RECENT DEVELOPMENTS

INSURANCE

MANDATORY VENUE PROVISION IN TEXAS INSURANCE CODE ARTICLE 21.49 § 9A GOVERNS VENUE OF CLAIMS

In re Texas Windstorm Ins. Assoc., ____ S.W.3d ____ (Tex. App.—Beaumont 2003)

FACTS: Joe Malley filed a water and mold claim on his Galveston County beach house. The Texas Windstorm and Insurance Association ("the Association") denied his claim. Malley filed suit in Jefferson County, Texas, suing both his homeowner's insurer and the Association. The Association moved to transfer venue from Jefferson to Travis County, arguing the Texas Insurance Code Art. 21.49 section 9A venue provision made Travis County the mandatory venue for the case. Malley argued the provision created a permissive venue and because his homeowner's insurance carriers were subject to suit in Jefferson, that county was proper venue. The trial court denied the Association's motion to transfer venue, and the Association filed a writ of mandamus asserting the venue provision was mandatory.

HOLDING: Writ granted.

REASONING: Article 21.49 created and governed the Association, providing for causes of action to be derived from the statute. Tex. Ins. Code, art 21.49. Where a cause of action and the remedy for its enforcement are derived from a statute, the statutory provisions are mandatory and must be complied with in all respects, or the action is not maintainable. *Rowen v. Texas Catastrophe Property Ins. Ass'n*, 677 S.W.2d 83, 87 (Tex. App.—Corpus Christi 1984). Section 9A was amended in 1991. Before the amendment, courts held Travis County to be the mandatory venue for suits under the section. After amendment, the section stated, "[V]enue in a proceeding against the Association… is in the county in which the property is located or in …. Travis County." The court reasoned the legislature made no indication of intent to change the mandatory nature of the provision when it amended the section.

Joining Malley's homeowner's insurer in the suit against the Association did not change the mandatory nature of the provision. Section 15.016 of the general venue statute of the Texas Civil Practice and Remedies Code states that "an action governed by any other statute prescribing mandatory venue shall be brought in the county required by that statute." Furthermore, section 15.004 provides that in instances where the plaintiff joins multiple claims or causes of action, if one of those claims or causes of action is subject to a mandatory venue provision, the suit must be brought in the county required by the mandatory venue provision.

Section 9A of the Texas Insurance Code mandated that venue for actions against the Texas Windstorm Insurance Association be in Travis County. Following the mandatory venue provisions of the Texas Code, the court granted the Association's writ of mandamus.

AN INSURANCE AGENT HAS NO DUTY TO EXPLAIN POLICY TERMS TO AN INSURED

DISCOVERY RULE DOES NOT APPLY TO INSURED WHO COULD HAVE DISCOVERED INJURY BY READING POLICY

Mauskar v. Hardgrove, ____ S.W.3d ____ (Tex. App.—Houston [14th Dist.] 2003).

FACTS: Anant Mauskar ("Mauskar") purchased four life insurance policies in 1982, 1988, 1990, and 1992, respectively. Mauskar allegedly explained to Hardgrove and Reddy, the insurance agents, his desire to purchase policies that would pay approximately two to three times the death benefit when he reached age 65. Mauskar claimed the agents represented to him that the policies would meet this requirement. Mauskar cashed in the policies in 1999, but did not receive the return he alleged to have been promised.

In July 2000, Mauskar sued the insurance agents and two of the policy issuers, General American and New England Life, for negligent procurement, negligent misrepresentation, fraud, and violations of the Texas Insurance Code and the Texas Deceptive Trade Practices Act. Mauskar asserted the discovery rule in response to defendants' assertion that his claims were barred by the statute of limitations. Each defendant moved for summary judgment on statute of limitations. The trial court granted all motions for summary judgment. Mauskar appealed the summary judgment.

HOLDING: Affirmed.

