From: Osler McCarthy
Subject: Texas Supreme Court orders and opinions 2.15.08
Date: Friday, February 15, 2008 12:48:40 PM

Texas Supreme Court advisory

Contact: Osler McCarthy, staff attorney for public information
512.463.1441 or click for email

THIS EMAIL IS BEST READ IN HTML FORMAT. SET YOUR BROWSER TO RECEIVE IN HTML INSTEAD OF RICH OR PLAIN TEXT.

WOEFULLY LATE ORDERS AND OPINIONS ISSUED FEBRUARY 15, 2008
Three petitions granted oral argument in today's orders

LINKS TO FULL-TEXT OPINIONS FOLLOW SUMMARIES.
NOTE: ***Summaries are prepared by the Court's staff attorney for public information and reflect his judgment alone on facts and legal issues. These summaries are not part of the Court's opinion in the case.*** Links are to Adobe's PDF format (duplication of the document) and to HTML documents (rendition). Click here to download a free Adobe Reader.

FEBRUARY 15 ORDERS (in HTML)
Decisions in cases (motions, requests, etc.) from February 7 through Wednesday (PDF)

OPINIONS

03-0647
Evanston Insurance Co. v. ATOFINA Petrochemicals Inc.
from Jefferson County and the Ninth District Court of Appeals, Beaumont
For petitioner: Jeffery T. Nobles, Houston
For respondent: Jack G. Carnegie, Houston
AFFIRMED IN PART, REVERSED IN PART, JUDGMENT RENDERED, opinion on rehearing by Justice Green:

The principal issue is whether a refinery owner is covered as an additional insured under an umbrella policy held by its contract maintenance

provider after its employee died in a refinery accident. In this case Triple S's employee died after he fell through a corroded roof. ATOFINA sued Evanston, Triple S's excess insurer, to declare coverage under the policy. Triple S's contract with ATOFINA required it to maintain insurance that covered ATOFINA as an additional insured and to indemnify the refinery owner for losses not including those attributed to ATOFINA's negligence. Triple S's umbrella policy, with Evanston, was limited to the same extent. The trial court granted Evanston's summary-judgment motion. The court of appeals reversed.

The Supreme Court HOLDS that the umbrella policy provides coverage for liabilities arising from the additional insured's sole negligence, that the settlement agreement binds the insurer to the settlement amount and that the additional insured is not entitled to penalties for untimely payment of claims.

Additional insured. Regardless of the underlying service agreement's terms, the Court declines to follow the fault-based interpretation of certain kinds of additional-insured endorsement because they no longer prevail and instead interprets "with respect to operations" under a broader causation theory. An event "respects" operations generally if "a causal connection or relation" exists between the event and the operations. Proximate cause or legal cause are not required. In cases in which the premises condition caused a personal injury, the injury respects an operation if the operation brings the person to the premises for purposes of that operation. The particular attribution of fault between insured and additional insured does not change the outcome.

Coverage scope. Evanston's argument is that nature of the "following form" policy precludes coverage because the general liability policy specifically excludes coverage for ATOFINA's sole negligence. But the record in the case does not afford a determination as a matter of law whether the accident was the product of ATOFINA's sole negligence. But because ATOFINA is entitled to coverage under more than one who-is-an-insured clause in the applicable policy paragraph, it is not unreasonable to conclude that the policy should be read to provide the broader measure of coverage available under the applicable clauses.

Obligation to pay settlement. The Court's holding in *Employers Casualty Co. v. Block* applies in this case, despite its different facts – that an insurer that wrongfully denies coverage is barred from challenging a settlement's reasonableness when its insured later agrees to settle. Neither

the difference in policy claims nor the absence of a judgment memorializing the parties' settlement in this case disrupts the *Block* principles because *Block*'s rule is not derived from the nature of the violated policy term or the formality of agreed judgments. The cases barring insurers' challenges rest on principles of estoppel and waiver, but what is most important in this context is notice to the insurer and an opportunity to participate in the settlement discussions.

