LEGISLATIVE and TEXAS SUPREME COURT UPDATE

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Disclaimers

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New Insurance-Related Legislation
88th Legislature

HB 1040
Doing Business Electronically

- This bill changes a company's ability to do business electronically by changing from an "opt in" to an "opt out" for consumers and agents
- In other words, as long as both parties are aware from the start that business will be conducted electronically, that is the default method
- This bill allows a person to change (opt out) to a non-electronic method of doing business (like paper) at any time
- Eff. 9-1-23

SB 833
Underwriting Criteria

- This bill prohibits the use of ESG (environmental, social, or governance) criteria in the underwriting of policies
- Underwriters may not use any ESG model, score, factor, or standard to charge a rate different than the rate charged to another business or risk in the same class for essentially the same hazard
- The bill requires underwriting to premise coverage on actuarially based criteria or expected loss and expense experience
- Eff. for policies issued, delivered, or renewed in Texas on or after 1-1-24

HB 1706
Surplus Lines

- This bill assures that consumers insured through a surplus lines policy have the right to hire a public adjuster to assist with a claim
- Previously, some surplus lines policies expressly prohibited hiring a public adjuster
- Eff. 9-1-23

HB 1900
Notice for Non-Renewal

- Currently, an insurer wanting to non-renew a personal policy must notify the policyholder thirty days in advance of the intent to non-renew
- This bill increases the notice period to 60 days
- Bill analysis states that, now that insurers can use their own policy forms, with different coverage, exclusions, limitations, and conditions, this is designed to give consumers more time to shop for replacement coverage
- Eff. 9-1-23

SB 2008
Farm Mutual Companies

- Currently, farm mutual insurance companies only can write business for “rural property.” “Rural property” means areas with a population of 2,500 or less, and the definition has not been updated in more than 50 years
- This bill raises the population threshold in the definition to 6,500 and also includes a method for the definition to float up and down with the decennial census
- In the November following the last census, the Insurance Commissioner computes a new population limit
- Eff. 9-1-23

Other Insurance-Related Bills That Passed

- **HB 2065:** Clarifies who is "an insured" versus the "named insured" in matters involving uncooperative insureds and the nonrenewal of personal auto policies
- **HB 609:** Protects business owners from liability for exposure to pandemic diseases if the business owner does not require employees to be vaccinated
- **HB 679:** Prohibits governmental jurisdictions from using worker's compensation experience modifiers in their calculation for awarding government contracts

Insurance-Related Bills That Failed

- **HB 3665:** Would have allowed moving violations to be used as a rating factor (currently only allowed in county mutuals)
- **SB 1083:** Would have required OEM (original equipment manufacturer) parts on vehicles owned 36 months or less
- Three bills would have required appraisal clauses for home/auto or all P&C policies (HB 597, HB 1437, HB 4194)
- **HB 287:** Would have required insurers to pay 80% of claim up front on replacement cost value policy

Other Legislation

88th Legislature

Law/Justice Bills That Passed

- **SB 372:** Makes it a criminal offense for anyone other than a judge or a justice to knowingly disclose any non-public judicial work product. Requires confidentiality as to any person involved in crafting an opinion/decision for an adjudicatory proceeding
- **SB 599:** Adds district and county clerks to the list of persons authorized to carry a handgun in a courthouse, with a proper license
- **HB 2291:** Adds retired judges and justices to the handgun-in-a-courthouse list
- Eff. 9-1-23

Some Non-Insurance Bills That Passed

- **HB 1:** State budget and allocation of funds
- **HB 12:** Extends post-partum Medicaid for low-income Texans for a full year after childbirth
- **HB 6:** Allows murder charges for death by fentanyl poisoning
- **HB 3:** Expands school safety funding and requirements
- **HB 9:** Allocates $1.5B to expand internet availability
- **SB 18:** Protects university tenure while codifying guidelines and requiring regular performance reviews
- **HB 1595:** Endows $3B for TSU, UH, Texas Tech, and UNT, contingent on voter approval

Some Non-Insurance Bills That Failed

- **HJR 102:** Legalizing online sports betting
- **HJR 155:** Constitutional amendment to allow casinos
- **HB 1422:** Adopting permanent daylight savings time
- **HB 2744:** Raising the age to purchase a semi-automatic rifle from 18 to 21
- **SB 8** (and SB 1/HB 1 in special sessions): Creating education savings accounts to allow parents to have "alternative education opportunities"
- Multiple bills relating to medical cannabis and legalizing marijuana

Notable Opinions from the 2023-2024 Term

Insurance Cases

In re Illinois Nat'l Ins. Co.

