrier . . . would be a windfall"; since the hospital had no claim for these amounts

against the patients, the patients "in turn had no claim for them against [the tortfeasor]." The court cited Tex. Civ. Prac. & Rem. Code sec. 41.0105 as codification of the rule that a claimant may not recover medical expenses in tort for which the claimant has no exposure.

While it does not appear that a motion for rehearing has been filed yet in *Linnstaedter*, the Texas Trial Lawyers Association has already filed an amicus brief asking the court to delete the reference to 41.0105 because (1) the statute was not in effect at the time of the dispute, (2) it is dicta, and (3) "[t]he statute's interpretation is of such importance, and is critical to so many cases, that it should receive the full, and not oblique, attention of this court."

In addition, a recent case from the Eastern District of Texas illustrates how some courts will deal with the evidentiary question presented by 41.0105. In *Coppedge v. K.B.I., Inc.*, 2007 WL 1989840 (E.D. Tex. July 3, 2007), the court held that while Section 41.0105 may prohibit a plaintiff from recovering past medical

expenses which have been reduced or written off, the statute does not, on its face, prohibit the introduction of the full amount of the medical bills, allowing the trial court to reduce them if the jury finds liability and awards damages for past medical expenses. The court cited *Bituminous Casualty Corporation v. Cleveland*, 223 S.W.3d 485 (Tex. App.—Amarillo 2006, no pet.) in which the Amarillo court of appeals noted, "apparently approvingly," that following the receipt of the jury's verdict, the trial court reduced the award pursuant to Section 41.0105. Further, the *Coppedge* court held that allowing defendants to introduce billing records which indicate that medical bills were "adjusted down" would "possibly infer the existence of insurance, which would be patently unfair and inadmissible."

Lamar Homes, cont.

(Continued from page 2)

that allegations of defective construction do not constitute “property damage” because “[s]elling damaged property is not the same as damaging property.” Accordingly, the dissent characterized the homebuyers’ claims for construction defects as “broken promises and breached duties connected with the sale” rather than claims for “property damage.” Under the dissent’s view, only injury to a third person or property or damage to the home that the builder causes after the sale would constitute “property damage” as envisioned by the CGL policy.

The dissent charged that the majority’s holdings will “turn the construction industry on its head” since the duty to make necessary repairs and stand behind subcontractors’ work is shifted from the builders to insurers. The majority disagreed with the dissent’s arguments and characterizations and accused the dissent of creating a “code” for interpretation of the CGL policy rather than following the policy’s plain language. The dissent did not address the prompt payment issue.

Comment

Lamar Homes will have far-reaching effects not only in construction cover-

age cases, but in all liability cases involving tangible products due to the court’s interpretation of “property damage.” With this issue decided, we expect to see increased focus on the exclusions as the next line of defense. Moreover, the court’s holding that the prompt payment statute’s penalties and attorney’s fees apply to the duty to defend adds pressure on carriers to reach a correct coverage decision at the outset of liability claims.

Entergy States, cont.

(Continued from page 5)

1993 a subcontractor was defined as “a person who contracts with a general contractor to perform all or part of the work or services that the general contractor has **undertaken** to perform.” The 1993 change was a re-codification of the statute which the Legislature stated was meant to revise the law “without substantive change.” Thus, Summers argued that the dual role

remained precluded by the Labor Code. However, the supreme court pointed out that there was a substantive change in the definition and “even if the earlier statutory definition of subcontractor suggested that the prime contractor and premises owner must be separate entities, and the revised Code states that no substantive change was intended, prior law and legislative history cannot be used to alter or disregard the express terms of a code provision when its meaning is clear.” Construing the statute

according to its plain and ordinary meaning, Entergy is a general contractor because it “[undertook] to procure the performance of work from IMC.” Thus, Entergy was entitled to the Labor Code’s exclusive remedy defense and the fact that it also owned the premises where the accident occurred was immaterial.

Vandalism by Hummer?