Insurance Code article 21.55 penalties. A loss incurred in satisfaction of a settlement belongs to the third party and is not suffered directly by the insured. This case in which ATOFINA seeks coverage for injuries sustained by a third party presents a classic third-party claim. Because the Legislature intended that article 21.55 apply to claims personal to the insured, ATOFINA is not entitled to the article 21.55 damages or attorney's fees.

Opinion in HTML

Opinion in PDF

Online briefs

Justice Hecht CONCURRING IN PART, DISSENTING IN PART, joined by Justice Johnson:

Evanston, which had no duty to defend ATOFINA, cannot be estopped to challenge the reasonableness of the settlement simply because it denied coverage and refused to participate in negotiations with the claimants. An insurer that breaches its duty to defend a claim cannot later be heard to complain that the amount the insured paid in settlement was unreasonable, absent evidence of collusion. An insurer that wrongly refuses to defend a claim, leaving its insured to defend himself, can hardly be allowed to argue that it would have done a better job. But Evanston had no duty to defend ATOFINA, as ATOFINA itself admits. The umbrella policy gave Evanston *the right* to defend a covered claim but *no duty* unless the claim was not covered by an underlying policy or that policy's limits were exhausted, neither of which occurred here. Evanston had no duty to participate in settlement discussions, and surely ATOFINA's invitation could not create one.

Hecht concurrence/dissent in HTML

Hecht concurrence/dissent in PDF

Original opinion in PDF

03-0824
Kathryn Aylor Bowden, et al. v. Phillips Petroleum Co., et al.
from Fort Bend County and the 14th District Court of Appeals, Houston
For petitioners: Anita Kawaja, Houston
For respondents: Michael V. Powell, Dallas
Justice Brister did not participate
REVERSED IN PART, AFFIRMED IN PART AND REMANDED,
opinion by Justice Wainwright:

A principal issue in this interlocutory challenge of class certification is whether in a class action res judicata bars future litigation of absent class members' unasserted claims. The petitioners also argue that the court of appeals erred by reversing the trial court's certification of three classes of royalty owners against the gas lessee, Phillips. In this case the trial court certified three subclasses of royalty owners alleging Phillips underpaid them, reflecting three different contract formula for royalty payments. The certification order specifically excluded claims not included in the order. In its review, the court of appeals held that the trial court's order impermissibly split breach-of-contract claims and that, given the class representatives' willingness to abandon certain claims to achieve common issues for the classes, the trial court abused its discretion by certifying the class. The court also determined that individual issues predominated over common ones in each subclass.

The Supreme Court HOLDS that the court of appeals was correct in decertifying two subclasses, but on different grounds. The appeals court's per se approach – that the class representatives' willingness to abandon claims to achieve commonality – would leave class representatives always at risk of being inadequate representatives if they do not assert all possible claims for each individual class member. Applying Texas's transactional approach to res judicata, class members will be barred only from asserting claims in subsequent individual litigation which arose from the same transaction or subject matter and either could have been or were litigated in the prior suit. The choice of claims to pursue or abandon is one relevant factor in evaluating the requirements for class certification such as typicality, superiority and adequacy of representation. A proper analysis under *Bernal* requires the trial court to venture beyond the pleadings to "'understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'"

Subclass 1. Even if Phillips owes identical duties to market to all of the Subclass 1 royalty owners, whether under an express or implied duty, the task for the jury would be to determine the price a reasonably prudent operator would have received at the wellhead. In this case, the variations in well locations, quality of production, and field regulations, among other factors, will require the jury to conduct a well-by-well analysis, defeating predominance unless the class offers particular evidence that the gas price at the wells can be evaluated classwide.

Subclass 2. The pricing provisions of the gas royalty agreements are unambiguous and may be construed classwide for royalty owners who executed substantially identical agreements. The subclass 2 agreements require royalties to be paid based on the volume of natural gas metered at the wells multiplied by a price averaged from sales to third parties, before liquid products are extracted or processed. The trial court erred in its trial plan by proposing to send the interpretation of the royalty agreements to the jury and, accordingly, the court of appeals erred in decertifying subclass 2 on predominance grounds.

