

RECENT DEVELOPMENTS

Each witness established that the incident caused some emotional impact and disruption in the plaintiffs' daily lives. The court noted that even SCI's former manager agreed one of the most devastating circumstances that could occur for an already-grieving family was to experience a wrongful burial. In reviewing the jury's award, the court distinguished Estela, Christian, and Rebecca from Stephan and Erica in regards to damages. The court's distinction was based on the degree of pain and impact

suffered by each of the parties. The court found Stephen and Erica's testimony failed to establish injury beyond mere emotions or significant disruption in their routine affairs as to constitute mental anguish. The court noted there must also be evidence to justify the amount awarded. In regards to Estela, Christian, and Rebecca the court upheld the jury's award, and affirmed the finding of mental anguish. However, the court rendered Stephen and Erica take nothing, reversing the jury's decision.

INSURANCE

DOCTRINES OF WAIVER AND ESTOPPEL CANNOT BE USED TO RE-WRITE CONTRACT OF INSURANCE AND PROVIDE CONTRACTUAL COVERAGE FOR RISKS NOT INSURED

IF AN INSURER'S ACTIONS PREJUDICE ITS INSURED, THE INSURER MAY BE ESTOPPED FROM DENYING BENEFITS THAT WOULD BE PAYABLE UNDER ITS POLICY

Ulico Cas. Co. v. Allied Pilots Ass'n, 262 S.W.3d 773 (Tex. 2008).

FACTS: Ulico Casualty Company issued a policy to Allied Pilots Association ("APA") for liability coverage. The policy provided coverage for "all losses which such insured shall become legally obligated to pay on account of any claim made against insured during the policy period. Before the policy expired, APA was served with a lawsuit, but did not notify Ulico of the suit until a month after the policy expired. Ulico advised APA that no defense costs could be incurred or settlements made without Ulico's prior written consent and that Ulico expressly reserved its rights to deny coverage.

Ulico then informed APA that pursuant to its reservation of rights, it agreed to reimburse APA for reasonable and necessary defense expenses. APA made no communication to Ulico until one and a half years later when APA's attorney sent a bill to Ulico. Neither APA nor the law firm had sought Ulico's prior approval for the expenses. Ulico filed suit seeking a declaratory judgment that it did not owe APA's defense costs. The trial court entered a judgment in favor of APA and the court of appeals affirmed under the theory of waiver and estoppel. Ulico appealed.

HOLDING: Reversed and rendered.

REASONING: The court held that APA could not use waiver and estoppel doctrines to extend Ulico's policy coverage to cover the suit. In Texas, insurance policies are contracts and are construed by the rules governing general contract construction. Accordingly, an insurer has the burden to plead any exception or limitation to coverage, but only after the insured has shown the risk of loss is covered by the policy. The equitable doctrines of waiver and estoppel have been applied by the Texas courts when necessary to avoid forfeiture of an insurance policy; however, they have been denied operative force to change, re-write and enlarge the risks covered by an insurance policy.

Here, the court found the issue was not about a forfei-

ture of policy coverage. Instead, it was a question of risk coverage under the contract. The court ruled that applying the doctrine of waiver and estoppel in the instant case would change the insurance policy to cover a risk of loss its terms never originally covered. This would create liability for a risk not created by the contract and never assumed by the insurer. Affirming the general principal to avoid re-writing the contract, the court reversed.

The court noted, however, that under some circumstances, insurers who take control of their insured's defense without a valid right reservation or non-waiver agreement can, and should be prevented from denying benefits that would have been payable had the claim been covered, because the insured is actually prejudiced by the insurer's actions. When an insurer's defense of or controlling the defense of the insured prejudices an insured, the insurer cannot escape liability for the detriment its actions cause its insured. The court held that in such a situation, the insurer would be estopped from refusing to pay the damages of its actions caused, but there was no rewriting of the insurance contract. The determined that ethical rules applicable to attorneys defending insureds, and the doctrine of estoppel, all work to protect an insured without the necessity of remodeling the doctrines of waiver and estoppel to create an anomaly in the law by judicially rewriting agreements between insurers and insureds. It goes without saying that an attorney defending an insured has the obligation to fully disclose to the insured conflicts of interest, whether because of the attorney's relationship with the insurer or otherwise. The court said that obligation is independent of the insurer's issuing a valid reservation of rights or obtaining a non-waiver.

The court held that the question of the insurer's liability should turn whether an insured is prejudiced as a result of the conflict, an inadequate or absent disclosure, or other insurer's actions. If an insurer defends its insured when no coverage for the risk exists, the insurer's policy is not expanded to cover the risk simply because the insurer assumes control of the lawsuit defense. But, if the insurer's actions prejudice the insured, the lack of coverage does not preclude the insured from asserting an estoppel theory to recover for any damages it sustains because of the insurer's actions.

INSURER HAD DUTY TO DEFEND

Zurich Am. Ins. Co. v. Nokia, Inc., 268 S.W.3d 487 (Tex. 2008).

