INSURANCE

AN INSURER IS REQUIRED TO DEFEND ANY CASE IN WHICH AT LEAST SOME OF THE ALLEGATIONS IN THE PLEADINGS POTENTIALLY STATE A CLAIM COVERED BY THE POLICY

American Nat'l Gen. Ins. Co. v. Ryan, 274 F.3d 319 (5th Cir. 2001).

FACTS: Linda Isbell ("Isbell") filed a negligence action in state court against Charlotte Ryan ("Charlotte") alleging Charlotte breached her duty by failing to warn Isbell of Charlotte's minor son's propensity to molest children which resulted in the molestation of Isbell's daughters. At the time of the lawsuit, Charlotte and her husband Stephen Ryan (collectively, "Ryans") were insured by a Texas Standard Homeowner's Policy ("the Policy") issued by American National General Insurance Company ("ANGIC"). ANGIC filed a declaratory judgment action in federal court against the Ryans, seeking a declaration that it had no duty to defend the Ryans in the state court action under the Policy, nor any obligation to pay or indemnify them for any damages recovered by Isbell. Thereafter, Isbell countered with her own declaratory judgment action in state court against ANGIC and American National Property and Casualty Company ("ANPCC"). Her action was subsequently removed to federal court. The parties then cross-moved for summary judgment. The district court granted ANGIC's and ANPCC's motion for summary judgment and denied Isbell's and Ryan's motion. The district court issued a memorandum and opinion holding that the facts alleged in Isbell's negligence action against Charlotte did not constitute an "occurrence" as required by the Policy as a prerequisite to coverage. Both Isbell and the Ryans appealed the ruling.

HOLDING: Affirmed.

REASONING: On appeal, Isbell and the Ryans contend that both ANGIC and ANPCC have a duty to defend and potentially a duty to indemnify Charlotte in Isbell's state action against her. The court rules that an insurer is required to defend any case in which at least some of the allegations in the pleadings potentially state a claim covered by the policy. *See Gulf Chem. & Metallurgical Corp. v. Associated Metals & Minerals Corp.*, 1 F.3d 365, 369 (5th Cir. 1993). However, the court also rules that the insured bears the burden showing that the claim against him is potentially within his policy coverage. *N.Y. Life Ins. Co. v. Travelers Ins. Co.*, 92 F.3d 336, 338 (5th Cir. 1996).

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The court further determines that, by the terms of the Ryan's Policy, in order for coverage to exist and both ANGIC and ANPCC to have a duty to defend, the underlying action must allege damages caused by an "occurrence." The Policy defines an "occurrence" as "an accident, including exposure to conditions which result in bodily injury or property damage during the policy." Texas case law defines "an accident" as "an unexpected happening without intention or design." *Allen v. Auto. Ins. Co.*, 892 S.W.2d 198, 199 (Tex. App. – Houston [14th Dist.] 1994, no writ). Isbell and the Ryans concede that, from the standpoint of Charlotte's son, it did not constitute an occurrence within the meaning given by the Policy. They contend instead that Charlotte's negligent acts causing Isbell's daughters' injuries must be considered separately from Charlotte's son's intentional acts.

The court rules that, under Texas law, "where a third-party's liability is related to and interdependent on other tortious activities, the ultimate issue [in determining coverage] is whether the underlying tortious activities are encompassed within the definition of 'occurrence.'" *Am. States Ins. Co. v. Bailey*, 133 F.3d 363, 371 (5th Cir. 1998). In this case, the court rules Charlotte's son's underlying acts are not encompassed within the definition of occurrence because Charlotte's liability is related to and interdependent on the tortious acts of her son. Therefore, neither ANGIC and nor ANPCC have a duty to defend.

INSURER BEARS THE BURDEN OF PROVING THAT THE ALLEGATIONS CONTAINED IN THE UNDERLYING PLAINTIFF'S PETITION ARE EXCLUDED FROM COVERAGE, AND ANY DOUBT IS RESOLVED IN FAVOR OF THE INSURED

Westchester Fire Ins. Co. v. Gulf Coast Rod, Reel & Gun Club, 64 S.W.3d 609 (Tex. App. – Houston [1st Dist.] 2001).

