

Below is the "Third Edition" of the Smith & Knott case law summaries legal update. Cases are grouped according to subject matter and generally deal with cases relating to torts, coverage, and procedure. We invite any comments and requests as to ways that we can make this more useful for you and address any subject matter in which you might have an interest.

SMITH & KNOTT LEGAL UPDATE

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FIRST PARTY COVERAGE

Mold Damage Held Excluded Under Standard Texas HO-B Policy. The Texas Supreme Court has ruled that mold is not covered under the formerly state mandated Texas HO-B policy, even if it is caused by an otherwise covered water leak. The Court explained that the policy's exclusion "1.f.," which states that the insurer does not "cover loss caused by...mold" means what it says - that the policy does not cover losses where mold is the cause. The insured argued that the "ensuing loss" clause, appearing immediately after the "mold" exclusion in the policy - "[w]e do cover ensuing loss caused by water damage" - is intended to provide coverage for mold which was caused by water damage. The court rejected that argument, explaining, in effect, that the insured had it backwards, and that the "ensuing loss" clause provides coverage only for ensuing water damage which might ensue from mold, but not mold damage which ensues from water damage, because the insured's interpretation would almost completely re-write the policy. The insured also argued that the policy is ambiguous due to the opinions of the Texas Department of Insurance, insureds, and insurers that mold is covered pursuant to a different interpretation of the policy. The Court rejected this argument as well, holding that the word "mold" is unambiguous on its face, and such outside evidence of other opinions cannot be used to create an ambiguity. *Fiess v. State Farm Lloyds*, 202 S.W.3d 744 (Tex. 2006).

"Accidental Discharge" Coverage Under HO-B Also Held Limited by Fiess. Section I of the Texas HO-B form specifically affords coverage for "accidental discharge, leakage or overflow of water...from a plumbing, heating or air conditioning system or household appliance." The form also contains an "exclusion repeal provision" stating that "[e]xclusion 1.a. through 1.h. under Section I Exclusions," which includes the "mold" exclusion 1.f.(2), "do not apply to loss caused by this peril." Nevertheless, a federal district court has construed the *Fiess* decision to mean that mold caused by "accidental discharge" from a household appliance is also excluded under the "mold" exclusion. The Court did not account for the "exclusion repeal provision," but reasoned that any other conclusion would conflict with the decision in *Fiess* that mold damage to a dwelling is excluded, regardless of whether the water damage causing the mold is otherwise covered. *Gordon v. Allstate Texas Lloyds*, No. H-04-1061, 2006 U.S. Dist. LEXIS 73848 (S.D. Tex. Sept. 27, 2006, no. pet. h.).

First Party Homeowner Policy Coverage Limits Will Not Stack Despite Multiple Losses. The Coats filed homeowner policy claims for several independently occurring water damage losses to their home, all of which occurred at different times, including roof leakage due to wind and hail in April of 2001, water entry and leakage from Hurricane Allison in June of 2001, and a hot tub leak and HVAC leaks discovered in early 2002. Their insurer, Farmers Insurance, tendered the Coats' full \$138,000.00 policy limits after determining that the cost to repair the water damage from all of the claims exceeded that limit. The Coats sued Farmers when it denied yet another claim for a subsequent HVAC water leak in December of 2002. The Coats alleged that they were entitled up to \$138,000.00 for each independent loss, regardless of the number of losses. Invoking the basic insurance principle of indemnity, under which an insured should neither reap economic gain nor incur a loss, if adequately insured, the Court ruled that the Coats were entitled to no more than the \$138,000.00 policy limits, regardless of the number of covered losses which might occur. The Court also held that the policy is not ambiguous in this regard when read in its entirety. *Coats v. Farmers Ins. Exch.*, No. 14-04-00686-CV, 2006 Tex. App. LEXIS 5534 (Tex. App.—Houston [14th Dist.] June 29, 2006, no pet. h.).

THIRD PARTY COVERAGE

Going for Dad's Smokes Was Within Employer's "Permissive Use". A Bryan, Texas Goodyear tire store gave its employee, Adams, permission to drive a one-ton company truck back and forth each day commuting from his home in Houston. Adams would occasionally use the truck to make deliveries from Bryan to Houston stores. Although Goodyear never expressly gave him permission to do so, Adams' supervisor was aware that Adams would occasionally use the company truck to run small personal errands, such as picking up lunch and his dry cleaning, in addition to using it to commute to work. One evening, Adams stopped at his father's house on his way home from work, drank a six-pack of beer, ate dinner, and then slept 4 to 5 hours. He awoke at about 2 a.m. and drove the Goodyear truck to a convenience store about 10 minutes away to purchase cigarettes for his father. On his return trip, he fell asleep at the wheel, crossed into oncoming traffic, collided with and severely injured Mayes. Goodyear terminated Adams for his unauthorized use of the truck. Goodyear's auto liability insurer, Travelers, denied coverage to Adams for Mayes' claims pursuant to the policy provision requiring that the truck be used 'with [Goodyear's] permission'. The Court found that, although tenuous, there was some evidence of implied permission, because Adams' use of the truck for purchasing his father's cigarettes at 2 a.m. could be considered a "minor deviation," arguably within the scope of Goodyear's implied permission to use the truck for minor deviations from company business, such as his personal errands. *Adams v. Travelers Indem. Co.*, 465 F.3d 156 (5th Cir. 2006).

