

Legislative and Case Law Update

Insurance Seminar
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Topics

- Proposed Legislation
- Update on Leading Cases from the Texas Supreme Court, Developing Issues, and Cases to Watch

Legislation

- Pre-filing began November 14, 2022
- The 88th Legislature convened January 10, 2023
- Regular session ends May 29, 2023
- As of the 60th day of the session, 8,276 bills were filed
- Approximately \$33 billion budgetary surplus to fund new projects and legislation
- Legislature focusing on several core issues for the session including gun control, immigration, LGBTQ/social issues, and education

Legislation

- **S.B. 27** (Sen. Hughes) and **H.B. 19** (Rep. Murr et al.) - Creation of a Business Court
- If passed, will go into effect January 1, 2025
- Holds the power to grant any relief that may be granted by a district court
- The court's jurisdiction includes: action alleging a business owner breached a duty, including the duty of care, loyalty, or good faith; derivative action on behalf of an organization, such as a suit by a class of shareholders; securities action; or action arising out of a transaction

Business Court Continued

- A party to an action filed in a district court or county court may “remove” the action to the business court
- Appeals from business court would go up to a newly created Fifteenth Court of Appeals
- The governor would appoint the business-court bench, which would be comprised of seven judges serving in two-year increments

Legislation

- **H.B. 2127** (Rep. Burrows) and **S.B. 814** (Sen. Creighton) - Preemption
- Would give the state exclusive authority over any activity contained in the Agricultural Code, Finance Code, Insurance Code, Labor Code, Natural Resources Code, and Occupations Code
- Unless state law expressly authorizes a city or county to act in these fields, any local ordinance or order that attempts to regulate any activity within these codes would be void and unenforceable

Legislation

- **H.B. 2252** (Rep. Turner) - Trampoline Courts
- Would, among other things: (1) prohibit a person or entity from operating a trampoline court unless they obtain an annual written certificate from an insurer stating that the court has been inspected, meets the standards for insurance coverage, and has a sufficient insurance policy in effect written by an insurance company licensed to conduct business in the state or by a surplus line insurer;
- (2) authorize a city or county, or state law enforcement personnel to shut down a trampoline court for failure to provide proof of the required insurance certificate and policy

Legislation

- **H.B. 601** (Rep. Jetton) - Recovery of Costs Related to Retaining Public Adjuster
- Amends Section 542.003(b) of the insurance code to expand the list of unfair claim settlement practices to include compelling an insured to retain a public adjuster to assist in recovering amounts due on a policy
- Requires the insurer to reimburse the adjuster for services rendered in association with the disputed recovery

Legislation

- **H.B. 1716** (Rep. Guillen) - Increase of Minimum Vehicle Liability Insurance
- Amends Section 601.072(a-1) of the insurance code to increase the minimum amounts of motor vehicle liability insurance coverage required to establish financial responsibility to \$50,000 for damage or destruction of property

Legislation

- **H.B. 3391** (Rep. Johnson) - Disclosures by liability insurers and policyholders to third-party claimants
- Amends Section 542 to add subsection C-2 requiring disclosure of certain information to a potential claimant including name of the insured, name of the insurer, coverage limits, applicable coverage defenses, and copies of the policies
- Failure to comply with the disclosure requirement may subject the receiving party to a \$500 penalty per violation
- The deadline to provide requested information is 30 days
- Receiving party has an obligation to supplement disclosures in the event of a material change

Texas Supreme Court Update

- 2022 Calendar Year
- Disposed of 95 causes, consisting of
 - 73 causes taken on petition for review,
 - 14 original mandamus proceedings,
 - 6 certified questions from the Fifth Circuit, and
 - 2 direct appeals
- Twenty-seven of the causes were disposed of by per curiam opinions
- The reversal rate in 2022 was 86%. This is higher than the historical average of 75%
- Excluding per curiam opinions, there were 53 unanimous opinions, including 5 of the mandamus opinions that were unanimous and all 6 of the certified questions that were unanimous

Sunchase IV Homeowners Ass'n, Inc. v. David Atkinson,
643 S.W.3d 420 (Tex. 2022)(per curiam)

- A defending party who obtains a take nothing judgment is considered a “prevailing party” under the Uniform Condominium Act and is entitled to reimbursement of attorney fees
- A party that successfully defends against a plaintiff’s main issues and obtains a take-nothing judgment qualifies as a prevailing party because it obtains “actual and meaningful relief that materially alters the parties’ legal relationship”

