
Agents & Brokers

Policyholder's Litigation and Settlement of Coverage Dispute with Insurer in England Does Not Preclude Later Lawsuit against Broker in United States If Factual and Legal Arguments in Both Cases Are Consistent

Broker's Election of Remedies and Judicial Estoppel Defenses Rejected and Summary Judgment Based on Those Defenses Reversed

Horizon Offshore Contractors, Inc. v. Aon Risk Services of Texas, Inc., ___ S.W. 3d ___, 2009 WL 620257 (Tex. App.—Houston (14th Dist., March 12, 2009)

Case at a Glance

A clause in a commercial brokerage agreement making the brokerage the policyholder's agent for purposes of confidential communications between the brokerage and the policyholder's legal counsel and between the brokerage and the policyholder's insurance carriers did not create a fiduciary relationship between the broker and the policyholder.

A policyholder's litigation and settlement of a coverage dispute with its insurer in England did not constitute an election of remedies that precluded the policyholder from suing the broker responsible for placing the policy where the remedies, rights, and facts the policyholder alleged against the broker were not inconsistent with the remedies, rights, and facts the policyholder alleged in the English suit.

The trial court improperly entered summary judgment based on judicial estoppel. Neither sworn statements by an expert witness in prior litigation, nor non-sworn statements by a policyholder in prior litigation, nor sworn statements by the policyholder in the litigation in which judicial estoppel is invoked are a proper basis for a finding of judicial estoppel.

Summary of Decision

This is a long and complicated opinion addressing

a Texas trial court's grant of summary judgment in favor of an insurance brokerage in a policyholder's lawsuit accusing the brokerage of breach of contract, negligence, negligent misrepresentation, and breach of fiduciary duties. The trial court granted summary judgment after the policyholder settled litigation in England against the insurer that issued the insurance policy at the heart of the policyholder's claims against the brokerage. The trial court held that the brokerage did not owe the policyholder a fiduciary duty, and dismissed the other three causes of action based on two affirmative defenses: the doctrine of election-of-remedies and the doctrine of judicial estoppel. Both affirmative defenses were based on the policyholder's assertions and arguments against the insurer in England. The court of appeals unanimously affirmed as to the non-existence of a fiduciary duty, and unanimously reversed as to the other three causes of action. It held that the district court had misunderstood and misapplied the doctrines of election-of-remedies and judicial estoppel.

Relatively Established Facts. The appellant-insureds, the Horizon group of companies ("Horizon"), provide offshore marine construction services to the petroleum industry. The appellee-insurance-intermediary ("Aon") served as Horizon's insurance broker. In 2004, they entered into a one-year service agreement, paying Aon a base fee of \$400,000, plus commissions on insurance placement, in return for which Aon agreed to perform a whole range of services, including developing underwriting information, recommending and procuring insurance, and reviewing and monitoring claims handling. In the Agreement, Aon and Horizon chose Texas law and agreed that all claims arising out of or relating to the Agreement shall be resolved in Houston, Texas.

During the period of this Aon-Horizon agreement, Horizon contracted with Israeli Electric Corporation to construct an undersea pipeline, using two barges. The barges had to be towed from Sabine Pass, Texas to Ashod, Israel. Horizon needed insurance for the barges. Aon obtained coverage from Beazley Underwriting, Inc., a British underwriting syndicate. The Beazley policy provided \$28 million in coverage for the tow with no deductible, and English law applied under the explicit "Choice of Law Clause," with England explicitly named as the exclusive venue in the "Forum Clause." The choice of law and choice of forum clauses would prove significant for two

reasons: (1) English law apparently places greater disclosure requirements on policyholder's than does Texas law; (2) the choice of forum was different from the brokerage agreement's choice of Houston, Texas, precluding Horizon from suing Beazley and Aon in a single lawsuit.

Off the coast of North Carolina, fire started on one of the barges. The barge crew, which was not working in the area at the time, could not put the fire out, and abandoned ship. The barge was lost, though not the crew. Horizon immediately notified Beazley, which issued a reservation-of-rights letter. The ground was that the application Aon submitted on behalf of Horizon made insufficient disclosures about the amount and type of work that was to be done on the barge during towing. Beazley also cancelled coverage on the other barge, which did not burn and was set to sail for Israel. This forced Horizon to immediately procure replacement coverage that was \$384,375 more expensive than the insurance that Beazley had provided. Aon received an 18% commission on this replacement policy.