REASONING: A cause of action accrues when the wrongful act causes a legal injury, even if the fact of the injury is not discovered until later. The statute of limitations starts running when this cause of action accrues. Mauskar's claims, two of which have four-year statutes of limitations and four of which have two-year statutes of limitations, had accrued after July 4, 1996, or July 4, 1998, respectively. However, his causes of action accrued at the time he purchased the policies, which was when the insurance agents allegedly misrepresented the payout to him.

Mauskar alternatively argued his claims were tolled by the discovery rule, which tolls the statute until the plaintiff has knowledge of facts, which through reasonable diligence, would lead to discovery of the injury. The rule is only applicable if the nature of the injury is "inherently undiscoverable," which means that the wrong and injury were unknown to the plaintiff because of the very nature of the injury, and not because of fault of the plaintiff. Mauskar's injury was not inherently undiscoverable because he easily could have discovered his injury by reading the policies.

Mauskar also asserted that although he expressed his payout expectation to the insurance agents, they failed to explain to him that the purchased policies would not have the promised payout. An insurance agent, however, has no duty to explain policy terms to an insured. The insured has a duty to read the policy and is charged with knowledge of the policy

terms and conditions. Mauskar should have discovered the terms of the policies by reading them. Therefore, the discovery rule did not toll the limitations period to defeat the statute of limitations.

USE OF STAFF ATTORNEYS BY INSURANCE COMPANY TO REPRESENT INSURED DOES NOT CONSTITUTE UNAUTHORIZED PRACTICE OF LAW

American Home Assurance Inc. v. Unauthorized Practice of Law Comm., ____ S.W.3d ____ (Tex. App.—Eastland 2003)

FACTS: American Home Assurance Company, Inc. ("American Home") sought a declaratory judgment against the Unauthorized Practice of Law Committee ("UPLC") that an insurance company's use of staff attorneys to represent insureds under their liability policies was not the unauthorized practice of law. UPLC counterclaimed for a declaratory judgment and an injunction to prevent use of staff attorneys to represent insureds. The trial court entered judgment for UPLC, holding this was the unauthorized practice of law, but stayed the injunction pending appeal.
HOLDING: Reversed and rendered.
REASONING: UPLC first argued the employers had the right to direct and control the work of their employees. They argued this created a conflict of interest with the insured because it interfered with the attorney's exercise of independent professional judgment. The court held an employee attorney does not owe an absolute duty of loyalty to his or her employer. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 201 (Tex. 2002). The court noted, the insurance staff attorney, like the outside attorney, may face conflicts; however, his status as an employee is not an irreconcilable conflict. There is no evidence in the record that staff attorneys face conflicts not faced by outside attorneys. The court also noted the ABA Ethics committee has often reaffirmed its ruling that insurance companies can use staff attorneys to represent the insured and that many of the early Texas Ethics opinions relied on the ABA guidelines in this area.

UPLC also argued Texas law only allows an attorney to have one client. The court held although the insured is the primary client, the insurance company also has an interest in the outcome. The insurance company retains the attorney, controls the legal defense, decides if the case should be settled, and pays any judgment or settlement amount up to policy limits. The court noted contract law allowed the attorney to have two clients, but all ethical considerations must be resolved in favor of the insured.

Finally, UPLC argued that the insurance company was "practicing law," in violation of a number of statutes, by allowing its employees to give legal advice, draft documents, and represent an outside client. The court held corporations may use staff attorneys to practice law if they possess a present financial interest in the matter. When the insurance company provides a staff or outside attorney to the insured, it is seeking to protect its own interests. The court also noted 18 out of 20 states that have considered this question held the use of staff attorneys to represent the insured was not the unauthorized practice of law.

WHEN PLAINTIFFS ALLEGE BOTH PROFESSIONAL AND NON-PROFESSIONAL NEGLIGENCE, THE GENERAL LIABILITY INSURER HAS A DUTY TO DEFEND THE UNDERLYING SUIT

Utica National Insurance Company of Texas v. American Indemnity Company ____ S.W.3d ____ (Tex. App.—Austin 2003)

FACTS: A doctors' association purchased general liability insurance coverage from Utica National Insurance Company of Texas. This policy had an exclusionary clause precluding coverage when the injury was caused by a professional service.