Insured's Plea of Intentional Shooting in Self Defense May Not Preclude Finding of "Accident" and "Occurrence" Under Homeowners Policy. Fearing a confrontation with another woman in her driveway, an insured homeowner retrieved a firearm from her home and returned to the front porch. A physical altercation between the two women ensued. A man who had accompanied the other woman allegedly tried to kick the

insured in the face during the fight. The insured shot and killed the man. The insured entered a plea of self-defense at her criminal trial, testifying that she only used the firearm to prevent being kicked. The criminal jury convicted the insured of manslaughter or, in other words, of recklessly causing the death. When the man's survivors sued her for wrongful death in a civil action, her insurer, State Farm Lloyds, declined coverage because a shooting, even if in self-defense, must have been deliberate and could not consist of an "accident" or an "occurrence." The Court ruled, however, that a fact question existed on that issue because the criminal jury convicted the insured of manslaughter, a reckless killing, instead of murder, which is intentional. *State Farm Lloyds v. Jones*, No. 4:05-CV-389, 2006 U.S. Dist. LEXIS 63978 (N.D. Tex. Sept. 7, 2006).

Construction Defect Claims for Loss Arising from Warranty Obligations Not An "Occurrence" Under CGL Policy. Hardscape Construction contracted with a developer to build swimming pools located at a residential development. Hardscape subcontracted with two other companies for the construction of pools and decking. After the swimming facility was completed, cracks and various structural problems began developing in the walls and floor of the pools, which led to the eventual demolition of the pools and decking. The residential developer sued Hardscape for negligence, gross negligence, breach of contract and breach of express and implied warranties. Century Surety, the subcontractor's insurance carrier, sought declaratory relief and a judgment that they had no duty to defend. The Court determined that the developer's claims failed to qualify as an "occurrence" under the CGL policy, as they arose from the contractual and warranty obligations owed by the insured. The negligence claim also failed, as it too arose out of the contractual and warranty obligations. The developer's claims were, in essence, that their injury was the result of a failure to fulfill what was promised under the contract, which is not an occurrence. *Century Sur. Co. v. Hardscape Constr. Specialties, Inc.*, No. 4:05-CV-285-Y, 2006 U.S. Dist. LEXIS 47563 (N.D. Tex. July 13, 2006).

Biological Damage Potentially Caused by Cell Phone Radiation Enacts Duty to Defend for Commercial General Liability Policies. Both Nokia and Samsung were sued by customers alleging that cell phones produced by them emit harmful radio frequency radiation that potentially cause injury to human cells when the cell phones are used without a headset. Both companies tendered these complaints to their commercial and excess umbrella liability insurance carriers. The insurers argued that there was no duty to defend or indemnify in any of these class actions because their duty to defend arises when a third party sues an insured on allegations that, if taken as true, potentially state a claim within the terms of the policy. The Court found that the class action suits brought by the customers were sufficient to potentially fall under the companies' commercial general liability policies because these policies included a provision to cover bodily injury. The allegations of biological injury to human cells by the claimants are potentially a claim for bodily injury under the policy. As the policies only cover damage for "bodily injury," however, there is no duty to defend where the complaint is not seeking damages for physical injury. Thus, there is no duty to defend where the class is seeking reimbursement for headsets which were purchased out of fear of the damage being caused by cell phone radiation, as that is solely economic damage. No business

risk exclusions apply to this duty to defend because those exclusions only cover property damage. *Samsung Elec. Am., Inc. v. Fed. Ins. Co.*, 202 S.W.3d 372 (Tex. App.—Dallas 2006, no pet. h.); *Nokia, Inc. v. Zurich Am. Ins. Co.*, 202 S.W.3d 384 (Tex. App.—Dallas 2006, no pet. h.).

