EVANSTON v. ATOFINA

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15TH ANNUAL INSURANCE LAW SYMPOSIUM

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***Evanston Insurance Company v. ATOFINA Petrochemicals, Inc.*, 51 Tex.Sup.J. 460 (Feb. 15, 2008).**

I. Facts

ATOFINA contracted with Triple S Industrial Corporation to perform maintenance and construction work at ATOFINA's Port Arthur refinery. The service contract contained an indemnity provision and a requirement that Triple S to carry certain minimum levels of liability insurance coverage naming ATOFINA as an "additional insured." Matthew Todd Jones, a Triple S employee, was drowned after he fell through a corroded roof of a storage tank filled with fuel oil. Jones's survivors sued Triple S and ATOFINA for wrongful death. Admiral, the primary CGL insurer for Triple S tendered its $1 million policy limits. ATOFINA then demanded coverage from Evanston as an additional insured under the umbrella policy. Evanston denied the claim, and ATOFINA brought Evanston into the case as a third-party defendant seeking a declaration of coverage. This claim was then severed. While the coverage case was pending, the Jones case was settled for $6.75 million. ATOFINA sought to recover from Evanston the $5.75 million not covered by Admiral.

The trial court granted summary judgment in favor of Evanston, and the court of appeals reversed the judgment holding that the Evanston policy covered ATOFINA. 104 S.W.3d 247 (Tex.App.—Beaumont 2003).

II. Holding

Evanston made two arguments in the court of appeals. First, it agreed in the indemnity agreement that it would not seek indemnification for losses resulting from its own negligence. One of the additional insured provisions had similar language. As a result, ATOFINA claimed that it should not have any responsibility. Second, under *Fireman's Fund v. Commercial Standard Ins. Co.*, 490 S.W.2d 818 (Tex. 1972), ATOFINA claimed that since it cannot get indemnity arising from its own negligence, likewise it should not be entitled to additional insured status.

The Evanston policy contained two provisions regarding additional insured status. The first was section III.B.5. which provides:

> Any other person or organization who is insured under a policy of "underlying insurance." The coverage afforded such insureds under this policy will be no broader than the "underlying insurance" except for this policy's Limit of Insurance.

The second provision is contained in section III. B.6. which provides as follows:

> A person or organization for whom you have agreed to provide insurance as is afforded by this policy; but that person or organization is an insured only with respect to operations performed by you or on your behalf, or facilities owned or used by you.

With respect to Section III.B.6, Evanston argued that the insurance provided did not apply to ATOFINA's own negligence, but rather for liability for Triple S's conduct. Evanston relied primarily on *Granite Construction Co. v. Bituminous Ins. Cos.*, 832 S.W.2d 427 (Tex.App.—Amarillo 1992, no writ), in support of the proposition. The court noted that other Texas cases, including *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex.App.—Houston [1st Dist.] 1999, *pet. denied*), had taken a much more expansive view holding that so long as the liability arose out of the work of Triple S, there could be coverage for ATOFINA's own negligence. The court held that this result was dictated by the ordinary and natural meaning of the phrase "with respect to" and was also supported by the majority of other courts facing the same issue. The court noted that although the pleadings in the underlying case did not indicate whether Jones was performing a Triple S operation at the time of the accident, Jones was present at the ATOFINA facility for the purposes of Triple S's operations when the accident occurred. As a result, even if

ATOFINA's negligence alone caused Jones's injuries, Section III.B.6 of the Evanston policy provided direct insurance coverage to ATOFINA.

Evanston next argued there was no coverage by virtue of Section III.B.5. Again, Section III.B.5 says an insured can be: "Any other person or organization who is insured under a policy of "underlying insurance." The coverage afforded such insureds under this policy will be no broader than the "underlying insurance" except for this policy's Limit of Insurance." Looking to the underlying policy, Evanston argues that it specifically excludes coverage for ATOFINA's sole negligence and, as a result, Section III.B.5 is limited and excludes losses caused by ATOFINA's sole negligence. The court noted that on the record before, it was unable to determine whether the Jones's accident was the product of ATOFINA's sole negligence. Both ATOFINA and Triple S had originally been sued by both parties. In addition, there were allegations that Jones himself was contributorily negligent. However, the case was settled against ATOFINA with no admission of liability by either party. Thus, the court held that without such factual determination, it is impossible to determine whether the accident would be excluded under Section III.B.5 of the Evanston policy.

