

workers' compensation by Fireman's Fund Insurance. Reliance became insolvent and Colamaria's workers' compensation claim was therefore made against CIGA.

The parties went to trial before a workers' compensation judge (WCJ) on the issues of employment and insurance coverage and liability. CIGA agreed to pay \$127,308 in compensation and reserved any right to contribution and/or reimbursement from the defendants. CIGA also filed a petition to recover all benefits paid. Rocket Science and Fireman's Fund asked to be dismissed as defendants, contending that they did not intend insurance coverage for employees like Colamaria under Labor Code § 3602(d). The WCJ found that Payday was the general employer and Rocket Science was the special employer of Colamaria when he injured his back. The WCJ denied the motion for dismissal by Fireman's Fund and Rocket Science, finding that because their liability was joint and several, and the Fireman's Fund policy did not contain an express exclusion of coverage for special employees like Colamaria, the claim was covered by other insurance and not CIGA. The WCJ based the findings on the continuing agreement between Payday and Rocket Science, the language of Reliance and Fireman's Fund workers' compensation policies, and testimony of witnesses.

The Workers' Compensation Appeals Board (WCAB) adopted the WCJ's findings and denied Fireman's Fund's petition for reconsideration. The court of appeal initially denied Fireman's Fund's and Rocket Science's petition for writ of review. The California Supreme Court granted review and directed the court of appeal to vacate its order and issue a writ of review.

On reconsideration, the court of appeal affirmed the decision of the WCAB and remanded, concluding that Payday and Rocket Science were jointly and severally liable employers to employees like Colamaria for workers' compensation, and that the liability of Rocket Science and Fireman's Fund was not extinguished by compliance with Labor Code § 3602(d). Section 3602(d) provided that employers who had complied with the statute's requirement of securing payment of compensation were not subject to penalties for failure to provide workers' compensation coverage. The legislature did not include joint and several liability to employees for workers' compensation in the provision extinguish-

ing penalties, however. Section 3602(d) also did not preclude Rocket Science from having applicable worker's compensation coverage under the Fireman's Fund policy, the court concluded. The coverage under the Fireman's Fund policy was clear, explicit, broad and unqualified by an exclusionary endorsement, and because the policy was unambiguous there was no need to go outside its provisions to interpret coverage and intent. Further, the fact that Payday and Rocket Science agreed and obtained the Reliance policy under § 3602(d) was insufficient to extinguish workers' compensation coverage because the statute allowed Rocket Science to have applicable coverage under the Fireman's Fund policy. // Holt

Liability Insurance/ Anti-Assignment Clauses

Under Texas Law, Anti-Assignment Clauses in CGL Policies Are Valid and Enforceable

Court Refuses to Make Anti-Assignment Clause Inapplicable to Liability for Loss Occurring Before Assignment

Keller Foundations, Inc., &c. v. Wausau Underwriters Insurance Co., ___ F.3d ___, 2010 WL 4673026 (5th Cir., November 19, 2010)

Case at a Glance

This case was decided, by the Fifth [federal] Circuit of Appeals, using Texas law. Basically, corporation X sold most of its assets and liabilities to corporation Y. There were exceptions, including most of X's insurance policies. Y agreed to be responsible for virtually all of X's legal obligations. After the sale was complete, suits were filed against X on tort theories. These arose from X's presale-of-assets work. Y assumed the defense of X in these cases and assumed liability. Y sought defense and indemnity from X's liability insurer, Wausau. Wausau refused based on its policy's anti-assignment clause. Y filed suit, and on cross-motions for summary judgment, Y prevailed. The magistrate held that the non-assignment clause did not prohibit post-loss

assignments. The Fifth Circuit reversed the magistrate and granted Wausau summary judgment, holding that the anti-assignment clause applied regardless of when the loss occurred.

Summary of Decision

Enough Facts. The business facts in the case at hand were more complex than those just sketched. There were several seller companies; several buying companies; the relevant portion of the purchase agreement was short but complex; it looks like the buying companies may have reorganized; and company names were changed. The fundamental and relevant facts, however, were actually no more complex than outlined above under “Case at a Glance,” so the entirety of the decision, as to law, its legal reason reasoning, and therefore its general application can be understood in the XY terms set forth there. Hence this discussion will proceed based on them.