After being injected with anesthesia, several patients of the center where the doctors worked became infected with Hepatitis C. This anesthesia was contaminated because an employee who was infected with Hepatitis C had repeatedly stolen anesthesia from the Center's drug storage using contaminated needles, thereby infecting part of the anesthesia supply. These patients filed suit against the doctors alleging both professional negligence in dispensing the anesthetic and non-professional negligence in the storage of the drug.

At the time of the infection, Utica was the general liability insurer. At trial for the underlying suit against the doctors' association, Utica denied their duty to defend, claiming that its exclusion clause barred coverage. The association's other insurance carriers assumed the defense. Subsequently, those carriers filed suit against Utica for breaching its duty to defend the association. The trial court held Utica had breached this duty. The appellate court affirmed.
HOLDING: Affirmed
REASONING: A liability insurer is obligated to defend a suit if the facts alleged in the pleadings would give rise to any claim within the coverage of the policy. *Nat'l Union Fire Ins. v. Merch. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997). The allegations in the pleadings of the underlying suit raised both the possibility that the treating doctors were negligent in their administration of the drug and the possibility that the doctors were negligent in the storage of that drug. Because the plaintiffs alleged both professional and non-professional negligence, the general liability insurer had a duty to defend the underlying suit under the "eight corners" doctrine, which states that an insurer's duty to defend is determined by the allegations in the pleadings and the language of the insurance policy. Therefore, if the complaint could potentially be covered under the policy, the insurer is obligated to defend the case.

To discover the scope of coverage, the court examined the policy as a whole to decide the true intent of the parties. By examining the language of the policy, the court concluded the parties intended the general liability policy to exclude coverage normally provided by professional liability policies, or coverage for liability caused by the breach of a professional standard of care. Because the plaintiffs' pleadings in the underlying dispute alleged a cause of action that could establish liability for the doctors' association even in the absence of a breach of a professional standard of care, the court affirmed the judgment that Utica had a duty to defend the case.

RECENT DEVELOPMENTS

FIFTH CIRCUIT ALLOWS CLASS ACTION AGAINST INSURER'S USE OF CREDIT SCORING TO CONTINUE

Dehoyos v. Allstate Corp., ____ F.3d. ____ (5th Cir. 2003).

FACTS: A proposed class of non-Caucasian insurance customers instigated a civil rights action against Allstate Corporation ("Allstate"), alleging that defendant used a credit scoring system: (1) to target non-Caucasian customers for the sale of more expensive insurance policies and (2) to place non-Caucasian customers in more expensive policies. Plaintiffs claimed that defendant's conduct was racially discriminatory, and thus in violation of the Civil Rights Act.

Defendant filed a motion to dismiss, arguing that the plaintiffs' claim was pre-empted by the McCarran-Ferguson Act ("MFA"). The MFA states that federal laws are not applicable when they are not specifically directed at insurance regulation and either expressly conflict with a state insurance law or frustrate an officially articulated state insurance goal. Defendant specifically contended that plaintiffs' claim violated the MFA because the Civil Rights Act does not regulate insurance, and its application would invalidate state insurance law. The district court denied defendant's motion to dismiss, so defendant filed an interlocutory appeal.

HOLDING: Affirmed.

REASONING: The Supreme Court recently identified three MFA preemption threshold requirements: (1) the federal law must not be specifically directed at insurance regulation, (2) a particular state law or declared regulatory policy enacted for the purpose of regulating insurance must exist, and (3) the application of the federal law to the controversy in question must invalidate, impair, or supercede that state law. *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999).