- Liability policy coverage battle presenting three issues that arise often when insured settles with injured party—the underlying "claimant"—without the insurer's participation or consent:
- First, if the settlement agreement does not require the insured to pay money, and instead limits claimant's recovery to any liability coverage available under the policy, has the insured suffered a "loss" the policy covers?
- Second, can the claimant assert claims directly against the insurer to recover the insurance benefits?
- Third, if the insured has suffered a loss, is the settlement agreement binding against the insurer or admissible as evidence to establish coverage or the amount of loss?

In re Illinois Nat'l Ins. Co.

- Here, Cobalt (oil and gas producer) sued by its investors (GAMCO) for federal securities fraud violations relating to wells off the coast of West Africa
- Cobalt had "tower" of liability insurance from multiple companies. Cobalt gave insurers notice but they denied coverage based on late notice and exclusions
- Cobalt self-funded its defense and sued insurers to recover defense costs
- Cobalt filed bankruptcy in 2017, and GAMCO started settlement negotiations
- Cobalt kept insurers apprised of settlement discussions but insurers continued to decline to participate

In re Illinois Nat'l Ins. Co.

- Parties settled for $220M, full amount of insurance "tower" if covered; they agreed settlement would be funded solely by insurance and GAMCO would pursue insurers (but no assignment of claims made)
- Cobalt to pay nothing out-of-pocket and would get $28.5M if insurers paid (to cover defense costs)
- Bankruptcy court and federal court approved settlement
- Cobalt notified insurers of settlement but insurers did not appear, participate in, or lodge objections to settlement, federal-court judgment, or bankruptcy plan
- GAMCO intervened in Cobalt's coverage suit and sought DJ that insurers must pay settlement

In re Illinois Nat'l Ins. Co.

- First/second issues: whether Cobalt was "legally obligated to pay" damages (i.e., suffered "loss") even though it did not have to pay anything to GAMCO
- Held: Yes, because policies were Cobalt assets and were true liability policies (i.e., pay on behalf of) that required insurer to pay even if Cobalt did not actually pay first
- Covenant not to execute against Cobalt did not relieve insurers of obligation to pay up to policy limits
- Thus, Cobalt suffered a "loss" and GAMCO could sue insurers directly for coverage
- But, because settlement did not result from "fully adversarial trial," as required by *Gandy* and *Hamel* cases, it was not binding on insurers or admissible at trial

In re Illinois Nat'l Ins. Co.

- Third issue: Cobalt had no actual risk of being held liable for damages sought by GAMCO and had no other "meaningful incentive" to ensure the settlement accurately reflected GAMCO's damages
- Settlement amount tied solely to total amount of available liability coverage, not to actual damages
- GAMCO agreed not to enforce judgment or pursue Cobalt's non-insurance assets
- "Fully adversarial trial" requirement applies even if insurer denies coverage
- Distinguished *Evanston v. ATOFINA* (where insurer who denied could not attack settlement) because ATOFINA settled without knowing whether settlement would be covered, motivating it to minimize settlement

Rodriguez v. Safeco Ins. Co.

- September 2023 Texas Supreme Court Update insurance case to watch
- Rodriguez made a claim under his homeowner’s policy for damage done by a tornado; Safeco partially paid for the damage
- Rodriguez sued Safeco, claiming it owed additional coverage
- Within a week after Safeco had the property appraised, it issued payment for the full amount of Rodriguez’s claim, plus interest
- Rodriguez believed Safeco also should pay his attorney’s fees

Rodriguez v. Safeco

- U.S. Fifth Circuit Court of Appeals certified question to TSC:
  - Does insurer's payment of full appraisal award, plus any possible statutory interest, preclude recovery of attorney's fees in an action under the Texas Prompt Payment of Claims Act, as amended in 2017 (Insurance Code Ch. 542A)?
  - District Court (N.D. Texas) said yes—no fee award for plaintiff's counsel
- TSC agreed with federal district court
- Insurance Code Sec. 542A.007(a)(3) requires courts to use a mathematical formula to determine the amount of attorney's fees available in cases like this
- Applying that formula here resulted in $0 fee award
- The Court reiterated that, in *Ortiz v. State Farm Lloyds* (2019), it held an insurer's payment of an appraisal award discharges its obligations under the policy

In re Liberty County Mutual Ins. Co.

Mar 20, 2024

Texas Supreme Court Clarifies Permissible Scope of Discovery in Auto Collision Cases

By: Michelle E. Robberson

Late last year, the Texas Supreme Court addressed the permissible scope of a defendant's discovery requests in an automobile collision case in a mandamus proceeding, *In re Liberty County Mutual Insurance Co.*, 679 S.W.3d 170 (Tex. 2023) (orig. proceeding) (per curiam). The Court agreed with the defendant's arguments and reversed the trial court's order quashing the discovery and assessing sanctions. The Opinion provides some helpful guidance for both courts and litigants.

