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U.S. DISTRICT COURT CONCLUDES THAT INSURER HAD NO DUTY TO SETTLE CLAIMS ARISING FROM MCS-90 ENDORSEMENT OBLIGATION

Last week, the United States District Court for the Southern District of Texas concluded that insurer had no duty to settle claims arising from MCS-90 endorsement obligation. In *Progressive Commercial Casualty Ins. Co. v. Xpress Transport Logistics, LLC*, No. H:21-2683, 2022 WL 103555 (S.D. Tex. [Houston Division] Jan. 11, 2022), Miguel Cuellar agreed to accompany his friend, Fabian Santiago, who was to drive a truck loaded with steel parts from Texas to Missouri. Santiago was driving for ESD Transport. Xpress Transport Logistics, LLC ("Xpress") initially agreed to haul the load but re-brokered it to ESD Transport. At some point during the trip, Cuellar drove the truck, when it rolled and killed both him and Santiago.

At the time of the accident, Xpress was insured by a commercial auto policy with Progressive. The policy included an MCS-90 endorsement which required Progressive to pay "any final judgment recovered against the insured for public liability resulting from negligence in the operation ... or use of motor vehicles ... regardless of whether [it] is specifically described in the policy." The MCS-90 endorsement excluded coverage of an "insured's employee".

After Cuellar's mother sued Xpress in Texas state court, Progressive sued Xpress and Cuellar's mother in the U.S. District Court seeking a declaratory judgment that it had no duty to defend or indemnify Xpress. In response, Cuellar's mother filed a counterclaim asserting that Progressive had a duty to accept and pay a settlement offer that was reasonable and within the MCS-90 policy limits. She also filed a partial motion for summary judgment seeking to establish that Cuellar was not an employee of Xpress when the accident occurred and, therefore, the MCS-90 endorsement applied. Progressive moved to dismiss Cuellar's mother's counterclaim on the ground that there is no cause of action for a "duty to settle" in relation to an MCS-90 endorsement.

The U.S. District Court concluded that if Cuellar was provided with value in exchange for his service of helping drive with Santiago, then Cuellar may be considered an employee of ESD Transport, which took the job on a re-brokered contract from Xpress; but the Court denied Cuellar's mother's motion on the ground that it was premature as discovery had just begun.

Next, the Court dismissed Cuellar's mother's counterclaim. "The reasons behind a duty to settle in the indemnity-insurance context, in which the insurer has a duty to defend and indemnify the insured, do not apply to the MCS-90 endorsement context, in which the insurer owes only an obligation to pay the remaining debt of an insured after the insured's debt has been established." The Court recognized that "the outcome might be different if the insurance contract, by terms other than those in the MCS-90 endorsement, imposed a duty to defend and indemnify on Progressive that encompassed claims brought under the MCS-90 endorsement. But that was not what Cuellar's mother pleaded in her counterclaim."

U.S. DISTRICT COURT FOLLOWS TEXAS SUPREME COURT'S RULING IN K & L AUTO CRUSHERS; CONCLUDES THAT FEE SCHEDULES AND REIMBURSEMENT RATES OF PLAINTIFFS' MEDICAL PROVIDERS ARE DISCOVERABLE

Last week, the United States District Court for the Western District of Texas concluded that the defendant in a personal-injury suit was entitled to discovery of the fee schedules and reimbursement rates of the plaintiffs' medical providers and granted the defendant's motion to compel. In *Acuna v. Covenant Transport, Inc.,* No. SA-20-CV-01102-XR, 2022 WL 95241 (W.D. Tex. [San Antonio Division] Jan. 10, 2022), Theresa Acuna and Ashley Acuna ("Plaintiffs") sued Covenant Transport, Inc. ("Covenant") in connection with a motor vehicle collision. Through discovery, Covenant determined that Plaintiffs had health insurance but chose to self-pay instead of billing their insurance for their past medical expenses, which totaled almost $700,000.