FACTS: Landowners on Bolivar Peninsula sued Gulf Coast Rod, Reel and Gun Club ("the Club") in a series of lawsuits asserting claims in connection with beach erosion and other property damage allegedly resulting from the Rollover Pass Fish Cut ("the Cut").

After the lawsuits were filed, the Club filed a claim with its insurance carriers. Westchester Fire Ins. Co. and a number of other insurance companies ("Appellants") denied the Club's request for a defense. The Club and two insurance companies that agreed to provide a defense to the Club sued Appellants, requesting, among other things, that the trial court render a judgment declaring that Appellants owe an obligation to the Club under its policies. Both the Club and Appellants filed motions for summary judgment. The trial court granted the Club's motion, denied Appellants' motion, and ordered Appellants to provide the Club with a defense in the underlying lawsuits.

HOLDING: Affirmed.

REASONING: Appellants contend that the Club in the

underlying lawsuit did not allege an "occurrence" within the meaning of the liability insurance policies. An occurrence is defined in the policies as an accident, including continuous or repeat exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. Appellants further argue, without citing authority, that the mere presence of a negligence allegation is insufficient to trigger an insurer's duty to defend when the alleged acts of negligence are related to and interdependent with intentional tortious activities.

The court, however, rules that an insurer's duty to defend is triggered when the allegations in the plaintiff's pleadings raise a potential for coverage under the policy. *See Argonaut S.W. Ins. Co. v. Maupin*, 500 S.W.2d 633, 635 (Tex. 1973). The insurer bears the burden of proving that the allegations contained in the underlying plaintiff's petition are excluded from coverage, and any doubt is resolved in favor of the insured. *See Adamo v. State Farm Lloyds Co.*, 853 S.W.2d 673, 676 (Tex. App. – Houston [14th Dist.] 1993, writ denied). The court finds that the occurrence was the repeated exposure to water currents that were altered by the dredging and that resulted in the erosion of sand on the Club's underlying property. This occurrence was not an intentional act because the sand erosion that resulted in property damage was neither expected nor intended from the standpoint of the Club. Therefore, the court concludes that the Club's underlying petition alleges an occurrence within the meaning of the Club's liability insurance polices. Accordingly, the court rejects appellants' contention.

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INSURANCE POLICY MAY BE CANCELLED ONLY FOR REASONS PROVIDED IN THE INSURANCE CODE

INSURANCE POLICY PROVISION REGARDING CANCELLATION MUST BE STRICTLY CONSTRUED

SUMMARY JUDGMENT ON DTPA AND INSURANCE CODE VIOLATIONS REVERSED

Jones v. Ray Ins. Agency, 59 S.W.3d 739 (Tex. App.—Corpus Christi 2001).

FACTS: On December 28, 1997, Jones' automobile was severely damaged when hit by another automobile driven by an uninsured driver. The day after the accident, Jones was told by Ray Insurance Agency ("insurer") that she was fully covered by the insurance policy. However, thirty minutes later, insurer called Jones to inform her that she was no longer covered by the policy. At first, Jones was told the policy was cancelled because she had not excluded her sister as a driver. Later, Jones was instead told that she was cancelled because she failed to provide a copy of her driver's license. Insurer alleged the policy was cancelled on November 25, 1997, however the postmark showed that notice of cancellation wasn't mailed until December 1, 1997. Despite this alleged cancellation, insurer accepted and never returned a December premium payment from Jones on December 1, 1997. Jones claims to have never received the insurer's cancellation notice, and she did not become aware of cancellation until claiming the accident.

After insurer denied personal auto coverage, Jones filed suit against insurer alleging breach of contract, DTPA violations, and violation of Article 21.21 of the Texas Insurance Code. Insurer was granted summary judgment as to all causes of action. The trial court based summary judgment on a finding that the policy was effectively cancelled before the accident occurred.

HOLDING: Reversed and remanded.

REASONING: An insurer may cancel a personal automobile insurance policy only for grounds listed in § 4 of Article 21.49-2B of the Texas Insurance Code. Subsection (i) does not allow an insurer to cancel for any reason other than those listed in the other subsections of § 4, and by implication would prohibit cancellation after sixty days. *See* TEX. INS. CODE art. 21.49-2B, § 4(i). In this case, the grounds offered by insurer for cancellation were not listed in § 4 of Article 21.49-2B, and thus insurer was in violation of the statute. In accordance with § 4(g) of Article 21.49-2B, a cancellation does not take effect until the tenth day after the date the insurer mails notice of cancellation. However, by accepting the premium payment on December 1, insurer in this case failed to allow the ten-day period to elapse, again in violation of the statute.