Columbia Valley v. A.M.A., 654 S.W.3d 135 (Tex. Apr. 22, 2022)

- Trial court must point to evidence, either contained in the record or gathered in further hearings about the structure of the periodic payments
- Re-emphasized that periodic payments cannot contradict the jury award
- The award must not evade the statutory requirement that payments of future medical costs cease if the beneficiary dies before the payments are complete

Virlar v. Puente, ___ S.W.3d___, 2023 WL 2053170 (Tex. Feb. 17, 2023)

- The main issues in this medical malpractice case involve settlement credits under Chapter 33 of the Texas Civil Practice and Remedies Code and periodic payments for future medical expenses under the Texas Medical Liability Act in Chapter 74
- The Texas Supreme Court found that the Plaintiff's daughter was a "claimant" under Chapter 33 because her claims derived from injuries to another person; thus her recovery should be classified as a settlement credit against the judgment
- The Court reversed with respect to the court of appeals' analysis of the Medical Liability Act and periodic payments, finding that defendants had presented sufficient evidence of the statutory prerequisites and that the trial court was, therefore, required by the Act to order periodic payments for at least future medical expenses

Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.

640 S.W.3d 195 (Tex. 2022).

- No private right of action under the Texas Insurance Code requiring an insurer to pay for emergency services provided to an insured by an out-of-network provider at the provider's "usual and customary rate."
- Rejected theory that new state and federal legislation relating to medical billing creating a mandatory arbitration scheme for emergency claims retroactively created a private right of action for claims preceding the enactment of the new legislation
- Rejected quantum meruit claims as doctor could not satisfy the second element - that the doctor rendered treatment to insureds for the benefit of the insurer

Tex. Med. Res., LLP v. Molina Healthcare of Tex., Inc.,
659 S.W.3d 424 (Tex. Jan. 13, 2023)

- Expands the scope of the traditional “eight-corners rule” (“four-corners” of the complaint and the “four-corners” of the insurance policy) in evaluating an insurer’s duty to defend.
- A court may consider extrinsic evidence “if the underlying petition states a claim that could trigger the duty to defend, and the application of the eight-corners rule, due to a gap in the plaintiff’s pleading, is not determinative of whether coverage exists . . . provided the evidence
 - (1) goes solely to an issue of coverage and does not overlap with the merits of liability,
 - (2) does not contradict facts alleged in the pleading, and
 - (3) conclusively establishes the coverage fact to be proved.”

Arce v. Am. Nat'l Ins. Co., 633 S.W.3d 228 (Tex. App.—Amarillo 2021), pet. granted (Nov. 18, 2022)

- Oral Argument occurred January 2023
- Primary issue is whether an insurer's ability to rescind an insurance policy based on an applicant's material misrepresentation requires proof of the applicant's intent to deceive
- Although the question before the Texas Supreme Court is limited whether "intent to deceive" is an element of Texas Insurance Code Section 705.051, the Court's decision will likely impact Texas Insurance Code Section 705.004 as well
- Should the Texas Supreme Court confirm that the Texas Insurance Code requires strict proof as to "intent to deceive," such a decision may severely limit an insurer's ability to win these cases at the summary judgment stage

Overstreet v. Allstate Vehicle & Prop. Ins. Co., No. 21-10462, 2022 WL 1579278 (5th Cir. May 19, 2022)

- Causation—What is an insured’s burden when the claimed loss involves a mix of covered and non-covered causes?
- Addresses the “concurrent causation doctrine,” which states when insured property is damaged by a combination of covered and non-covered causes, the insured (rather than the insurer) must prove how much of the damage is solely attributable to the covered cause

Overstreet Continued

- The Fifth Circuit re-certified three questions to the Texas Supreme Court:
 - (1) Does the concurrent cause doctrine apply when non-covered damage (such as wear and tear) does not directly cause the claimed loss;
 - (2) If so, do plaintiffs have to allocate their losses between the covered peril and non-covered perils that plaintiffs contend did not cause the particular loss; and
 - (3) If so, whether plaintiffs can meet that burden with evidence indicating that 100% of the loss is attributable to the covered peril.
- The case settled before the Supreme Court could answer the questions but we anticipate the issue arising again and returning to the Supreme Court in the coming years

QUESTIONS?

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