The civil rights statute under which the plaintiffs sought relief does not specifically relate to the insurance business, so the first *Humana* requirement was met. However, plaintiffs failed to point to any law which the federal civil rights laws conflict with, or any declared regulatory policy which the application of these statutes would frustrate, so the second *Humana* requirement was not met. Appellants could not demonstrate that the federal law in question frustrated a policy associated with the regulation of insurance pricing without identifying an actual policy. The general contention that the application of federal law to the practices at issue would impair the state laws did not meet the *Humana* standard because the impairment must directly conflict with state regulation, frustrate a declared policy, or interfere with an administrative regime. The implied goal of allowing the states to pursue their pricing regulatory goals in isolation was clearly rejected by the *Humana* court as a relevant policy goal. Moreover, federal and state law can concurrently affect the same issues and further the same goals so long as the federal law does not frustrate the state's declared policy.

Appellants could not demonstrate that the federal law in question frustrated a policy associated with the regulation of insurance pricing without identifying an actual policy.

The third *Humana* requirement, impairment caused by the application of the federal law, could not be met without fulfilling the second requirement. Thus the defendant's motion to dismiss was denied because the Civil Rights Act does not expressly conflict with a state insurance law or an officially declared state insurance policy.

EMPLOYMENT RELATED EXCEPTIONS DO NOT APPLY TO BAR INDEMNIFICATION

Waffle House, Inc. v. Travelers Indem. Co. of Illinois, 114 S.W.3d 601 (Tex. App.—Fort Worth 2003).

FACTS: Waffle House, Inc. ("Waffle House") brought action against its comprehensive general liability insurer, Travelers Indemnity Company of Illinois ("Travelers"), and commercial excess liability insurers, Federal Insurance Company ("Federal"), to enforce the policies after Waffle House was found liable to a former employee, Therese Scribner ("Scribner"), and her personnel-recruiting firm, Resource Recruiters, Inc. ("Resource"), for defamation and tortious interference with contract.

Scribner alleged Waffle House executives defamed her by telling Grandy's, a Waffle House competitor and a client of Resource, that she was vindictive and was trying to entice people to leave Waffle House. Scribner also alleged Waffle House caused Grandy's to sever business relations with Resource by disparaging Scribner.

Travelers and Federal argued each of their policy contain exclusions that relate to employment-related activities. The Trial Court agreed and entered summary judgment in favor of the insurers. Waffle House argued on appeal the exclusion does not apply to the claims against them by Scribner and Resource.

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

REASONING: Employment related exclusions within an insurance policy have the effect of barring coverage for indemnification of certain claims. Travelers' policy has an exclusion for personal injuries arising out of any termination of employment, thus it does not cover Scribner's personal injury claim for defamation from her termination of employment.

The court, however, reasoned Waffle House Executives made defamatory remarks about Scribner outside the context of her employment. There must be a causal connection between the injury and the event excluded by policy. *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153, 156. There is no such connection here because the context shows the defamatory statements giving rise to personal injury arose out of an attempt to prevent Waffle House employees from leaving and not out of Scribner's termination. The exclusions, therefore, do not apply, and Travelers owes Waffle House a duty of indemnification.

Federal Insurance argues Waffle House is not covered by its policy because the policy specifically excludes coverage for intentional "personal injury" arising out of actual or alleged

termination of an employee. Similar to the analysis for Travelers' policy, because the defamatory statements made by the Waffle House executives also arise out of Waffle House's need to maintain a stable work force, and not in regard to Scribner's employment, Federal's Employment Related Discrimination Exclusion does not bar coverage under the facts. Federal, therefore, owes a duty to indemnify any amounts over the Traveler's policy limits.

The Court reversed the trial court's summary judgment for Travelers and rendered partial summary judgment for Waffle House against Travelers in that Travelers had a duty to indemnify Waffle House for the damages arising out of the defamatory statements and the employment-related practices exclusion did not apply. The Court affirmed the judgment for Federal to the extent that Federal has no duty to indemnify Waffle House for Scribner's mental anguish damages arising from the defamatory statements. Additionally, the Court reversed the trial court's summary judgment for Federal and held Federal had no duty to indemnify Waffle House for Resource's damages for lost profits and rendered partial summary judgment for Waffle House holding Federal owed Waffle House a duty of indemnification for Resource's lost profits but only to the extent Traveler's policy limits are exhausted.