Starting Points. A discussion like this one must begin with two basic propositions. First, CGL policies, like virtually all other insurance policies, contain a “non-assignment clause,” or better yet an “anti-assignment clause,” or an “assignment forbidding clause.” The idea is that if a right to coverage is assigned without the provable consent of the insurer, the insurer has no obligation to pay any claim by the assignee(s). This proposition is universal in all CGL (and other) forms and cannot be eliminated without an endorsement. It is also standard in all manuscripted policies, of whatever type, as well.

Second, some states and some standard treatises hold or argue that these clauses apply only to pre-loss assignments but do not apply to post-loss assignments. With regard to this second point *Couch on Insurance* states that “the great majority of courts adhere to the rule that general stipulations in policies prohibiting assignment thereof except with the consent of the insurer apply only to assignments before loss and do not prevent an assignment after loss.” (See §35:7 (2010)). This short chapter is entitled “Assignment of Policy: Factors Affecting Assignment,” and the relevant subsection, which is a page and half long, is entitled “General Rule that Nonassignment Clause Applies Only Before Loss.” The main point of this reference is to observe (1) that while a chose-in-action could not be assigned many years ago—say a

century or more—they are now much more assignable; and (2) much more general and flexible principles have developed over many years tending (at least) to permit the post-loss assignability of insurance claims. The majority of courts now reason that “[t]he purpose of a no assignment clause is to protect the insurer from increased liability, and after events giving rise to the insurer’s liability have occurred, the insurer’s risk cannot be increased by a change in the insured’s identity.” *Id.*

The Fifth Circuit in *Keller* rejected the Couch-Majority position as inconsistent with Texas law. In so doing, the court refused Y’s invitation to chart a new course based on several theories, namely, that: (1) the assignment of the right to the proceeds of an insurance claim is different in an assignment of the insurance itself; (2) the insurer must show the assignment prejudiced its interest; and (3) coverage transfers with liability by operation of law.

Precedent. The few Texas appellate cases to consider whether anti-assignment clauses apply to pre-assignment losses reject the Couch-Majority position and apply the language of the no assignment literally as written. The most interesting Texas case is a court of appeals case—not a Texas Supreme Court case—in which an accident victim assigned her claim to the tortfeasor’s liability insurance to a chiropractor who was treating her. The purpose of the post-accident and injury assignment was to get the chiropractor paid by the liability insurer belonging to the guilty causer of the car wreck. *Farmers Insurance Co. v. Gerdes*, 880 S.W.2d 215 (Tex. App.—Fort Worth, 1994, writ denied). Another case, *Conoco Inc. v. Republic Insurance Co.*, 819 F.2d 120 (5th Cir. 1987), was a complex multi-business case in which an insured attempted to assign rights to first party property insurance covering the insured’s ship after the ship sank. The holding in *Conoco* is pretty clear: under Texas law, no assignment clauses are to be enforced literally and across the board. Obviously, if anti-assignment clauses in first party property policies are applicable to pre-assignment losses, where the date of the loss is unambiguous, such clauses are similarly enforceable under liability policies, where liability for the claimant’s pre-assignment loss has yet to be determined.

Chose[s]-in-Action. Y Corporation attempted to circumvent the anti-assignment clause as a chose-in-action, that is, a right to the proceeds of insurance,

rather than the insurance claim itself. The court rejected this view. The fact that the plaintiff is seeking the proceeds of an insurance claim, rather than the claim itself is of no consequence whatsoever. In fact, the same argument had already been rejected in the *Conoco* case over 20 years ago. Perhaps *Y* thought that after 20+ years, the Fifth Circuit might be willing to change its mind. Instead, the court repeated the observation to be found in *Conoco*: “Words cannot change a plugged nickel into a silver dollar.”

Prejudice. The court rejected the view that an insurer in *Wausau*’s position would have to prove that it was prejudiced by the assignment in order to invoke the no-assignment clause. While it is true, the court said, this principle applies in some cases, *e.g.*, settlement-with-out-consent and notice-of-claim clauses, there is no authority that such an exception applies here. Instead the fundamental principles of contract law apply.

