

**Special Thanks to
Contributing Editors**

Nathan Rymer
Clay Wilkerson
Debra Mayfield



NEW DEVELOPMENTS IN THE LAW

Defective Work May Trigger The Duty To Defend

The Texas Supreme Court recently determined whether an insurer under a CGL policy has a duty to defend its insured against a claim of faulty construction. *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, No. 05-0832, slip op., 2007 WL 2459193 (Tex. Aug 31, 2007).

The DiMare family purchased a home from Lamar Homes, Inc., and after several years discovered problems such as cracked sheetrock, which they attributed to a defective foundation. The family sued Lamar, who asked their insurer, Mid-Continent Casualty Company, to defend them under their CGL policy. After Mid-Continent refused, Lamar brought an action to declare that Mid-Continent owed a duty to defend and indemnify them against the homeowner's suit alleging construction defects. In other words, they requested Mid-Continent to insure them in a suit for their faulty performance.

The Court first focused on the language of the CGL policy, and the words "occurrence" and "property damage." The CGL policy form at issue was a standard ISO form. The ISO form is used throughout the United States, and several courts have concluded either that a CGL policy does provide coverage for defective workmanship that injures the work of the general contractor, or alternatively, that a CGL does not provide coverage in those circumstances.

The Court focused on the issue of whether the defective construction that injures the general contractors work (here being the home) constitutes an "occurrence" and "property damage." The Court determined that defective construction or faulty workmanship that damages only the work of the insured is an "occurrence." An "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The word, "accident" was at issue in this definition. An "occurrence" depends on the fortuitous nature of the event. "A deliberate act that is performed negligently is an accident if the effect is not intended or expected, and this result would have been different if the act had been performed correctly." Thus, under this definition, if a party alleges that the insured intended the injury or that the damage was the expected result of the insured's action, the result would not be an accident, and thus, not an "occurrence." To determine if the insured's defective work was intended or accidental must be determined by the facts of the particular case, and the duty to defend by the plaintiff's complaint.

The Court next focused on whether defective construction or faulty workmanship damaging only the general contractor's work is "property damage." "Property damage" is defined as "physical injury to tangible property, including all resulting loss of use of that property."

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The definition does not exclude a general contractor's work, and the home and its parts are tangible property. The DiMare's allegations of cracks in the foundation and the stone veneer would be physical injury to the tangible property. The Court dismissed the argument that CGL insurance does not exist to repair the insured's defective work because a performance bond would accomplish the same goal.

In addition, Mid-Continent argued that the "economic loss rule" should apply and limit the plaintiffs' remedy to a contract claim which the CGL does not cover.

Hot off the press.....

The owners of a condominium project brought suit against the developer and general contractor alleging faulty workmanship and structural defects. The developer brought Fox, a subcontractor, into the suit. Fox had a CGL policy with Amerisure and alleged that Amerisure had a duty to defend. Specifically, Fox argued that in light of *Lamar*, Amerisure had a duty because the damage alleged was an "occurrence" of "property damage." The Court did not reach this argument because the allegations in the petition were excluded by either the "your work" or "impaired property" exclusions. (For more on determining the duty to defend turn to page 4.)

Fox's CGL policy included an exclusion for "your work" which "excludes coverage for

This rule "precludes recovery in tort for economic losses resulting from the failure of a party to perform under a contract." In action it restricts parties to a contract to only contractual remedies. However, in refusing this argument the Court noted that the CGL makes no distinction between tort and contract.

Probably of equal importance, the Court determined that the "Prompt Payment of Claims" statute does apply to the insurer's breach of the duty to defend.

Thus, when an insurer is liable for a claim under an insurance policy, and does not promptly respond to or pay the claim, the insurer will be required to pay 18% interest on the attorneys' fees, as well as reasonable attorney's fees.

damage to another's property arising out of work or operations performed by Fox."

It also contained an exclusion for "impaired property," meaning "property that cannot be used because it incorporates Fox's work or can be restored by repair of Fox's work." All of the damages alleged involved either Fox's own defective work, such as uncaulked penetrations through fire-rated walls, or caused by Fox's defective work, such as damage to metal stud framing and potential loss of use in order to repair.

The court determined Amerisure's duty to defend was not triggered because the allegations in the original complaint were excluded by the "your work" and "impaired property" exclusions. *FoxElectric I, Ltd. v. Amerisure Ins. Co.* Slip op., 2007 WL 2693633 (5th Cir. 2007).

May A Plaintiff Recover Amounts That A Health Care Provider Has Written Off?