In *USAA v. Cook*, 2007 WL 2332674 (Tex. App. – Houston [1st Dist.] August 16, 2007, n.p.h.), the court affirmed a jury verdict that collision damage to an insured’s car was covered in spite of the fact that the insured’s policy did not contain collision coverage. The accident was unwitnessed, but was apparently caused by a “very large SUV” hitting the insured’s car while the SUV exited a parking space. USAA denied the claim because the insured had declined to purchase collision coverage (presumably he had also opted against uninsured motorist coverage), but the insured maintained that the damage was caused by vandalism which was covered under the insured’s policy. The jury apparently believed that because the insured’s car was

moved back about 15 feet from where it was originally parked, the car was “obviously struck in a willful, intentional way.” The insured conceded that the damage was the result of a large SUV “colliding” with the front-end of his car. However, the court of appeals found that the terms “collision” and “vandalism” are not mutually exclusive and the evidence supported an inference that the damage to Cook’s car was caused by “a deliberate act akin to road rage.” The court of appeals did not address the jury’s finding that USAA’s denial of the claim was in bad faith because the jury did not award damages beyond his actual damages of \$1,926.56. Finally, the court of appeals upheld the jury’s award of \$23,310 in

attorney’s fees (for trial) and \$30,000 in attorney’s fees (for appeals) to the insured’s counsel, who happened to be his father. The court of appeals conceded that the attorney’s fees awarded “greatly exceeds” the amount of actual damages, but “we cannot say given the amount of time invested in the case by [the insured’s] attorney, that the attorney’s fees awarded are excessive or unreasonable.” In fact, it appears that USAA got a bargain, as attorney’s fees were calculated at \$150 per hour and not the father’s standard \$400 per hour rate charged as a senior partner at Bracewell and Giuliani.

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Spotlight on: Catherine Hanna

It is your editor's turn to be under the spotlight this issue. Catherine is one of the founding partners of Hanna & Plaut. Although Catherine is a West Texas girl, she left the dusty plains of Lubbock after Texas Tech University to attend law school at Stanford in Palo Alto, California. She graduated in 1988 and began her practice at the late, great Brobeck, Phleger & Harrison firm in San Francisco. Family and skyrocketing California housing prices brought her back to Austin, Texas, where she and her husband and two daughters have made their home since 1990.

What inspired you to become a lawyer?

No inspiration was required. When I was in eighth grade, my mother told me that I was going to be a lawyer and after that I never thought I would be anything else. I remember a high school Sunday school teacher asking why I wanted to go to law school when I could marry a lawyer instead. That strange comment aside, I found my path to a career in the law to be remarkably easy. My law school classmates and San Francisco colleagues found my Texas accent much more exotic than my gender. I

have been fortunate to have female mentors as co-workers and clients throughout my career.

What is your favorite aspect of practicing law?

Like David, I love trials, but we don't have nearly enough of them. I also enjoy researching and briefing – finding that one angle on an argument or holding in a case that makes the difference. My daughters hear that and think that I am the biggest nerd in the world. I guess I am.

What are you reading?

I love to read, but I realized earlier this year that I have been existing on a steady diet of fiction, so I made a resolution to read more nonfiction. As with most resolutions, I have not stuck with it as well as I should although I did just finish *Guests of the Ayatollah*, a fascinating story of the Iranian hostage crisis, by journalist Mark Bowden. I highly recommend it. Back to fiction, this summer I really enjoyed the final Harry Potter book. J.K. Rowling may not be the best dialogue writer in the world, but she is a master of characterization and I have really enjoyed watching the development of her main characters through their adolescence. I am about to dive into *Great Expectations*



because it is on my ninth-grade daughter's English assignment list and I love to be able to discuss what she is reading with her.

What do you do in your spare time?

As anyone with children knows, the concept of spare time is laughable when they are young. However, now that both my girls are in their teens, I find that I do get time to myself more – I just need to remember how to spend it! I love to eat out and read about food and cooking (*Top Chef* is my absolute favorite show) and I also enjoy traveling. We were able to combine those interests this past summer with a family trip to Italy where we enjoyed some great food and fabulous sights. I try to volunteer as well. For the past few years, my volunteer time has been devoted to the PTA. I started out with a mission to make it a friendlier place for working moms to volunteer and have continued my involvement because it is such a great way to support public education. I have also found that it does not hurt to be on good terms with the principal!