Transfer by Operation of Law. The court acknowledged that the “question of whether insurance coverage for pre-acquisition liabilities transfers by operation of law to a purchasing company who assumed those liabilities by contract is one of first impression for Texas courts.” The *Y* Corporation urged the court to adopt the reasoning of a Ninth Circuit case focusing on California law, *Northern Insurance Co. v. Allied Mutual Insurance Co.*, 955 F.2d 1358 (9th Circuit, 1992). The Fifth Circuit refused to do so, finding *Northern Insurance* to be idiosyncratic and not likely to be followed by the Texas courts. The court point out that *Northern Insurance* depends on another piece of California law pertaining to product-line successor liability. According to the circuit court in this case, Texas has no such rule; therefore, the ruling in the case *Y* suggests as precedent is anything but. In fact, the California Supreme Court has refused to extend the Rule in *Northern Insurance* to assignment via contract rather than assignment via operation of law. *Henkel Corp. v. Hartford Accident & Indem. Co.*, 62 P.3d 69 (Cal. 2003). Also, Ohio adopted the same rule at about the same time. *Pilkington Northern America, Inc. v. Travelers Casualty & Surety Co.*, 861 N.E.2d 121 (Ohio 2006). Importantly, the court in this case explicitly and inequitably states that it believes that Texas courts would reject *Northern California Insurance*, at least “where, as here, the liabilities in question were assumed through a contract that also specifically

excluded the transfer of the insurance policy covering those liabilities.”

Comments

First, one wonders why the Fifth Circuit did not simply refer this case to the Texas Supreme Court for a decision. Perhaps it thought the case was too uncontroversial to pester the state court with it. Perhaps it was thought that the case was too rare for statutorily authorized referral.

Second, why did *Y* pursue a chose-in-action theory? That phrase, although involving language of many meanings over several centuries, has a theme in its “descriptions.” Here is how a recent Black’s Law Dictionary defines the term:

The term “chose” comes from the French and means “A thing, whether tangible or intangible; a personal article, a chattel. See THING.” “A ‘chose in action’ is 1. a proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort. 2. The right to bring an action to recover a debt, money, or thing. 3. Personal property that one person owns but another person possesses, the owner being able to regain possession through a lawsuit.”

It is difficult to see how any of these would have much to do with an entity like *Y* suing *X*’s insurer to recover a debt which *Y* may end up owing *X*.

Third, it is possible to limit the Fifth Circuit’s holding in *Keller Foundations, Inc.* to the somewhat unusual facts of the case in which the agreement between Corporation *X* and Corporation *Y* excluded insurance policies from the transfer of assets. However, given the court’s broad endorsement and literal enforcement of anti-assignment clauses, and reliance on Texas cases in which anti-assignment clauses precluded coverage for pre-assignment losses despite the absence of a similar exclusion of insurance policies from the asset sale, it does not appear that the language in the sale agreement had an effect on the outcome of the case.

Fourth, one may wonder what a “plugged [or plug] nickel” might be. It is a coin with the center removed and another medal of much lower (or no)

value inserted. Of course, with the governmentally authorized metal gone, the coin is no longer a legal tender. // Quinn

Liability Insurance/ Business Risk Exclusions

Landscaping Company Not Covered for Spraying Non-Selective Herbicide on Lawns

Exclusion for Damage to Part of Real Estate Where Insured Was Performing Operations Applied

Brake Landscaping & Lawncare, Inc. v. Hawkeye-Security Ins. Co., ___ F.3d ___, 2010 WL 4273244 (8th Cir. Nov. 1, 2010)

Case at a Glance

A landscaping company's liability policies did not cover restoration of lawns accidentally sprayed by a company employee with non-selective herbicide. A policy exclusion for property damage to that particular part of real property on which the company was performing operations, if the property damage arose out of those operations, applied. A second exclusion of coverage for property damage to that particular part of property that must be restored, repaired or replaced because the insured's work was incorrectly performed on it also applied. The policies' "products-completed operations hazard" exception to the exclusion was inapplicable when the landscaping company's work had not been completed at the time the spraying occurred.