It is common practice for medical care providers to accept less than the original billed for their services, or to write off certain amounts pursuant to an agreement with a patient's medical insurers.

Recently, the San Antonio Court of Appeals said a Plaintiff is not entitled to recover amounts written off by a medical provider. Below is a short summary of the case and the Court's reasoning. *See generally, Mills v. Fletcher*, No. 04-06-00345-CV, 2007 WL 1423883 (Tex. App.--San Antonio May 16, 2007, no pet. h.).

In the personal injury case between Plaintiff Fletcher and Defendant Mills, the jury awarded

Fletcher \$1,551.00 for past medical expenses.

On appeal, the parties argued about amounts that were written off by Fletcher's medical providers in the award for past medical expenses. The outcome of this argument hinged on the Court's interpretation of the relevant statute.

Section 41.0105 of the Texas Civil Practice and Remedies Code states, "In addition to any other limitation under law, *recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.*" TEX. CIV. PRAC. & REM. CODE ANN. (Vernon Supp. 2006) (emphasis added).

Mills argued that the amount awarded should be reduced because Fletcher’s medical providers accepted amounts less than the initial bill for payment from Fletcher’s insurance company, and as a result, Fletcher did not “incur” those charges because he would never have to pay those amounts.

In response, Fletcher argued that he “incurred” the medical charges at the time of his doctor visits, and that amounts subsequently written off should not impact his recovery for past medical expenses.

To interpret the meaning of the word “incurred” in the statute the Court looked at its context, common usage and rules of grammar. After referring to several dictionaries, the Court agreed with Mills that “incur” means “to become liable to pay.”

Next, applying common grammar rules to the statute, the Court determined that the word “actually” preceding the words “paid or incurred” modifies both the word “paid” and “incurred.” Therefore, the incurred expenses intended by the statute are the amounts that Fletcher actually had to pay after the adjustments were made.

In conclusion, a plaintiff may not recover amounts that represent medical or health care expenses that have been “written off.”



Sheila Hill and Kinnie Simon keep things in order in the file room.

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Charging Higher Rates Based On Credit Scores Without Notice Might Land Insurance Companies In Hot Water.

The Supreme Court recently ruled on two consolidated cases involving GEICO General Insurance Company (GEICO) and Safeco Corporation (Safeco). Applicants to each company filed claims alleging violations of the Fair Credit Report Act (FCRA). The claims were based on the companies’ failure to provide notice to consumers who received higher premiums than they would have if they had a better credit score. *Safeco Ins. Co. of Am.v. Burr*, 127 S.Ct. 2201, 167 L.E.2d 1045 (2007).

The purpose of the FCRA is to “ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy.” One requirement of the act is that “any person [who] takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report” must notify that consumer. A credit report is considered to be a consumer report under this act. An adverse action is a “denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for.” The consequences of failing to comply with FCRA requirements vary. If the failure was a result of negligence the consumer is entitled to actual damages, but if the failure was willful the consumer may be entitled to actual damages, or statutory damages ranging from \$100-\$1,000, and possibly even punitive damages.

Both lawsuits involve consumers who claim that an adverse action was taken against them when they were given higher premiums than they would have with better credit scores. The alleged violation of FCRA occurred when the companies failed to give the consumers notice of that action.

GEICO has several subsidiary companies that offer different premiums. During the application process customers call an agent who takes information and reviews the applicant’s credit score. An appropriate subsidiary and rate is chosen using this information. The subsidiary company and tier placement chosen is then compared to what the company and tier placement would have been without relying on credit history (called a neutral credit score). GEICO sends the customer an adverse action notice only if the applicant would have a better premium with the neutral score. In the case against GEICO, Plaintiff Edo applied for auto insurance, and after the application process was offered a standard policy with a subsidiary that services moderate risk customers. He would have received the same offer even with the neutral credit score, and in accordance with their policy, GEICO did not send him an adverse action notice. Edo filed suit alleging willful failure to give notice. Safeco also relies on credit reports to set initial insurance premiums, though they do not use the same process as GEICO. Safeco offered Burr and Massey higher rates than the best rates possible, and failed to send adverse action notices. Plaintiffs Burr and Massey also alleged willful violation of the FCRA.



Leah Clemons works behind the scenes to keep her lawyers organized.

The Court first decided what actions would be considered a “willful” violation of the statute. GEICO and Safeco argued that this meant acts known to violate the FCRA, and not acts that were done in reckless disregard of the statute requirements. However, the Court held that the term willful in the context of the FCRA did encompass acts done in reckless disregard of the statute’s requirements.