Litigation Between Horizon and Beazley. Shortly after reserving its rights, Beazley instituted a "declination proceeding" in England seeking a judicial determination that there was no coverage for the casualty based on Horizon's alleged misrepresentations and failure to sufficiently disclose the work to be performed during the tow, as required under English law. Aon was not a party in the English lawsuit.

For its part, Horizon sued Beazley in Texas, but got no place. Indeed, it was enjoined by the English court from pursuing the Texas case. After being forced to use the English court, Horizon counterclaimed against Beazley in England. In July 2006, Horizon settled its claims against Beazley in the English suit for about half of the policy limits. Horizon incurred approximately \$6 million in attorney's fees defending the English suit.

The Present Litigation between Horizon and Aon. After settling the English suit, Horizon pursued Aon in Texas state court, as prescribed in the 2004 agreement already outlined. Horizon's suit against Aon alleged causes of action against Aon for breach of contract, negligence, negligent misrepresentation, and breach of fiduciary duties. Significantly, Horizon did not allege that the Beazley policy Aon acquired provided no coverage, that the policy was invalid due to failure to make all the disclosures, or that Aon failed

to procure any insurance at all. The gravamen of Horizon's suit against Aon was that Aon was negligent in allowing the Beazley policy to issue with English choice of law and choice of forum clauses, and in communicating with and between Horizon and Beazley in a manner that virtually required settlement of the English suit.

As for damages, Horizon sought the rest of Beazley's policy limits (or, in the alternative, the remainder of the value of the lost barge), its attorney's fees in the English case, the extra premium it had to pay to get a substitute for the one Beazley canceled, return of the unearned premium and commission, "sue and labor" expenses, expert witness fees, expenses in the English lawsuit, reasonable attorney's fees for the Texas case, and pre- and post judgment interest plus court costs in the Texas case.

Aon moved for summary judgment. With respect to the breach of fiduciary duty claim, Aon asserted that it did not owe Horizon a fiduciary duty. However, Aon did not challenge the substantive elements of Horizon's remaining causes of action. Instead, Aon asserted two affirmative defenses—election of remedies and judicial estoppel—based on inconsistency between the English litigation and the present litigation in Texas.

The Texas trial court entered summary judgment for Aon, and Horizon appealed. The Texas Court of Appeals, Houston, ruled that the trial court correctly granted summary judgment on the breach of fiduciary duty cause of action because the summary judgment evidence conclusively proves the broker did not owe the Horizon a fiduciary duty. As to the remaining claims, the court of appeals reversed and remanded because the broker did not conclusively prove entitlement to summary judgment based on election of remedies or judicial estoppel.

Fiduciary Duty Issue. Horizon took the position that, under the terms of the brokerage agreement, Aon was its legal agent. Disagreeing, the court pointed out that the agreement expressly states that Aon is not Horizon's agent. There is narrow exception designed to preserve the attorney client privilege, but it has no meaningful extensions.

Texas law is otherwise perfectly clear, says the court: as a matter of law, insurance intermediaries are not the fiduciaries of their customers/clients, and they do not owe them fiduciary duties for any other reason, although one could imagine an explicit agreement to

the contrary. Interestingly, the court of appeals states—alas, without explanation or argument—that Texas appellate cases holding that insurance intermediaries are generally the agents of the insureds are not on point.

Election of Remedies. The Texas Supreme Court is not fond of this doctrine. Its contours are elusive, and it is easily confusable with other legal doctrines; it has no “single underlying principle[.]” In *Bocanegra v. Aetna Life Insurance Company*, 605S.W.2d 848, 851 (Tex. 1980), the Texas Supreme Court explained the elements of an election of remedies defense:

The doctrine of election may constitute a bar to relief when (1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states of facts (3) which are so inconsistent as to (4) constitute manifest injustice. . . . There is no problematic election, that is, no inconsistency in choices, when one first unsuccessfully pursues a right or remedy which proves unfounded and then pursues the one that is allowed.

Id. at 851-52. A plaintiff may plead two positions and/or two inconsistent sets of fact against one or more defendants; it may settle with one such defendant and pursue the other; under the right circumstances this can happen in separate lawsuits. As the court of appeals observed in this case, “[t]he Supreme Court of Texas ha[s] made it clear that the election-of-remedies doctrine may be successfully invoked only in limited circumstances.”

So when does the doctrine bar coverage. The *Barcanegra* case puts it this way:

an election will bar recovery when the inconsistency in the assertion of a remedy, right, or state of facts is so unconscionable, dishonest, contrary to fair dealing, or so stultifying [to] the legal process, or trifles with justice or the courts as to be manifestly unjust.