Subclass 3. Whether brought under the broad duty to manage and administer the lease or under the specific duty to market, subclass 3 may not be certified because it expressly includes both proceeds/amount realized and market value leases. A class such as subclass 3 would fail the Rule 42 commonality requirement by including both types of leases. The inquiry under a market value lease would be different than under a proceeds lease.
s24

Opinion in HTML
Opinion in PDF
Online briefs

04-0431
PR Investments and Specialty Retailers Inc. v. State of Texas
from Harris County and the 14th District Court of Appeals, Houston
For petitioner PR Investments: H. Dixon Montague, Houston
For petitioner Specialty Retailers: W. Allyn Hoaglund, Houston
For respondent: Danica L. Milios, Austin
AFFIRMED, opinion by Justice Willett:

The principal issue is whether a road-design change deprives the trial court of jurisdiction to review condemnation damages when those damages

were based on a different design. In this case PR Investments and Specialty Retailers argued that the trial court lost jurisdiction over the appeal because the Transportation Department eliminated the design to which they agreed for access from a street to their property. The department notified them of the change just before a trial de novo on a condemnation award. Instead of dismissing the proceeding, the trial court initially gave the department three options, including the one the department took that allowed it to proceed on the new design but likely face an inverse-condemnation lawsuit. Later the court granted PR Investments and Specialty Retailers' dismissal motion, based on their jurisdiction argument, and ordered the department to pay sanctions. The court of appeals affirmed. On rehearing before the entire court, it split 5-4, holding that the condemnation statute does not prohibit the department from changing its design plans even if that change prejudices landowners. The court also held that the statute does not require that issues in a condemnation appeal be the same as what special commissioners considered in awarding damages.

The Supreme Court HOLDS that a condemning authority's decision to change the traffic-flow design (revising the road's signs and stripes but not its intended use) does not divest the trial court of jurisdiction over the trial de novo. A trial de novo, conducted as other civil causes, is not confined to the same evidence that was presented at the administrative phase. No statutory requirement exists that TxDOT must specify its exact lane-configuration plans for the highway and is bound by those plans throughout the condemnation proceeding.

Opinion in HTML
Opinion in PDF
Briefs

04-0728
Fairfield Insurance Co. v. Stephens Martin Paving LP, et al.
certified question accepted from the U.S. Court of Appeals, Fifth Circuit
For appellant: David M. Pruessner, Dallas
For appellees: Charles C. Self III, Abilene; Michael R. Cooper, Salado
CERTIFIED QUESTION ANSWERED, opinion by Justice Wainwright:

The certified question is whether Texas public policy prohibits a liability insurer from paying a punitive damages award imposed on its insured because of gross negligence? The Fifth Circuit certified the question in a challenge of a summary judgment declaring that Fairfield must defend

Stephens Martin Paving in a lawsuit claiming punitive damages based on gross negligence. The underlying state case involves a spouse's claim that the paving company's gross negligence resulted in her husband's death when a highway-paving machine he operated rolled over on him. Fairfield, the paving company's workers compensation insurer, argues that punitive damages under *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), cannot be indemnified because such damages are intended to punish a grossly negligent defendant.

The Supreme Court HOLDS that in the workers compensation case at issue in the federal lawsuit, Texas public policy does not prohibit insurance coverage for exemplary damages. The Labor Code's provision for workers comp as an exclusive remedy does not prohibit recovery of exemplary damages if the employee's death is caused by the employer's gross negligence. Under the Texas Department of Insurance's mandatory policy, a participating employer would have coverage for workers' compensation claims and claims based on gross negligence. The Legislature's expressed intent is that Texas public policy does not prohibit insurance coverage for claims of gross negligence in this context. That ends the necessary inquiry in the present case, but the Fifth Circuit framed its certified question as a broad inquiry about Texas public policy and the coverage of exemplary damages. In the absence of expressed direction from the Legislature, whether a promise or agreement will be unenforceable on public policy grounds will be determined by weighing the interest in enforcing agreements versus the public policy interest against such enforcement. Inherent tension exists between the policies recognized by freedom of contract and the policy behind awarding exemplary damages. Without clear legislative intent to generally prohibit or allow the insurance of exemplary damages arising from gross negligence, we decline to make a broad proclamation of public policy here but instead offer some considerations applicable to the analysis in other cases.