CONSUMER CREDIT

CAR BUYERS WHO INCURRED NO ACTUAL DAMAGES WHEN A DEALER FAILED TO PROVIDE THEM WITH COPIES OF THEIR PURCHASE AGREEMENTS IN A TIMELY MANNER COULD NOT SEEK STATUTORY DAMAGES UNDER THE TRUTH IN LENDING ACT

Baker v. Sunny Chevrolet Inc., 349 F.3d 862 (6th Cir. 2003).

FACTS: Baker signed a retail installment sales contract ("RISC") to purchase a car from the Defendant. Baker asked for a copy of the contract, and Defendant refused. Baker finally received a copy of the contract approximately three weeks later. Baker filed a class action lawsuit for violations of Truth in Lending Act ("TILA"), alleging that Defendant repeatedly failed to give the consumer "a copy of the contract [in connection with the purchase and finance of a motor vehicle] to keep prior to the consummation of the transaction." Baker did not allege any actual damages or claim that any of the disclosures that were made before they signed the RISC were inaccurate. Baker sued only for statutory damages under TILA. The district court denied the motion for class certification and dismissed Baker's complaint in its entirety on the basis that Defendant's refusal to provide the copies of the disclosures could not give rise to TILA statutory damages. Plaintiffs appealed.
HOLDING: Affirmed.
REASONING: The Truth in Lending Act, 15 U.S.C. section 1638(a), requires creditors to make specific disclosures to lenders. Section 1638(b) provides the required form and timing of these disclosures, and section 1640(a) provides consumers with a cause of action for certain violations of the act. For purposes of summary judgment the court assumed a violation of section 1638(b) took place. Under section 1640(a) there are two types of violations. The first is a complete non-disclosure of enumerated items in section 1638(a), which is punishable by statutory damages. The second is when the enumerated items in section 1638(a) are disclosed, but not in the manner required by section 1638(b), which is not subject to the statutory damages.

In the instant case, the lender only violated the section 1638(b) requirement, therefore, damages were not available because the consumer suffered no actual damages for the untimely delivery of the RISC. Furthermore, section 1640(b) provides that violations that are corrected within sixty days by the lender are not subject to statutory damages, assuming certain conditions are met. Defendant provided Baker with the copy of the RISC two weeks after the signing date, which was clearly within sixty days.

FAIR CREDIT REPORTING ACT DOES NOT PREEMPT ALL STATE LAW CLAIMS AGAINST FURNISHERS OF INFORMATION

FOR PURPOSES OF TILA THE TERM "OBLIGOR" INCLUDES PARTIES TREATED BY CREDITOR AS OBLIGOR

Stafford v. Cross Country Bank, 262 F. Supp. 2d 776 (W.D. Ky. 2003).

FACTS: John Stafford filed a complaint against Cross Country Bank ("Bank") in connection with debt accumulated on a Bank credit card that was fraudulently obtained under Stafford's name. Stafford first learned about this credit card in 2000 when he was denied financing because his credit report showed he was delinquent on a Bank credit card. Stafford contacted the Bank to inform them of the fraudulent credit card. At the Bank's request, Stafford provided his current phone number and residence and they updated their records.

Stafford alleged he subsequently received incessant phone calls from the Bank regarding the account. Stafford demanded the account not be turned over to a collection agency. Stafford hired an attorney, who contacted the Bank and requested any information the Bank had that supported Stafford's demand. The Bank sent Stafford a letter saying it planned to report the account to a collection agency and credit bureaus if the amount was not paid within 48 hours. The Bank was on notice as early as August 2000 that the account was not Stafford's but did not change the account's status from "delinquent" to "disputed" until Stafford sued months later. The Bank moved for summary judgment.
HOLDING: Motion sustained in part, denied in part.
REASONING: The Fair Credit Reporting Act has two separate preemption provisions contained in section