GO MAVERICKS!!

Validity of Policy Buy-Back Agreements

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- What is a policy buy-back?
- Why do insurers and insureds use them?
- Public policy issues

Stroop v. Northern County Mutual

2000 WL 33409635 (Tex. App.—Dallas 2000, pet. denied).

- Facts
  - The critical facts are undisputed. Sunset is a common carrier that hauls sand, gravel, and steel.
  - Sunset carried a commercial insurance policy issued by Northern County. The policy was issued for a one-year term from Feb. 15, 1992 to Feb. 15, 1993.
  - Sunset was current on all premium payments.

Stroop v. Northern County Mutual

- Facts
  - Sunset discovered that Underwriters Lloyds Insurance Company could issue commercial insurance at a rate cheaper than Northern County. Sunset purchased insurance coverage from Underwriters Lloyds. The Underwriters Lloyds policy was effective April 1, 1992.
  - On April 7, 1992, a Sunset truck collided with a car driven by Ray Dillen, in which Stroop was a passenger.

Stroop v. Northern County Mutual

- Facts
  - Sunset signed a "policy release" in favor of Northern County. The effective date of the policy release was April 1, 1992 at "12:01." No date appears next to the signature of the Sunset representative.
  - Sunset's president called Northern and sought to cancel the contract on either March 31, 1992 or April 1, 1991. Sunset stipulated there was no advance written notice of the policy cancellation prior to April 7, 1992.

Stroop v. Northern County Mutual

- Issue
  - Whether an insured and an insurer can retroactively cancel a commercial insurance policy after a collision occurs, when the insured is covered by other insurance.

Stroop v. Northern County Mutual

- Holding
  - Northern County initially refused to honor Sunset's oral request to cancel the policy and attempted to collect the premium for April 1992. Only after the collision on April 7, 1992, did Northern County attempt to retroactively cancel the policy.
  - Northern County's attempt to cancel the contract does not comply with the Insurance Code or the provisions of the policy. Moreover, the attempted cancellation violates public policy requiring commercial carriers to carry liability insurance to protect the public.

Stroop v. Northern County Mutual

- Holding
  - The Court held, on the facts of this case, than an insurer and its insured cannot mutually agree to cancel an insurance contract after a loss has occurred, which impacts third persons covered by the insurance.

Ranger Ins. Co. v. Ward,

107 S.W.3d 820 (Tex. App.-Texarkana 2003, pet. denied).

- Facts
  - On March 19, 1991, Ranger issued policy number IAU03278 to Thompson Flying Services, Inc., owned by Jesse Thompson.
  - This policy brought Thompson Flying Services into compliance with financial responsibility laws governing the commercial application of herbicides and pesticides.

Ranger Ins. Co. v. Ward

- Facts
  - On June 26, 1991, operating under this liability policy, Thompson Flying Services applied a potent herbicide by aerial application to the Smith Trust Ranch in Franklin County.
  - The herbicide drifted across the county line onto a large portion of 3,400 acres of land in Red River County owned by Landowners, destroying a growing cotton crop and preventing Landowners from planting a crop the following season.

Ranger Ins. Co. v. Ward

- Facts
  - On Jan. 19, 1996, Thompson and Ranger entered into the Release, under which Ranger paid Thompson $100,000 in exchange for his retroactively releasing Ranger from its obligations under the policy as of the date of issuance.
  - Neither party notified the Department of Agriculture of the Release, as required by the Texas Agriculture Code.

Ranger Ins. Co. v. Ward

- Issue
  - Does a policy buy-back (or release) executed after a loss violate Texas public policy?

Ranger Ins. Co. v. Ward

- Analysis
  - The court held that it had to study the circumstances surrounding the execution of the release to determine its validity, and examine the entire instrument to determine the parties' intent.
  - Here, Ranger and Thompson entered into the Release in January 1996. At that time, both parties were indisputably aware of the Landowners' claim. Ranger did not dispute this, nor could it.

Ranger Ins. Co. v. Ward

- Analysis
  - The circumstances paint a picture of two parties, both aware of their likely liability for Landowners' claims, entering into a release in which:
    - the two parties attempt to contract away liability, and
    - agree to leave the injured parties without the remedy intended by the statute in question.
  - Ranger now declares it is not liable under the policy because it agreed it did not want to be liable and paid Thompson $100,000 to accomplish that result.

Ranger Ins. Co. v. Ward

- Analysis
  - Court must next decide whether, considering these circumstances, a release of this nature is contrary to the public's best interest.
  - The public policy goal, as expressed in the statute in the instant case, is quite obvious: "protecting persons who may suffer damages as a result of the operations of the applicant."

Ranger Ins. Co. v. Ward

- Holding
  - While we recognize that enforcing a release can serve a policy goal by promoting freedom of contract and voluntary settlements of disputes, the danger in enforcing the release far outweighs the policy considerations in enforcing it.
  - Ranger's and Thompson's attempt to circumvent the intent of the required insurance clearly violates public policy.