The plaintiff, Thalia Harris, was in an auto accident with Darien Haynes in April 2017. She settled with Haynes's insurer for policy limits of $100,000 (with Liberty's permission), and then sought additional damages under Liberty's underinsured motorist coverage (UIM). When Liberty did not pay, she sued Liberty.

During her deposition, Harris testified that the accident caused injuries to her head, right shoulder, and back. Harris filed several medical records and billing records affidavits and also a "Plan of Anticipated Future Medical Expenses" in support of her claims for the April 2017 accident. Discovery also revealed that Harris had been involved in one auto accident before the April 2017 accident and four auto accidents after the April 2017 accident, all involving injuries to some of the same body parts.

Originally, the defendant sought discovery from Harris's primary care physician of "all documents pertaining to Dr. Simmons's care, treatment, and examination of Harris," as well as all films and images maintained by Dr. Simmons, for ten years before the accident and five years after the accident. Harris moved to quash as overbroad and sought sanctions.

Before and at the hearing, Liberty offered to reduce the time period to five years before and five years after the April 2017 accident and to allow the records to be sent first to Harris's counsel, so he could review them and remove anything privileged. The trial court (Dallas County Court at Law No. 5) rejected that offer, granted the motion to quash, and assessed $2,000 in sanctions against defense counsel.

Liberty sought mandamus relief from the Dallas Court of Appeals, which denied the petition without an opinion. Liberty then sought mandamus relief from the Texas Supreme Court.

In a mandamus proceeding, the moving party must prove two things: the trial court abused its discretion, and the relator has no adequate remedy by ordinary appeal. The Texas Supreme Court concluded Liberty had proved both.

The Court first discussed the applicable law relating to claims of overbroad discovery requests. While the permissible scope of discovery is broad, it said, trial courts must consider proportionality and weigh a party's right to discovery against the needs of the case.

This proportionality inquiry requires case-by-case balancing in light of several factors, including: the likely benefit of the requested discovery; the needs of the case; the amount in controversy; the parties' resources; the importance of the issues at stake in the litigation; the importance of the proposed discovery in resolving the litigation; and any other articulable factor bearing on proportionality. Ultimately, the trial court's responsibility, using all the information provided by the parties, is to consider these proportionality factors in reaching a case-specific determination of the appropriate scope of discovery.

The Court also briefly discussed UIM law. To succeed on her UIM claim, it said, Harris had to prove the original defendant's liability for the accident and that her damages exceeded the $100,000 received from the original defendant. The Court said information relating to these disputed issues is relevant.

Health Care Liability Claims

Uriegas v. Kenmar Residential HCS Svcs.

- CPRC 74.351 expert report case (PC opinion issued 9-23)
- Disabled, non-verbal nursing home resident suffered several falls; guardian sued and served two expert reports
- Trial court held reports sufficient; Amarillo CA reversed.
- TSC reversed CA, concluding reports were sufficient
- Reaffirmed that nurse expert could not opine on causation
- Although reports "lacked specifics in some instances," when read together, they provided a "fair summary" of standard of care for claim of failure to appropriately monitor patient after his two falls, as well as breach
- Physician's report addressed causation and it was unchallenged; reversed for further proceedings

Marsillo v. Dunnick

- Medical malpractice case against an emergency room physician who treated a minor patient for a rattlesnake bite
- Raynee Dunnick was admitted to the emergency department at Seton Medical Center
- Dr. Marsillo implemented the hospital's snakebite treatment guidelines and followed the antivenom manufacturer's (CroFab) guidelines for administering antivenom
- After receiving several doses of antivenom in accordance with CroFab guidelines, Dunnick was transferred to another hospital for admission

Marsillo v. Dunnick

- Raylee recovered but she and her parents sued Dr. Marsillo, claiming Raynee’s pain and suffering could have been avoided if Dr. Marsillo had departed from CroFab guidelines and administered antivenom sooner
- Trial court granted Dr. Marsillo’s summary judgment motion (no evidence of willful/wanton negligence)
- Austin Court of Appeals reversed
- TSC, interpreting Civil Practice & Remedies Code sec. 74.153(a), reversed and rendered judgment for Dr. Marsillo
- Under 74.153(a), plaintiffs have a heightened burden of proof when suing a physician for treatment rendered in an emergency setting