Summary of Decision

Plaintiff Brake Landscaping was a full-service landscaping company with primarily commercial customers. Brake had a commercial general liability policy from Midwestern Indemnity Co., and a commercial umbrella liability policy from Hawkeye-Security Insurance. While the policies were in effect Brake's employee mistakenly applied a non-selective herbicide that killed all vegetation on several customers' lawns. The employee was supposed to

apply a selective herbicide that killed only weeds. Although the effects of the non-selective herbicide were non-reversible the lawns did not begin to die until seven to ten days after they were sprayed. As a result of the error Brake incurred \$1.2 million in expenses to re-sod or re-seed the customers' lawns.

Both liability policies provided coverage for property damage caused by an occurrence, and both contained exclusions. The first exclusion excluded coverage for property damage to "[t]hat particular part of real property on which you ... are performing operations, if the 'property damage' arises from those operations." A second exclusion applied to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The primary Midwestern policy restored coverage for property damage under the second exclusion if the damage was included in the "products-completed operations hazard" which applied when the insured's work had not yet been completed. The Hawkeye policy applied the products-completed operations hazard to the first exclusion.

Brake filed insurance claims for the damage to the lawns. The insurers denied coverage. Brake brought an action in U.S. district court seeking a declaratory judgment that the damage was covered under both policies. The district court denied Brake's motion for partial summary judgment and granted summary judgment in favor of Hawkeye and Midwestern, finding that there was no "occurrence" as required for coverage under the policies. Alternatively, the district court held that even if the spraying were an "occurrence," the business risk exclusions would exclude coverage. Brake appealed, arguing that the district court erred in concluding that the spraying did not constitute an "occurrence" and in finding that the business risk exclusions applied.

The Eighth Circuit determined that the policies' business risk exclusions applied, and accordingly affirmed. The exclusion of coverage for property damage to that particular part of real property on which Brake was performing operations, if the property damage arose out of those operations, applied when Brake's employee sprayed the non-selective herbicide on the customers' lawns. Similarly, the second exclusion of coverage for property damage to that particular part of property that must be restored, repaired or replaced because Brake's

Katrina pricing, the supreme court noted that while there was evidence Lafayette was aware of the price increases, no evidence indicated that Lafayette instructed its adjusters to use pre-Katrina or below-market pricing. Thus, to determine the merits of each plaintiff's underpricing claim, the trial court will have to determine first the amount of wind-caused damages each claimant suffered and then, with respect to each claim, whether the pricing data actually used by either the independent adjuster or Lafayette's adjuster were the most appropriate when the claim was filed and adjusted, and whether supplemental payments were later made by Lafayette.

Similarly, the court found that common factual questions did not predominate with regard to the plaintiffs' assertion that Lafayette misadjusted their claims by excluding in the repair or replacement estimates for damaged roofs, overhead and/or profit where a general contractor was to be used or circumstances required the inclusion of such overhead and profit. The determination of whether the services of a general contractor would be reasonably likely to be required was, in the court's view, a fact question that will be different for every insured. The fact finder will "be required to determine whether the claimant's roof required replacement or could be repaired, the extent of the damages, and whether the complexity of the repair or roof replacement necessitated the engagement of a general contractor to supervise and coordinate the work." // DiMugno

Property Insurance/ Windstorm Deductible

Policy's Windstorm Deductible Did Not Apply to Storm with Considerable Amount of Precipitation

"Windstorm" as Used in Policy Was Ambiguous and Was therefore Construed in Favor of Insured

Bliss Mine Road Condominium Assn. v. Nationwide Property and Casualty Insurance Co., __ A.3d __, 2010 WL 4276645 (R.I. Nov. 1, 2010)

Case at a Glance

A clause in a property insurance policy that imposed a high deductible for damage caused by a "windstorm" is ambiguous and must be construed in favor of the insured. The Rhode Island Supreme Court defined "windstorm" to mean a storm with high winds or gusts, but little to no precipitation and concluded, based on undisputed testimony that the storm that damaged the property had a considerable amount of precipitation, that a trial court properly granted judgment as a matter of law for the insured in a suit challenging the insurer's application of the windstorm deductible.