Ranger Ins. Co. v. Ward

- Holding
  - Both the insurer and insured would benefit from this attempted manipulation of time; but, the injured parties would "suffer adverse effects," losing even the statutory minimum protection to the scheming of Ranger and Thompson.
  - Such an attempt to avoid legally imposed duties and to undermine the intent of the laws of the State violates public policy in "the most egregious manner."

Perez v. Catlin Specialty Ins. Co.,

No. SA-10-CA-472-H; In the U. S. District Court for the Western District of Texas, San Antonio Division (Dec. 20, 2010)

- Facts
  - In 2005, Plaintiffs contracted with Kyle Construction to construct an addition to their existing home. According to Plaintiffs, the construction work was performed negligently.
  - In March 2007, Plaintiffs experienced significant water damage to their home as a result of Kyle's negligence.

Perez v. Catlin Specialty Ins. Co.

- Facts
  - Plaintiffs brought suit against Kyle, and the case went to arbitration. An arbitration award and judgment in favor of Plaintiffs was entered against Kyle on April 8, 2010.

Perez v. Catlin Specialty Ins. Co.

- Facts
  - Catlin issued a policy of general liability insurance to Kyle for the period of Sept. 13, 2006 to Sept. 13, 2007. Thus, the policy was in effect at the time of the damage to plaintiffs' property.
  - Catlin initially accepted coverage and provided Kyle with counsel.

Perez v. Catlin Specialty Ins. Co.

- Facts
  - Roughly two years into the lawsuit, Kyle entered into a settlement agreement, in exchange for a lump-sum payment from Catlin.
  - Kyle expressly released Catlin from any further obligation to defend or indemnify it under the policy with respect to Plaintiffs' suit.

Perez v. Catlin Specialty Ins. Co.

- Facts
  - Thereafter, Plaintiffs proceeded with their claims and obtained the arbitration award against Kyle.
  - Plaintiffs obtained a turnover order, ordering Kyle to give Plaintiffs any and all rights and claims that Kyle might have against Catlin.
  - Plaintiffs then brought the present suit, alleging that Catlin is obligated to pay their judgment against Kyle.

Perez v. Catlin Specialty Ins. Co.

- Issue
  - Does a policy buy-back executed after a loss violate public policy?

Perez v. Catlin Specialty Ins. Co.

- Analysis
  - The court distinguished this case from the *Cowley v. Texas Snubbing Control, Inc.,* 812 F. Supp. 1437 (S.D. Miss. 1991).
  - In *Cowley*, an insurance company provided umbrella policies to Texas Snubbing Control, Inc.
  - The issue was the effect to be given a post-occurrence settlement by the contracting parties as against third parties.

Perez v. Catlin Specialty Ins. Co.

- Analysis
  - The *Cowley* court determined that a settlement and release between an insured and his liability insurer is ineffective as against a third party who establishes that he is an intended third-party beneficiary of the insurance contract prior to his obtaining a judgment against the insured.

Perez v. Catlin Specialty Ins. Co.

- Analysis
  - The *Cowley* court held, however, that the plaintiff, Stapleton, was not a third-party beneficiary of the policy, noting that Stapleton had never obtained a judgment against Texas Snubbing, and further, that no statute had required Texas Snubbing to purchase liability insurance.

Perez v. Catlin Specialty Ins. Co.

- Analysis
  - In the *Perez* case, Catlin contended, under the reasoning of *Cowley*, that the settlement agreement was valid because:
    - the insurance policy was not mandated by law, and
    - Plaintiffs were not intended third-party beneficiaries of the policy.

Perez v. Catlin Specialty Ins. Co.

- Analysis
  - The *Perez* court distinguished Cowley in several ways.
  - First, the court in *Cowley* found significant the fact that "the policy in the case at bar contains no provision granting Stapleton a right to proceed against the policy in the event of securing a judgment against Texas Snubbing."

Perez v. Catlin Specialty Ins. Co.

- Analysis
  - Also, the court in *Cowley* gave substantial weight to the fact that, "at the time the disputed settlement was effected, there was not just one claimant asserting a right of recovery against Texas Snubbing. Rather there were multiple claimants, not all of whose claims could have been satisfied from the insurance benefits provided by Underwriters' policy."

Perez v. Catlin Specialty Ins. Co.

- Analysis
  - Additionally, the insurer in *Cowley* contended that the policy expressly excluded coverage for the damage sought by those seeking policy benefits.
  - Thus, Texas Snubbing had substantial exposure to liability claims and limited or, perhaps, no insurance.

Perez v. Catlin Specialty Ins. Co.

- Holding
  - The *Perez* court held that the unique factors which prompted the result in *Cowley* are not present in the *Perez* case.
  - The *Perez* court concluded that Plaintiffs were third-party beneficiaries of the insurance policy prior to obtaining a judgment against Kyle.
  - Catlin and Kyle could not defeat Plaintiffs' right to recover under the policy through a release.
  - The release violated Texas public policy.