Next, the Court looked to whether either company actually violated the adverse notice requirement by determining if there was an adverse action at all. Under the statute, an adverse action is a “denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for.” The Court held that even though the plaintiffs were applying for initial policies, with no prior dealings with the companies, that the term “increase” within the definition of an adverse action under the statute does include initial rates for new applicants.

GEICO did not violate the notice requirement because the premium Edo received was the same as he would have received if his credit score had not been taken into account and the neutral score was used. Examining his report alone did not trigger the notice requirement, and GEICO did not violate the statute.

The applicants to Safeco did not receive any notice even though they did receive higher rates based in whole or part on their credit scores. Safeco stated that they did not believe the FCRA applied to initial applicants. Prior to this case, the term “increase” was not fully defined by either the Federal Trade Commission or any court of appeals. Because the action was a result of a reasonable reading of the FCRA’s terms, the Court held that they did not act in reckless disregard of the requirement.

In conclusion, when a premium is set based on a credit score, and as a result of the credit score the applicant receives a less than favorable rate, an adverse notice letter may be required. Please feel free to discuss this or any other issue with us.



Jack Jackson prepares for an upcoming hearing on behalf of his client.

May Extrinsic Evidence Be Used to Determine Whether A Duty to Defend Exists?

In a recent case, the Texas Supreme Court ruled on the issue of using extrinsic evidence (evidence not contained in the petition) to determine an insurer’s duty to defend. The Court reaffirmed the “eight corner rule,” and decided not to recognize an exception to this rule, despite the fact that extrinsic evidence would have shown that the events took place outside the coverage period. *See generally, GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305 (Tex. 2006).

GuideOne Elite Insurance Company issued a CGL policy to Fielder Road Baptist Church to be effective on March 31, 1993. The policy included liability coverage for sexual misconduct.

On June 6, 2001, Jane Doe filed a sexual misconduct lawsuit against the Church and also against Charles Patrick Evans, a former associate youth minister at the Church. Doe alleged that Evans sexually exploited and abused her during his time as a Church employee, and under their direct supervision and control. The Church insisted that GuideOne defend it in the lawsuit and indemnify it for any judgment or settlement that may arise. GuideOne then obtained discovery information on Evans’ employment history with the Church, and learned that Evans was not employed by the Church during the policy period. The discovery showed that the Church had not employed Evans after December, 1992, over three months before the policy took effect.





GuideOne prevailed at the trial court based on extrinsic evidence. However, the Court of Appeals reversed because they believed the trial court improperly considered extrinsic evidence of Evans' employment history with the Church in reaching its decision that GuideOne did not have a duty to defend the Church. By extrinsic information the Court meant evidence that was not part of a pleading filed by Jane Doe, or the insurance policy itself. This rule is commonly known as the "eight corner rule."

On October 20, 2005, GuideOne argued before the Texas Supreme Court that the extrinsic evidence which showed Evans was not employed during the policy period should be considered when determining if GuideOne had a duty to defend.

In its decision, the Court acknowledged that there are other courts that recognize exceptions to the "eight corner rule," particularly when the use of extrinsic evidence will be relevant only to an "independent and discrete coverage issue, not touching on the merits of the underlying third-party claim."

In contrast, the extrinsic evidence that GuideOne sought to admit was relevant to both the coverage issue and the merits of the case because it contradicted information contained in Doe's pleadings. The Court would not recognize an exception for this "overlapping" extrinsic evidence.

The duty to defend is invoked when a plaintiff makes allegations that potentially support a claim covered by the insurance policy. Doe's pleadings alleged that Evans sexually assaulted her during the coverage period and thus, triggered GuideOne's duty to defend. The Court noted that in the insurance policy at issue, the duty to indemnify was constructed more narrow than the duty to defend. The duty to indemnify the Church was triggered in the event of a meritorious claim for sexual misconduct, but the policy described more broadly that GuideOne had the duty to defend "any suit brought against the insured seeking damages, even if the allegations of the suit are groundless, false or fraudulent..." Accordingly, even though GuideOne knew that Evans was not an employee of the Church during the coverage period, under the language of the policy it still had a duty to defend. Given this ruling by the Texas Supreme Court, it is questionable as to whether any situation exists that would allow for extrinsic evidence to be used in determining an insurance company's duty to defend. If you would like more information, do not hesitate to contact us.



ATTORNEY SPOTLIGHT: Nathan Rymer

In this section, we invite you to get to know the attorneys who are working hard for your benefit.