Summary of Decision

A rain storm caused significant damage to Susan and Robert Phinneys' condominium unit. At the time of the storm the unit's roof was under repair and covered with a tarp that was not strong enough to withstand the storm. The damage to the unit included pooling of water on furniture, water damage to the ceiling, and water running into the electrical box. The Phinneys notified Nationwide Property and Casualty Insurance, their condominium association's insurer, of their claims. Nationwide placed a value on the loss of \$26,977.77, but notified the association that the amount of the award was less than the policy's windstorm deductible of 1% of the value of the property, and that Nationwide therefore would not provide compensation.

The condominium association filed suit alleging that Nationwide had breached the insurance contract, had waived certain rights under the contract, should be estopped from raising certain policy defenses, and was guilty of bad faith. The case proceeded to trial before a jury. At the conclusion of the evidence, and before the case was submitted to the jury, plaintiff moved for judgment as a matter of law. The trial justice reserved ruling on the motion and submitted the case to the jury, which returned a verdict for plaintiff. After the verdict, the trial justice granted plaintiff's motion for judgment as a matter of law. On appeal, defendant Nationwide argued: (1) that the trial court's grant of a judgment as a matter of law in favor of plaintiff was improper; (2) that the instruction to the jury of the definition of windstorm was error because the policy contemplated a windstorm accompanied by other weather events; (3) that the jury instruction was misleading to the resultant prejudice of Nationwide; and (4) that the denial of the motion for a new trial was in error.

The Rhode Island Supreme Court affirmed the judgment of the trial court, determining that the term "windstorm" as used in the policy was reasonably susceptible to more than one meaning, and was therefore ambiguous. The term was not defined in the policy, but dictionary definitions of windstorm indicated that the term referred to a storm with heavy wind but little or no precipitation. The court observed that, when an ambiguity arose in an insurance contract, the court was required to construe the ambiguity strictly in favor of the insured. The court accordingly construed the term windstorm to mean a storm with high winds or gusts, but little to no precipitation.

In view of this construction, the only remaining issue was whether a reasonable jury could conclude, considering all the evidence in the light most favorable to defendant, that the storm was a storm with high winds or gusts, but little to no precipitation. The court rejected Nationwide's contention that whether the storm was a windstorm was a question for the jury. The storm featured intense winds. However, the undisputed testimony of Nationwide's expert witness, a meteorologist, was that the storm included a variety of precipitation including sleet, freezing rain, and heavy snow. The expert testified that there were "blizzard conditions" leading to a total snow accumulation was between six and ten inches,

an amount of precipitation equaling approximately 0.69 inches of rain. Because the storm, as described by the expert, included a considerable amount of precipitation in a variety of forms, it could not be described as a windstorm under the association's policy. The court therefore concluded that a reasonable jury could not draw any conclusion other than that the damage was caused by the snowstorm, one that included very strong winds and, therefore, that the windstorm deductible did not apply. For that reason the trial justice properly granted the plaintiff's motion for judgment as a matter of law. // Holt

Uninsured Motorist Coverage

No Uninsured Motorist Coverage Exists Without Legal Liability

Tortfeasor with Statutory Immunity Owed Insured No Damages

State Farm Mut. Auto. Ins. Co. v. Slusher, __ S.W.3d __, 2010 WL 4679482 (Ky., Nov. 18, 2010)

Case at a Glance

The Supreme Court of Kentucky has held that no uninsured motorist benefits are recoverable when the tortfeasor has a statutory immunity, such as workers compensation. The reason is that the insured would not be "legally entitled" to recover damages from that tortfeasor, and hence cannot make a UM claim.

Summary of Decision

Donald Slusher and Arlie Napier were both employed by James Long Trucking in Bell County, Kentucky, hauling refuse from a coal mine. Slusher went inside a building while waiting for a load. Napier parked his own truck nearby with the engine running, but failed to set the brakes properly and it rolled into the building, fatally crushing Slusher.

When Slusher's estate sought UM/IM benefits under his personal auto policy, State Farm denied coverage on the ground he was not "legally entitled"