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COURTS DISAGREE OVER INSURERS' DUTY TO DEFEND

by MARY ALICE ROBBINS

Departing from 5th U.S. Circuit Court of Appeals rulings, the Texas Supreme Court held on May 30 that an insurer has a duty to defend an insured sued after his employee allegedly assaulted a man on a construction site.

The Supreme Court ruled 9-0 in *King v. Dallas Fire Insurance Co.* that the question of whether an "occurrence" that triggers an insurer's duty to defend must be answered from the insured's standpoint.

The 5th Circuit, using the "related and interdependent rule," has held that an insurer has no duty to defend an insured employer from claims that are the result of intentional conduct of an employee. The Supreme Court, in an opinion written by Justice Craig Enoch, said the rule doesn't reflect Texas law.

Earnest Wotring, an attorney for Carlyle King, says the decision, which reverses a 1st Court of Appeals ruling, reaffirms insurance law in Texas.

"I would say it's a win for insureds. It preserves Texas law and doesn't limit their coverage," says Wotring, a partner in Houston's Connelly, Baker, Wotring & Jackson.

The decision also is important, Wotring says, because the court held that any ambiguity in a policy is going to be construed in favor of the insured.

"I don't think anybody can say this court is a pro-insurance court," says Ronald E. Tigner, Dallas Fire's lawyer.

Tigner, a partner in the Houston office of Preis Kraft & Roy, says he believes the Supreme Court in *King* has expanded coverage beyond what was intended.

According to the opinion, the commercial general liability policy that Dallas Fire issued to King and his business, Tiedown Construction Co., covers bodily injuries or property damage caused by an "occurrence" within the "coverage territory." The term "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," the opinion said.

The opinion said Greg Jankowiak, an employee of another company working on the same site as Tiedown, sued King in 1997. Jankowiak alleged in his suit that he suffered serious injuries when he was attacked and kicked in the face by Carlos Lopez, one of King's employees.

Jankowiak alleged that King was liable for the injuries because of his negligence in hiring, training and supervising Lopez, the Supreme Court opinion said.

When Dallas Fire refused to defend him, King filed for a declaratory judgment, asking the 269th District Court to find that the insurance company was legally obligated to defend him against Jankowiak's suit.

The trial court held that Dallas Fire didn't have a duty to defend King, and its judgment was affirmed by Houston's 1st Court in a 2-1 ruling.

Frank Evans, retired chief justice of the 1st Court, said in the majority opinion that the assault by King's employee was not an accident. Because Jankowiak's claim against King was inextricably related and interdependent on the employee's intentional action, the intentional nature of that act was imputed to King, Evans said in the opinion in which he was joined by Justice Sam Nuchia. Justice Margaret Mirabal dissented.

Broader Applications

The genesis for the 5th Circuit's "related and interdependent rule" came in a 1992 ruling by the Northern Division of Texas in Dallas. In *Old Republic Insurance Co. v. Comprehensive Health Care Association Inc.*, the U.S. district court had to decide whether an insurance company had a duty to defend an employer against various claims, including negligent hiring, stemming from supervisors' alleged sexual harassment and discrimination. The court held that each allegation against the employer arose out of the alleged sexual harassment and therefore was "related and independent" and not an "occurrence" under the employer's policy.

The 5th Circuit affirmed the district court's ruling and articulated its rule in 1997's *American Guaranty & Liability Insurance Co. v. 1906 Co.* and 1998's *American States Insurance Co. v. Bailey*. The 5th Circuit's position is that negligent actions derived from an intentional incident don't exist in the abstract and would not exist but for the intentional conduct, Enoch said in *King*.

Enoch noted in the opinion that courts around the country generally are split on the issue of whether an employer's alleged negligent hiring, training and supervision is an "occurrence" when an employee's intentional act caused the alleged injury. While some courts have focused on an employee's intentional conduct and concluded that an insurer has no duty to defend the employer, other courts

have held that the employer's alleged negligent acts constitute an occurrence, the opinion said.

The Supreme Court concluded that the 5th Circuit's rule "improperly imputes the actor's intent to the insured." The proper inquiry, the court said, is whether someone who contributes to an injury is negligent, a question that's independent of whether a person who directly causes the injury acted intentionally.

Dallas attorney David Kitner, who filed an amicus brief in *King* on behalf of Travelers Casualty and Surety Co., says the Supreme Court's ruling potentially broadens the coverage that's available either on a duty to defend or actual coverage basis. "Obviously we have a potential for cases being defended that in the past have not been defended," says Kitner, a partner in the Dallas office of Strasburger & Price.

Jay Thompson, a partner in Thompson, Coe, Cousins & Irons in Austin, says he's concerned that the decision may give plaintiffs lawyers an incentive to sue defendants with other types of insurance. "It opens up more incentive where you've got coverage to find someone to sue," says Thompson, who represents insurers.

Thompson cites, as an example, medical professional liability insurance. Because insurers have a duty to defend, suits may be more likely against doctors for the intentional conduct of their employers, he says.

Wotring also says the decision may have broader applications. That means an insured who's sued for negligently hiring, training and supervising an employee who commits theft will be defended by his insurer, he says. TTL

Mary Alice Robbins' email is mrobbins@texaslawyer.com