As a general rule, insurance policies are construed in favor of coverage. *Gonzalez v. Mission Am. Ins. Co.*, 795 S.W.2d 734, 737 (Tex. 1990). As such, specific policy provisions for cancellation of coverage must be strictly construed and complied with. *See U.S. Liab. Ins. Co. v. Baggett*, 285 S.W.2d 804, 807 (Tex. Civ. App.—Texarkana 1955, writ ref'd n.r.e.). Because insurer failed to comply with Texas policy provisions for cancellation of coverage, the trial court erroneously found no coverage.

Jones had an active policy in full force at the time of her accident. Thus, summary judgment regarding her DTPA and Texas Insurance Code violations was reversed. Jones presented some evidence of insurer's: 1) false representations, 2) failure to disclose, 3) false advertising, and 4) unconscionable conduct. A no-evidence summary judgment is improperly granted if the non-movant counters with more than a scintilla of probative proof to raise a genuine issue of material fact. *See Lampasas v. Spring Ctr., Inc.*, 988 S.W.2d 428, 432 (Tex. App.—Houston [14th Dist.] 1999, *no pet.*). Because the evidence in this case presents more than a scintilla of evidence, and because insurer's attempted cancellation was void, Jones not only

has a cause of action for breach of contract, but also for violations of the DTPA and Texas Insurance Code.

COURT FINDS DUTY TO DEFEND

St. Paul Guardian Ins. Co. v. Centrum GS Ltd., ___ F.3d ___ (5th Cir. 2002).

FACTS: St. Paul Guardian Insurance Company ("St. Paul") issued a commercial general liability insurance policy ("CGL policy") to Centrum GS Limited ("Centrum"), the owner of the Centrum Building in Dallas, Texas. The CGL policy covered *inter alia*, bodily injury, property damage and personal injury liability.

Gerry Perdue ("Perdue") was a building engineer hired during the construction of the Centrum Building. After Perdue's employment was terminated, Centrum and other defendants ("Appellants") hired police officers to patrol in and around the Centrum Building and posted "WANTED POSTERS" that allegedly included a color photo of Perdue, his name, his home address, his driver's license number, his social security number and his car tag number.

Perdue filed a lawsuit against St. Paul and Appellants in federal district court in Dallas, for wrongful termination, as well as claims that the wrongful termination and libel, slander and invasion of privacy against him by the defendants caused him to suffer damages including mental distress, mental anguish and physical sickness. St. Paul filed a motion for summary judgment contending Perdue's claims were not covered under the CGL policy and thus it had no duty to defend nor indemnify Appellants. Appellants in turn filed a cross-motion for summary judgment arguing that Perdue's claims are covered under the CGL policy and therefore, St. Paul is obligated to defend Appellants. The district court held that Perdue's claims of physical damages resulting from the personal injury offenses, invasion of privacy and slander, did not result from defendants' "business activity" (owning and managing property) as required for coverage under the personal injury provision of the CGL policy. Thus, the district court granted St. Paul's motion for summary judgment. Appellants' cross-motion for summary judgment was denied. Appellants appealed the district court's decision.

HOLDING: Affirmed in part, reversed in part and remanded.

REASONING: Appellants argue that the district court erred in not granting summary judgment in their favor because sufficient facts were pled in the Perdue lawsuit to potentially state a claim under the CGL policy's personal injury provisions. The CGL policy did not define the term "business activity." The court rules that posting information concerning a perceived risk to the Centrum Building and its tenants by Appellants in a place where it could be viewed and appropriately used, constitutes "business activity" under the CGL policy because such action was consistent with Appellants' business of owning and managing property. Thus, the court concludes that the district court erred in granting summary judgment in favor of St. Paul. In reaching its conclusion the court rules that St. Paul has a duty to defend. In addition, the court rules that, if coverage exists for any portion of a suit, the insurer must defend the insured in the entire suit.

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