Marsillo v. Dunnick

- Plaintiffs must show that the physician deviated from the applicable standard of care with *willful and wanton negligence*
- The Court held that "willful and wanton" is the equivalent of "at least" gross negligence
- Under that standard, plaintiff had to show that Dr. Marsillo (1) knew her decision not to depart from the CroFab guidelines posed an extreme risk to Raynee and (2) was subjectively aware of that risk and proceeded with conscious indifference to Raynee's safety
- The Court held there was no evidence either that Dr. Marsillo knew about an extreme risk or that she proceeded with a conscious indifference to Raynee's safety
- The Court saved for another day issue of whether "willful and wanton" is something more than gross negligence

Hampton v. Thome

- Sufficiency of medical authorization for purposes of extending two-year statute of limitations (issued 3-24)
- Sec. 74.051(a) requires plaintiff to give notice of claim and a medical authorization in the form specified by sec. 74.052
- Sec. 74.052 actually includes the proposed form to be used, setting out in precise terms the info required
- If notice and medical authorization given, plaintiff is entitled to an additional 75 days to file suit
- Here, court said the medical authorization form given "closely resembled" the form required by sec. 74.052

Hampton v Thome

- Plaintiff sued more than two years after claim accrued but within 75-day extended period
- Dr. Thome asserted that plaintiff's failure to list 9 of 11 health care providers on the form meant form did not comply with 74.052, plaintiff not entitled to extra 75 days
- Trial court disagreed, denied Dr. Thome's MSJ on limitations, and case proceeded to trial
- Beaumont CA reversed, holding claim barred by limitations because form "falls well short" of statutory requirements
- TSC reversed, held "an imperfect medical authorization form is nevertheless a medical authorization form," which is sufficient to toll limitations and give plaintiff extra 75 days

Hampton v. Thome

- Texas law "favors bright-line rules that enable parties and courts to know with certainty—as early in the litigation as possible—whether the suit is time-barred"
- Any defects or omissions in form that came to light during litigation could have been adequately addressed by statutory remedy of abatement, by additional discovery, or even—where departure from statutory requirements is deliberate or in bad faith—by sanctions up to and including dismissal
- Ch. 74 does not require courts "to entertain satellite litigation" over whether limitations was tolled because defects were later discovered in the pre-suit authorization form

Premises Liability—Hospital

HNMC v. Chan

- Personal injury/wrongful death case
- Nurse (Chan) was leaving hospital after her shift and crossed in the middle of the street to walk to a parking garage adjacent to the hospital; struck by a car leaving parking garage and killed
- Hospital, at one time, had built a pad on the street but it had abandoned it in favor of crosswalks at either end of the block; roadway markings had faded
- Chan's family sued hospital and others
- Jury found hospital 20% responsible
- *En banc* Court of Appeals affirmed

HNMC v. Chan

- Supreme Court reversed and rendered judgment for the hospital
- The question: whether the hospital owed a duty of care to Chan once she left hospital premises
- Held: a property owner generally owes no duty of care to make an adjoining public road safe or warn of potential danger unless the owner exercises actual control over the adjacent property
- The hospital had limited control over the street abutting the hospital; but, Chan was not injured by the conditions in the area
- Instead, she was injured because the driver leaving the parking lot was negligent—and the hospital was not responsible for that risk

Whistleblower—Hospital

Scott & White Memorial Hospital v. Thompson

- Employment case involving nurse (Thompson) fired by hospital after revealing a minor's protected health information to a school nurse
- Nurse sued hospital, claiming it violated Family Code sec. 261.110, and that it terminated her in retaliation for having reported concerns about minor's parents' medication management to Child Protective Services (CPS)
- Under sec. 261.110, a professional who works with children, and reasonably believes a child is being abused or neglected, has a duty to report that concern to CPS
- Professionals who believe they have been retaliated against for reporting under this section may sue their employer

Scott & White Mem'l Hosp. v. Thompson

- An employer may defend the case by alleging it would have terminated the employee anyway, unrelated to the report to CPS
- Hospital here claimed it fired Thompson because, when she revealed protected health information to the minor's school nurse, it was the third violation of the hospital's personal conduct policy, and Thompson understood she could be fired for a third violation of the policy
- The trial court granted the hospital's summary judgment motion
- El Paso Court of Appeals reversed

Scott & White Mem'l Hosp. v. Thompson

- TSC reversed the Court of Appeals
- To prove a violation of sec. 261.110, a plaintiff need not show that the protected conduct (reporting to CPS) was the *sole* motivation for the firing—only that the firing would not have occurred when it did but for the protected conduct
  - In other words, no violation occurs if the employer would have fired the employee anyway—even if the employee had not engaged in the protected conduct
- The Court held the evidence established that the hospital would have fired Thompson anyway, even if she hadn't reported her concern to CPS
- Thompson violated the hospital's personal conduct policy twice before and knew a third violation would result in termination; revealing protected health information was the third violation

The End!

Questions?? Contact us:

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