FACTS: Nokia, Inc. became involved in a class action lawsuit, alleging that Nokia products emitted radiation causing biological

RECENT DEVELOPMENTS

injury. Nokia had purchased a general commercial insurance policy from Zurich American Insurance Company. In Nokia's policy, Zurich agreed to defend Nokia against suit, but reserved the right to contest the obligation to defend. As a result of the class action suit against Nokia, Zurich sued Nokia, seeking a declaration that Zurich had no duty to defend or indemnify.

The trial court granted Zurich's motion for summary judgment, declaring that Zurich had no duty to defend Nokia. Nokia appealed, and the court of appeals reversed the trial court's ruling, noting that the suits at issue involved a claim of alleged bodily injury and the business risk exclusion did not apply. On appeal to the Texas Supreme Court, Zurich argued that they had no duty to defend Nokia in the class action suit because the class action did not state claims for bodily injury or seek damages because of bodily injury.

HOLDING: Affirmed as modified.

REASONING: In determining whether a duty to defend exists, the Texas Supreme Court follows the eight-corners rule, also known as the complaint-allegation rule. An insurer's duty to defend is determined by the third-party plaintiff's pleadings, considered in light of the policy provisions, and without regard

to the truth or falsity of those allegations. All doubts regarding the duty to defend are resolved in favor of the duty. Where the complaint does not state facts sufficient to clearly bring the case within coverage, the general rule is that the insurer is obligated to defend if there is potentially a case under the complaint within. The insurance policy stated that it covered bodily injury, whereas all of the complaints couched the term as biological injuries. The court was unable to state with certainty that the underlying claims did not seek damages for bodily injury because the terms could have the same meaning.

The court concluded that where a suit includes a potentially covered claim, the insurer must defend the entire suit, even if the claim is groundless or fraudulent. Additionally, the court concluded that where there are covered and non-covered claims in the same lawsuit, the insurer is obligated to provide a defense to the entire suit, at least until it can limit the suit to those claims outside of the policy coverage. The court modified the court of appeals' judgment to provide a duty to defend ended upon filing of the second amended complaint and, as modified, the court affirmed.

DEBT COLLECTION

ATTEMPT TO COLLECT AMOUNTS DUE DID NOT VIOLATE AUTOMATIC STAY

Campbell v. Countrywide Home Loans, Inc., 545 F.3d 348 (5th Cir. 2008).

FACTS: Caesar and Pamela Campbell obtained a loan from Countrywide Home Loans for the purchase of a home. Campbells' monthly mortgage payment contained two distinct elements. It included the monthly installment for principal and interest, and it collected one twelfth of the estimated property taxes and insurance due on the property at year's end. Tax and insurance payments were deposited into an escrow account. Campbells filed a Chapter 13 Bankruptcy. Countrywide filed a proof of claim, listing delinquent pre-petition monthly principal and interest payments, escrow expenses from prior years, and other costs and fees. Countrywide did not include in its claim four months of unpaid escrow payments, which accrued before the bankruptcy.

In addition to its listed claims, Countrywide indicated, in its proof of claim, that it intended to increase Campbells' monthly mortgage payment post-petition to recoup the four months of escrow payments that were unpaid prior to the bankruptcy. Campbells objected to the increase in the mortgage payment, complaining that Countrywide's actions were an impermissible attempt to recover a claim against them that arose before the commencement of the bankruptcy case. The bankruptcy court agreed, granting partial summary judgment and holding that Countrywide's actions constituted a willful violation of the automatic stay. Countrywide appealed challenging the finding that it violated the automatic stay.

HOLDING: Reversed and rendered.

REASONING: The court held that a willful violation of an au-

tomatic stay means acting with knowledge of the stay. Whether the party believes in good faith that it had a right to the property is irrelevant to whether the act was willful or whether compensation must be awarded. Therefore, to establish an actionable violation of the automatic stay the Campbells must establish: (1) that Countrywide knew of the existence of the stay; (2) that Countrywide's actions were willful; and (3) that Countrywide's actions violated the automatic stay. It is undisputed that Countrywide knew of the existence of the stay and that it acted willfully and intentionally when it asserted the right to an increased mortgage payment in its proof of claim. The only issue in controversy was whether Countrywide's actions violated the stay.

Certain categories of actions are statutorily identified as prohibited by the automatic stay. None of these provisions bar a creditor from filing a proof of claim pursuant to bankruptcy code §501. The court found no precedents in which a court has held that asserting a right to payment in a proof of claim constituted a violation of the automatic stay. In fact, the court pointed to a similar case where a bankruptcy court held that filing for a proof of claim is the logical equivalent of a request for relief from the automatic stay, and could not in itself constitute a violation of the stay. The court viewed the analysis persuasive that the Bankruptcy Code allowed creditors to assert any claim even if that claim is contingent, un-matured or disputed. In this case, Countrywide

Filing for a proof of claim is the logical equivalent of a request for relief from the automatic stay, and could not in itself constitute a violation of the stay.