UNINSURED MOTORIST COVERAGE

Provisions That Limit Coverage To Provide Less Than the Statutory Minimum Amount of Coverage or Limit Covered Person's Actual Damages Are Invalid. In an accident involving an uninsured motorist, a passenger in one car was injured severely. She sued both drivers, saying that they were both at fault. The victim's family settled with her insurer for the amount of their maximum uninsured motorist coverage and with the insurer of the driver of the car she was riding in, Allstate, for his maximum liability coverage. The victim argued that her damages exceeded both of these settlements and sued the driver's insurance company for the additional sum pursuant to the uninsured motorist coverage policy. The Texas Legislature amended the uninsured motorist statute to provide coverage for uninsured motorist bodily injury coverage, uninsured motorist property coverage, underinsured motorist bodily injury coverage, and underinsured motorist property coverage. The Insurance Code was further amended to allow recovery under collision and underinsured motorist coverage for property damage in cases where neither coverage alone is sufficient to cover all of the damages. The statute, however, was never amended to state that the same was true for bodily injury. Allstate argued that as the declarations for the policy limits liability for both underinsured motorist and liability coverage to \$25,000 per person, \$25,000 is an absolute policy limit. In other words, Allstate argued that the policy limits are satisfied for both liability and uninsured motorist coverage with one single payment of \$25,000. Additionally, Allstate attempted to bolster their position by showing that the policy stated that recovery under uninsured motorist coverage will reduce any amount the insurer is entitled to recover under liability coverage. The Court held that the construction Allstate urged was unreasonable and was in violation of public policy. Provisions that limit coverage to provide less than the statutory minimum amount of coverage or limit a covered person's recovery of actual damages are invalid. *Jankowiak v. Allstate Prop. Cas. Ins. Co.*, 201 S.W.3d 200 (Tex. App.—Houston [14th Dist.] 2006, no pet. h.).

Anti-subrogation Rule Does Not Apply In Certain Circumstances. A woman, Shannon Perkins, was involved in an automobile accident with a dump truck owned by another man. The woman had an automobile insurance policy with State Farm, but the dump truck driver did not have automotive liability insurance. State Farm paid Perkins \$25,000 in UM policy benefits. She additionally filed a negligence suit against the dump truck driver for personal injury damage, claiming the driver was intoxicated and in the wrong lane at the time of the accident. She also alleged claims of negligence against the owner of the dump truck, who had an automobile liability policy with State Farm. State Farm intervened in this suit, asking for reimbursement for the UM benefits paid to the woman under her policy. Perkins argued that State Farm could not seek subrogation against its own insured. The trial court agreed to delay consideration of the intervention until the trial on the negligence claim. The jury found that the dump truck owner was negligent and awarded personal injury damages to both Perkins and to her children. The

subrogation claim made by State Farm pertained only to Perkins' injuries, not to those of her children. The trial court struck State Farm's subrogation claim. State Farm appealed this decision, asserting that it had contractual and statutory rights of subrogation for the UM benefits paid to Perkins under her policy. The Court found that the policy provided State Farm with contractual rights of subrogation and reimbursement, as did the Texas Insurance Code. As the risk of loss is not passed back to the insured, the anti-subrogation rule will not apply in these circumstances. *State Farm Mut. Auto Ins. Co. v. Perkins*, No. 11-04-00259-CV, 2006 Tex. App. LEXIS 6030 (Tex. App.—Eastland July 13, 2006, no pet. h.).

TORTS

Standard for Expert Testimony Proving Cause of Truck Crash Fire. Tamez's survivors sued Mack Truck, Inc., alleging that the defective design of the fuel tank in the oil tanker truck he was operating at the time of the crash caused a fire which killed him. The Tamezes' expert witness testified that the fuel tank's design made it more susceptible to leakage and ignition in a collision, and that based on his experience and training, that design defect, coupled with arcing from the truck's battery cables, probably caused the fire. The Court upheld Mack Truck's no-evidence summary judgment, however, because the Tamezes' expert's testimony was not based on any actual physical testing of similar fuel tanks and batteries. The expert's testimony also failed to rule out the crude oil cargo in the tanker trailer attached to the truck as the source of the fire. *Mack Trucks, Inc. v. Tamez*, 50 Tex. Sup. Ct. J. 80, 2006 Tex. LEXIS 1074 (Tex. Oct. 27, 2006).

Non-Subscribing Employer Not Liable For Grocery Sacker's Smashed Hand. Although not entitled to affirmative defenses such as comparative fault because it did not have worker's compensation coverage, Kroger Grocery Store was not legally liable when an employee's hand was crushed by the door of a car into which he was unloading groceries. To prevent the grocery cart from rolling away because of the parking lot's severe slope, the employee placed one foot on the cart and held onto the car door jamb with one hand, while unloading groceries with the other hand. In the process, the customer, who was not sued in the case, mistakenly pulled the door closed on the employee's hand. The employee sued Kroger for negligence for failure to provide a safe place to work. The Texas Supreme Court ruled that Kroger was not liable for the injury as a matter of law, explaining that unloading groceries on the sloped portion of a parking lot is not an unusually dangerous job, and that the danger of having one's hand smashed by a car door if one's hand is placed on the door jamb is a danger known to all and for which Kroger had no duty to warn or to provide specialized training. Basically, Kroger was not liable because it had no duty of care to prevent the accident. *Kroger v. Elwood*, 197 S.W.3d 793 (Tex. 2006).

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