Opinion in HTML
Opinion in PDF
Online briefs

Justice Hecht CONCURRING, joined by Justices Brister, Medina and Willett:

The Court answers "no" for the workers' compensation insurance at

issue in the federal court action, but the Fifth Circuit's question is broader and deserves a fuller response than the Court gives. Taking into account the policy favoring freedom of contract, the Court should hold that when Texas Civil Remedies and Practice Code chapter 41's punitive purpose would be significantly impaired, and a defendant's net worth could not be meaningfully incorporated in the assessment, as Chapter 41 requires, then insurance against punitive damages would violate Texas public policy unless these considerations are outweighed by other factors. Those factors could be expressions of legislative will, or regulatory approval of the coverage, or the attenuation of the burden of liability from the misconduct. In these situations, no formulaic answer to the public policy question exists. Chapter 41 provides for punishment of a person who knows full well that his conduct poses an extreme risk of harm to others and yet does not care. That, in essence, is gross negligence. The public policy analysis must answer why punitive damages for such egregious behavior should be avoided by insurance.

Hecht concurrence in HTML

Hecht concurrence in PDF

Justice Johnson CONCURRING:

Part III of the Court's opinion goes further than necessary in responding to the certified question presented even in light of Texas Constitution article V, section 3-c.

Johnson concurrence in HTML

Johnson concurrence in PDF

06-0868

Beatrice Crocker v. National Union Fire Insurance Co.

certified questions from the U.S. Court of Appeals, Fifth Circuit

For appellant: Thomas C. Wright, Houston

For appellee: William C. Schmitt, Austin

CERTIFIED QUESTIONS ANSWERED, opinion by Justice Willett:

In this case the Fifth Circuit U.S. Court of Appeals certified three questions in a case in which Crocker seeks to collect a $1 million default judgment against National Union's additional insured: (1) Where an additional insured does not and cannot be presumed to know of coverage under an insurer's liability policy, does an insurer with knowledge that a suit implicating coverage has been filed against the additional insured have a

duty to inform him of the available coverage? (2) If so, what is the extent or proper measure of the insurer's duty to inform the additional insured, and what is the extent or measure of any duty on the additional insured to cooperate with the insurer up to the point he is informed of the policy provisions? (3) Does proof of an insurer's actual knowledge that process has been served in a suit against its additional insured, when such knowledge is obtained in sufficient time to provide the insured's defense, establish as a matter of law no prejudice to the insurer from the additional insured's failure to comply with the policy's notice-of-suit provision? In this case Crocker, a nursing home resident, sued the nursing home and one of its employees who allegedly injured her. The employee never answered the complaint or appeared and was never told that National Union would provide a defense because he was covered under the nursing home's policy. Crocker moved to sever the claim against the employee from that against the nursing-home owner, then later moved for a default judgment against the employee and won. In the suit against the nursing-home owner, jurors returned a take-nothing verdict against Crocker, specifically finding that the owner and its agents, including Crocker, were not negligent. The trial court awarded Crocker $1 million in the suit on the severed claim against the employee. In this suit Crocker seeks to recover on the judgment from National Union. The federal district court granted Crocker's summary judgment motion and awarded her $1 million.