ATOFINA argued that regardless of a determination, it was entitled to the coverage under whichever provision afforded it the broadest coverage. Therefore, it is entitled to rely upon Section III.B.6 if Section III.B.6 provided broader coverage than Section III.B.5. The court held that because ATOFINA was entitled to coverage under more than one "who was an insured" clause, it was not unreasonable to conclude the policy should be read to provide the broader measure of coverage available under the applicable clauses. Therefore, the court held that ATOFINA was entitled to coverage under Section III.B.6 which does not exclude liabilities arising out of ATOFINA's sole negligence.

Evanston next argued that coverage attributed under *Fireman's Fund Insurance Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818 (Tex. 1972). In that case, Sam P. Wallace Co., Inc. was performing work at the General Motors Corporation plant in Arlington, Texas. The agreement had an indemnity provision with insurance to secure the indemnity agreement. The court held that the contract of indemnity would not afford protection to the indemnitor against the consequences of his own negligence unless the contract fully expressed that such an obligation in unequivocal terms. This contract was being construed under the old "clear and unequivocal" rule. However, there was no distinct additional insured status like there was in the *ATOFINA* case. The court held that the additional insured status was separate and independent from the contractual indemnity provided ATOFINA.

The next issue was whether Evanston was entitled to challenge the reasonableness of the $6.75 million settlement. The supreme court relies primarily upon its earlier decision in *Employers Casualty Company v. Block*, 744 S.W.2d 940 (Tex. 1988), in holding that an insurer who agrees to a duty to defend is not entitled to litigate the reasonableness of a settlement or the judgment. In *Block*, the supreme court had held:

> While we agree with the court of appeals' conclusion that [the insurer] was barred from collaterally attacking the agreed judgment by litigating the reasonableness of the damages recited therein, we do not agree with its conclusion that the recitation in the agreed judgment that the damage resulted from an occurrence on August 6, 1980 is binding and conclusive against [the insurer] in the present suit.

The court had some difficulty in distinguishing its later language contained in *State Farm Fire & Casualty Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996). There the court said:

> In no event, however, is a judgment for plaintiff against defendant, rendered without a fully adversarial trial, binding on defendant's insurer or admissible as evidence of damages in

> an action against defendant's insurer by plaintiff as defendant's assignee. We disapprove the contrary suggestion in dicta in *Employers Casualty Company v. Block*, 744 S.W.2d 940, 943 (Tex. 1988), and *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d 949, 954 (5th Cir. 1990).

First, the language in *Employers Casualty* was dicta. Second, the supreme court in *Gandy* did entirely overrule that language. However, the court never indicates that *Gandy* was limited just to those situations where five unique elements were present. However, a fair reading of the *Gandy* holding does not limit it to those situations where the *Gandy* elements were present.

The last issue addressed by the court was whether Article 21.55 would apply to the claim for recovery of the settlement proceeds that were due as opposed to attorneys' fees. The court employed language consistent with that in *Lamar Homes* in distinguishing between first and third-party claims. The court noted that "a loss incurred in satisfaction of a settlement belongs to the third party and is not suffered directly by the insured." As a result, the court held that the statute did not apply to the case.

III. Dissent

Justices Hecht and Johnson filed the dissent only with respect to the issue of ability of Evanston to contest the reasonableness of the settlement. As aptly pointed out by the dissent, Evanston had no duty to defend and therefore could not have breached any duty to defend. The umbrella gave Evanston the right to defend the covered claim, but no duty unless the claim was not covered by an underlying policy or that policy's limits were exhausted. Neither of those situations was applicable here since ATOFINA had its $1 million coverage in place. The question posed by the dissent was what possible basis is there to stop an insurer who has breached no duty to its insured? Even where there has been a breach of the duty to defend, the rule announced by the majority will not work and is inconsistent with the Restatement (2nd) of judgments. This rule will have to be reexamined by the court and in all probability, when reexamined, the court will conform their holding to prior decisions.