Id. at 851. In addition to quoting this language, the court of appeals in this case puts the point this way:

The core purpose of the election-of-remedies doctrine seems to be to prevent a party from

abusing the judicial process by obtaining a recovery against one defendant by asserting one set of facts and then later suing a second defendant seeking recovery by denying the alleged facts upon which the party recovered in the first suit.

Thus,

if a party successfully pursues one remedy against one defendant based on one set of alleged facts and then files a subsequent action against another defendant, the election of remedies will bar the second suit if the alleged facts or remedies in that [second] suit are sufficiently inconsistent with the alleged facts or remedies sought in the first suit.

No such inconsistencies existed between the English suit and the present suit, said the court of appeals. In addition, “to the extent that there is any inconsistency, it is not so unconscionable, dishonest, contrary to fair dealing, or so stultifying to the legal process or trifling with justice as to be manifestly unjust.”

First, at least allegedly, but for Aon’s error, Horizon could have sued both Beazley and Aon in Houston in the same case. If that had happened, then according to all applicable cases, there could be no problem as to election.

Second, under Texas law, it would violate the doctrine of election for an insured to claim in one case that there was coverage under an insurance policy and then claim in a second case that there was no coverage. *Lomas & Nettleton, Co. v. Huckabee*, 588 S.W.2d 863 (Tex. 1977). That did not happen in this case, said the court of appeals. In England, Horizon alleged that there was coverage, and came to the conclusion that it could not win because of certain components of English law pertaining to disclosure. In this case, Horizon did not allege that there was no coverage. It alleged that it could not recover under the contract of insurance because of the conduct of Aon. Thus, there was no inconsistency, so the doctrine of election-of-remedies does not apply. (For a court’s more recent use of this rule the results, though not reasoning, of which are more favorable to Aon see, *Metroflight, Inc. v. Shaffer*, 581 S.W.2d 704 (Tex. App.—Dallas, writ ref’d n.r.e.).)

Judicial Estoppel. The other legal theory which was involved in Aon's summary judgment motion was the doctrine of judicial estoppel. This rule is much narrower than its name suggests, and it is not a widely cited or used rule; indeed, those who try to use it seldom win. Below is some of the Texas law; it is not fundamentally dissimilar from that of the rest of the country, although there are some variations. The authoritative Supreme Court of Texas case reads this way:

The doctrine of judicial estoppel is not strictly speaking estoppel at all but arises from positive rules of procedure based on justice and sound public policy. It is to be distinguished from equitable estoppel based on inconsistency in judicial proceedings because the elements of reliance and injury essential to equitable estoppel need not to be present. 'Under the doctrine of judicial estoppel, as distinguished from equitable estoppel by inconsistency, a party is estopped *merely* by the fact of having alleged or admitted in his pleadings in a former proceeding *under oath* that contrary to the assertion sought to be made.' 31 C.J.S., Estoppel, §121, p. 309. . . . It has likewise been held that it is not necessary that the party invoking this doctrine should have been a party to the former proceeding."

Long v. Knox, 291 S.W.2d 292, 295 (Tex.1956) (emphasis added).

Interestingly, the *Long* court cited no Texas cases. It remains the central case under Texas law, and Texas law has changed only slightly. Thus, subsequent Texas cases hold that the party estopped judicially must—at last usually—have been successful in the previous litigation. *Spera v. Fleming, Hovenkamp & Grayson, P.C.*, 25 S.W.3d 863, 871-72 Tex. App.—Houston [14th Dist. 2000, no pet.]. And the public policy foundation of the doctrine of judicial estoppel has nothing to do with duties running from the alleged perpetrator and the opposing party in the subsequent lawsuit; rather, the "doctrine is intended to protect the integrity of the judicial system and to prevent a party from 'playing fast and loose' with the courts to suit the party's purposes. . . . [I]ts purpose is to prevent intentional self-contradiction as a method of gaining

an unfair advantage." *Brown, L.L.P. v. Lanier Worldwide, Inc.*, 124 S.W.3d 883, 898-899 (Tex. App.—Houston [14th Dist.] 2004, no pet.) Based on this law, said the court of appeals, none of Aon's factual contentions justify summary judgment. It gave five reasons for its view.