Meet **Nathan Rymer**, the managing shareholder of RMJE. He was born in Tennessee, but he and his family moved to Texas as fast as he could. Mr. Rymer grew up in Center, Texas where he graduated from High School. He attended Stephen F. Austin State University, and in 1991 he graduated with a degree in political science and history. Mr. Rymer then attended South Texas College of Law where he was a member of the Order of the Lytae and the Varsity Moot Court Team. While on the team, he was named National Champion and awarded the "Best Brief" distinction at the 1993 Starr Insurance Moot Court Competition in Hartford, Connecticut. In addition, his mock trial team was named "Best Team" at the Abraham, Watkins, Nichols, Ballard & Friend Mock Trial Competition.

Mr. Rymer's accolades have continued well into his professional carrier. Texas Monthly Magazine named Mr. Rymer as a 2004 Super Lawyer's Rising Star. He has been listed in this Super Lawyers publication as one of the best attorneys under age 40 for the last four consecutive years. In addition, H Texas Magazine named Mr. Rymer one of the top lawyers in Houston in its "Lawyers on the Fast Track 2004" November/December 2004 issue. He has appeared on this list for three consecutive years.

Outside his legal practice, Mr. Rymer enjoys spending time with his family. He lives in Katy with his wife Lyl and their four children, Ashley, Kameron, Douglas and Taylor. Some of the family's favorite activities include swimming and watching movies together. In addition, Mr. Rymer is an avid sports fan and particularly enjoys cheering for the Astros, Rockets and the Cowboys.

Mr. Rymer has litigation experience in state and federal courts throughout the country. His areas of practice include areas such as product liability, toxic torts, construction defects, oil and gas claims, as well as premises liability litigation. Mr. Rymer's practice also involves analyzing and litigating insurance coverage issues arising out of alleged insurance bad faith, insurance policy formation disputes, equitable subrogation claims and declaratory judgment actions.

--by Amanda Schesser



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Nathan Rymer



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OFFICE UPDATES

IT WAS A BUSY SUMMER FOR THE RMJE LAW CLERKS

This summer, the firm welcomed four law students into the office for valuable hands on experience.

Amanda Schesser worked at RMJE during the first summer session, and has returned to work during her third year of school. A Houston native, she grew up in Friendswood and graduated from the University of Houston in 2004 with a sociology degree. She currently attends South Texas College of Law where she is a member of the Order of the Lytae. She will graduate in May 2008.

Holly Morgan finished her first year and then enjoyed working at RMJE during the first session of summer. Holly is originally from Houston, and she graduated from Texas A&M with a degree in sociology. She recently began her second semester of law school at Wake Forrest University School of Law.

Robbie McDonough began working with the firm during the second summer session, and he has returned to work during his third year. Robbie grew up in Houston, graduated from Southern Methodist University, and currently attends South Texas College of Law. Robbie participates in the school's mock trial program and recently won the award for best speaker. He has been married for one year to his wife, Ashley, who is a nurse at Texas Children's Hospital. Robbie will graduate in May of 2008.

Wilson Polland, a student of South Texas College of Law, also enjoyed clerking for RMJE this past summer. He clerked during the second half of the summer, and he anticipates graduating from STCL this December. Congratulations, Wilson!



Law clerks rolled up their sleeves for hands-on experience this summer.

For more information about our law school clerkship program contact newhire@rmjelaw.com

We are pleased to introduce you to our newest members of the RMJE family!



Stephanie Davis is excited about the newest family member.

RMJE "SPECIAL EDITIONS"

Stephanie and B.J. Davis recently welcomed their second child into their family. On August 8, 2007 Kierstyn Faye Davis was born. Kierstyn weighed seven pounds and was 19 inches when born. She proudly boasts a cleft in her chin which is identical to that of her grandfather. Stephanie is an accounting clerk and has worked at RMJE for one year. The couple also has a four year old named Blake.



On July 10, 2007, Wendy and Rhet Taylor welcomed the arrival of Ryley Wade Taylor. Ryley, the couple's first son, weighed in at 9 lbs and 9.7 ounces and was 21 inches long. Wendy has been an employee at RMJE for two years and is an Administrative Assistant for Clay Wilkerson and Joshua Nelson-Archer. The couple "souped-up" Ryley's room by painting the walls "Chevy orange" and decorating it with plenty of hot rod cars. Congratulations, Wendy!



Wendy Taylor is all smiles when she talks about Ryley.

Closing Thoughts...

We hope you enjoyed this newsletter, found the articles helpful to your business, and got to know the RMJE family that is working hard for you! Please contact us if you have any questions regarding a topic from this article, or anything else we may do to assist you.