General Agents Ins. Co. v. El Naggar,

___ S.W.3d ___ (Tex. App.—Houston [14th Dist.] 2011, no pet. h.).

- Facts
  - El Naggar contracted with Frederick Bell, owner of Traxel Construction, Inc., for the construction of a steel building and a concrete slab.
  - Appellant Gainsco issued a commercial general liability (CGL) policy to Traxel.
  - Problems arose over the construction project and, in 2001, El Naggar filed suit against Bell, Traxel, and other parties.

General Agents Ins. Co. v. El Naggar

- Facts
  - The first trial ended in a mistrial.
  - Just after the mistrial, Gainsco and Traxel entered into a "buy-back agreement." Under its terms, Gainsco repurchased Traxel's CGL policy for $50,000, and Traxel released Gainsco from any and all claims or demands arising out of the policy.
  - The lawsuit proceeded to a second trial, which resulted in a judgment in El Naggar's favor against Traxel only.

General Agents Ins. Co. v. El Naggar

- Facts
  - El Naggar then sued Gainsco, along with other of Traxel's insurers, to collect the judgment.

General Agents Ins. Co. v. El Naggar

- Issue
  - El Naggar alleged several claims against Gainsco, including one in which it sought a declaratory judgment that the buy-back agreement between Gainsco and Traxel violated either the Texas Insurance Code, Texas public policy, or the Texas Uniform Fraudulent Transfer Act, and is unconscionable.
  - The trial court granted summary judgment voiding the buy-back agreement as against public policy.

General Agents Ins. Co. v. El Naggar

- Holding
  - The Fourteenth Court of Appeals held that the trial court erred by granting El Naggar's motion for partial summary judgment and implicitly denying Gainsco's cross-motion on the ground that the buy-back agreement between Gainsco and Traxel is void as against public policy.
  - The Court of Appeals reversed and rendered judgment declaring that the buy-back agreement is not void as against public policy.

General Agents Ins. Co. v. El Naggar

- Analysis
  - In its motion for summary judgment, El Naggar contended that the buy-back agreement is contrary to public policy because:
    - Gainsco and Traxel were aware of El Naggar's claims when they entered into the buy-back agreement, and
    - Execution of the buy-back agreement left El Naggar without a remedy.

General Agents Ins. Co. v. El Naggar

- Analysis
  - El Naggar also argued that insurance was a prerequisite to Traxel's being awarded the construction contract, a fact the parties dispute, and that the buy-back agreement circumvents that agreement.

General Agents Ins. Co. v. El Naggar

- Analysis
  - In its MSJ, El Naggar relied heavily on the Texarkana case, *Ranger Insurance Company v. Ward*.
  - The controlling factor in *Ranger* was that the insurance policy was statutorily required. ("Section 76.111 of the Texas Agriculture Code required that a commercial aerial applicator of pesticide maintain a policy of liability insurance in a minimum amount or provide a surety bond in that same amount.")

General Agents Ins. Co. v. El Naggar

- Analysis
  - The *Gainsco* court recognizes that, central to the interpretation and application of the compulsory insurance statute in *Ranger*, was the statute's expression of purpose: "protecting persons who may suffer damages as a result of the operations of the applicant."
  - Thus, Ranger's attempt to circumvent the statute and its purpose violated Texas public policy.

General Agents Ins. Co. v. El Naggar

- Analysis
  - *Ranger* is distinguishable from *Gainsco* because it involved circumstances not present in *Gainsco*: "two parties, both aware of their likely liability for Landowners' claims, entering into a release in which the two parties attempt to contract away liability and agree to leave the injured parties without the remedy intended by the statute in question."

General Agents Ins. Co. v. El Naggar

- Analysis
  - El Naggar did not cite to any statute requiring the CGL policy issued in this case.
  - The court rejected the argument that, under the Insurance Code, CGL insurance is for the public's benefit.
  - Nothing in former article 21.21 or current section 541.060 requires a CGL policy for the public's benefit.

General Agents Ins. Co. v. El Naggar

- Analysis/Holding
  - Nor did El Naggar cite to any statute or common law stating that the buy-back agreement of a CGL policy, under the circumstances presented here, is void as against public policy.
  - Without strong public-policy reasons against enforcement of the buy-back agreement, the court declined to declare the buy-back agreement in this case void as against public policy.

General Agents Ins. Co. v. El Naggar

- Holding
  - The trial court erred by granting El Naggar's motion for partial summary judgment and implicitly denying Gainsco's cross-motion.
  - The court sustained Gainsco's challenge, stating "we reverse and render judgment declaring that the buy-back agreement is not void as against public policy."

Considerations

- Before the loss
- As part of the settlement of the loss
- Statutory policy