The Supreme Court HOLDS that Texas law imposes no extra-contractual duty by an insurer to notify an additional insured that liability coverage is available and that an insurer's actual knowledge that an additional insured has been served with process does not establish as a matter of law that the insurer has not been prejudiced by the additional insured's failure to notify the insurer of the receipt of process. The Court's 1978 decision in *Weaver v. Hartford Accident & Indemnity Co.*, governs this case. In *Weaver* the Court held that an insurer was not liable to an additional insured's judgment creditor when the additional insured failed to notify the insurer that he had been served with process, even though the insurer knew about the suit, and the additional insured knew nothing about the policy. Notice and delivery-of-suit-papers provisions in insurance policies serve two essential purposes:(1) they facilitate a timely and effective defense of the claim against the insured and, more fundamentally, (2) they trigger the insurer's duty to defend by notifying the insurer that a defense is expected. Mere awareness of a claim or suit does not impose a duty on the insurer to

defend under the policy. No unilateral duty to act unless and until the additional insured first *requests* a defense—a threshold duty that the insured fulfills under the policy by notifying the insurer that the insured has been served with process and the insurer is expected to answer on its behalf. The Court's recent decision in PAJ Inc. v. Hanover Insurance Co., held that tardy notice of a covered claim will not defeat coverage unless the insurer was actually prejudiced by the delay. The issue in *PAJ* was whether a named insured's untimely compliance with the notice-of-suit provision is excused if the delay inflicts no prejudice on the insurer. Fundamental differences, however, exist between *PAJ* and this case: in *PAJ*, the named insured made a request for coverage under the policy, albeit several months after "as soon as practicable." In this case, however, the additional insured's notice was not merely late, it was wholly lacking. An insurer cannot necessarily assume that an additional insured who has been served but has not given notice to the insurer is looking to the insurer to provide a defense. Potential insureds, for a variety of reasons, might well opt against seeking a defense from an insurer.
Opinion in HTML
Opinion in PDF
Briefs
Fifth Circuit opinion

07-0035
Thao Chau and Ha Dien Do v. Jefferson Riddle, M.D., et al.
from Harris County and the First District Court of Appeals, Houston
REVERSED AND REMANDED, per curiam opinion:

A principal issue is whether the doctor sued for negligence conclusively established the Good Samaritan defense. The Supreme Court HOLDS that he did not. The Good Samaritan defense is subject to three exceptions at issue here: a doctor performing his or her work in an emergency room, a doctor associated by the admitting or attending physician and a doctor who charges for his or her services. An issue of material fact exists as to whether Riddle was "associated by the admitting or attending physician" so the Court does not consider whether Riddle regularly administers care in an emergency room or charged for his services.
Opinion in HTML
Opinion in PDF

Briefs

ISSUES SUMMARIES FOR PETITIONS GRANTED
ORAL ARGUMENT IN TODAY'S ORDERS

05-0563
Gilbert Kerlin, et al. v. Conception Sauceda, et al.
from Cameron County and the 13th District Court of Appeals, Corpus Christi/Edinburg
Oral argument date pending

Among principal issues in this contest by heirs claiming interest from a Spanish land grant to South Texas land, including Padre Island, are (1) whether the statute of limitations was tolled by Kerlin's absence from the state and (2) whether laches bars the claim.

Briefs
Court of appeals opinion

07-0485
City of Waco v. Larry Kelley
from McLennan County and the 10th District Court of Appeals, Waco
Oral argument date pending

A principal issue is whether hearing examiners exceeded their authority by ordering temporary suspension of an assistant police chief and reduction of his rank. Kelley had been indefinitely suspended after an arrest for drunken driving.

Briefs
Court of appeals opinion
Dissent (Gray)

07-0581
In re Harold R. Schmitz, et al.
from Bexar County and the Fourth District Court of Appeals, San Antonio
Oral argument date pending

Principal issues are (1) whether a letter objecting to a merger agreement constituted a proper demand letter required to file a shareholder derivative suit under Texas law; (2) whether irreparable injury was established that justified waiver of the 90-day waiting period before suit; and

(3) whether an adequate remedy by appeal existed.

Briefs

Court of appeals opinion