First, Aon contended that deposition testimony of a Horizon corporate representative *in this case* contained assertions about the previous case which give rise to judicial estoppel. The court of appeals rejected this view, since those sworn statements occurred in this case, not the previous case. Furthermore, said the court, "this deposition testimony does not prove up any sworn statements by Horizon in the English lawsuit."

Second, Aon invoked sworn statement made by Horizon's expert witness in the English lawsuit. The court also rejected this testimony as a basis for judicial estoppel:

Although an expert witness may be hired by one party to testify on that party's behalf, rarely will an expert witness agree to be under the party's control with respect to his testimony. Therefore, the testimony of an expert witness does not, ipso facto, bind the party who retained the witness, although in some circumstances it may if the witness is also an agent or employee of the party that hired him.

Thus, the expert's testimony did not bind Horizon. See *McChuskey v. Randall's Food Markets, Inc.*, 2004 WL 2340278 (Tex. App.—Houston [14th Dist.], pet. denied) (mem. op).

Third, Aon relied on a group of sworn statements by an employee of Horizon. The statements started with a description of the barge riding crew as to what they would be doing while the barges were being towed; this description was passed on to Aon and then to Beazley. The problem here, according to the court, was that Horizon was not rejecting what that employee had said, nor that it was presenting anything in contradiction to his statements. "Therefore, this prior sworn statement is not inconsistent with Horizon's position in this case and is not a proper basis for judicial estoppel."

Finally, Aon argued that Horizon's "Opening Submissions" in the English lawsuit were inconsistent

with its position in the current lawsuit. Disagreeing, the court noted that the Opening Submissions were “not sworn and therefore may not be used as the basis for judicial estoppel.”

Comments

The panel agrees that it is bound to follow the election-of-remedies set forth in *Bocanegra*. At the same time it argues that this rule—at least conceivably—permits unfair results.

[I]t seems to unfairly penalize (1) parties, such as Horizon, who happen to have agreed to mandatory forum-selection clauses required that defendants be sued in different forums, and (2) parties who happen to be unable to obtain personal jurisdiction over all defendants in the same forum. . . . But for these often fortuitous events that preclude suing all defendants in the same forum, the plaintiff could have sued the defendants at the same time and in the same suit, which case the election-of-remedies doctrine would not bar seriatim settlements or recoveries based on inconsistent factual allegations.

The court of appeals takes this matter up again in another footnote:

The election-of remedies defense does not apply to seriatim settlements based on inconsistent factual allegations that were simultaneously made against defendants in the same case. [This is established Texas law.] If for various reasons that may be beyond the plaintiff’s control, a plaintiff cannot sue two defendants in the same forum, then it still may avoid the election-of-remedies defense by settling both suits at the same time. If the defendant in one suit is willing to settle but the defendant in the other suit to which the election-of-remedies doctrine otherwise would apply is unwilling to settle at that time, then the election-of-remedies defense encourages the plaintiff not to settle the first suit until the second suit is ready to settle; otherwise the settlement of the first suit would bar any recovery in the second suit.

But settlements are “highly favored” by Texas public policy, as Justice Campbell concurring in the *Bocanegra* case explicitly recognized. See *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51 & 60 n. 3 (Tex. 2008), “citing Justice Campbell’s concurring opinion in *Bocanegra* for a similar proposition. // Quinn

Automobile Insurance

New Jersey Requires a “Substantial Nexus” for Auto Coverage

Injury with Incidental Relationship to Auto Not Covered

Penn National Ins. Co. v. Costa, 966 A.2d 1028 (N.J. 2009)

Case at a Glance

The New Jersey Supreme Court has held that an injury must have a “substantial nexus” to the maintenance of a motor vehicle to be covered by that vehicle’s policy. A claimant who slipped and fell onto a vehicle that was being repaired, therefore, was not covered by the auto policy.

Summary of Decision

The case of *Penn National v. Costa* was, in effect, a dispute between two insurers over responsibility for a freak accident. In 2004, Frank Costa was changing a tire in his driveway, when an acquaintance stopped by and offered to help. Costa waved him off and the friend, while turning to leave, slipped on a patch of ice and hit his head on the jack supporting Costa’s truck. Gulf (Costa’s auto insurer) and Farmers (Costa’s homeowners insurer) each claimed the other’s policy applied. The trial court sided with Farmers, the Appellate Division reversed, and the Supreme Court reversed again and reinstated the trial court’s ruling.

The Supreme Court initially noted that, while numerous cases had considered when an injury arises out of the “use” of a vehicle, hardly any had addressed when an injury arises from its “maintenance.” The