As such, Covenant served subpoenas on Plaintiffs' medical providers seeking "fee schedules in effect on [the year of Plaintiffs' treatment] for procedures provided on Plaintiffs including but not limited to, fee schedule with an insurance company, payor of insurance services, and or private pay client." The providers subsequently filed motions to quash, contending that production of contractual fee schedules and reimbursement rates were overbroad, irrelevant, and sought the disclosure of trade secrets. In response, Covenant filed a motion to compel.

The U.S. District Court granted Covenant's motion to compel after concluding that Covenant was entitled to the fee schedules and reimbursement rates. The Court began its analysis by recognizing that the Texas Supreme Court, in *In re K & L Auto Crushers*, LLC, 627 S.W.3d 239, 258 (Tex. 2021), "recently clarified that medical providers' negotiated rates and fee schedules with private insurers and public-entity payors are relevant and discoverable in personal-injury litigation on the issue of the reasonableness of a plaintiff's claimed damages." The Court further reasoned that "even if the fee schedules were trade secrets, the information was nonetheless

discoverable because the fee schedules were necessary for a fair adjudication of the defense that Plaintiffs' claimed damages were not reasonable." Further, the need for the information outweighed any potential harm to the medical providers, and any concern about confidential information or trade secrets could be adequately resolved with a protective order. Lastly, the Court reasoned that the request for documents did not impose an undue burden on the providers as they were operating under letters of protection, which gave them a direct financial stake in the resolution of Plaintiffs' claims.

FIFTH CIRCUIT COURT OF APPEALS HOLDS THAT INSURER HAS DUTY TO DEFEND MANUFACTURER-INSURED AGAINST CLAIMS OF LEAKS AND WATER DAMAGE

In *Siplast, Inc. v. Employers Mutual Casualty Co.,* No. 20-11076, 2022 WL 99303 (5th Cir., Jan. 11, 2022), the Archdiocese of New York (the "Archdiocese") purchased a roof membrane system from roofing manufacturer Siplast, which was installed at a high school in the Bronx, New York. After installation, leaks and water damage in the ceiling tiles occurred, which the Archdiocese's consultant subsequently found to be the result of issues with both the workmanship and the materials that were compromising the entire roof membrane system.

Consequently, the Archdiocese sued Siplast (the "Underlying Lawsuit"). In response, Siplast submitted a claim to Employers Mutual Casualty Company ("EMCC") asserting coverage under commercial general liability policies Siplast had purchased. Those policies required that EMCC "pay those sums that the insured becomes legally obligated to pay as damages because of ... 'property damage' to which this insurance applies" and that EMCC "will have the right and duty to defend the insured against any 'suit' seeking those damages." The policies were also subject to a "Your Product/Your Work Exclusion", which excluded coverage of "property damage to Siplast's product arising out of it or any part of it or property damage to Siplast's work arising out of it or any part of it …."

EMCC denied coverage, including its duty to defend Siplast in the Underlying Lawsuit. In response, Siplast filed suit against EMCC, seeking a declaratory judgment that EMCC was obligated to provide a defense to Siplast in the Underlying Lawsuit.

Applying Texas law, the Fifth Circuit concluded that the Archdiocese's complaint alleged damage to property beyond the product and work of Siplast and, therefore, EMCC had a duty to defend based on those allegations. The Court began its analysis by stating the type of factual allegations necessary to trigger a duty to defend: "If the complaint alleges damage to and seeks damages for any property that is not the insured's product or directly subject to the insured's work, then the claim falls outside of a "your product/your work" exclusion and the insurer has a duty to defend. However, if the complaint solely alleges facts and damage to the insured's own products, or solely seeks to recover the costs to repair the insured's work, then it is covered by a "your product/your work" exclusion and the duty to defend remains dormant." The Court reasoned that Underlying Lawsuit repeatedly pointed to damage to property other than Siplast's roof membrane system. That is, the Underlying Lawsuit alleged that there was "water damage in the ceiling tiles throughout the school after a rainstorm" and that Siplast recommended the Archdiocese "contact a designated Siplast roofing contractor to address the damage and leak." Additionally, the Underlying Lawsuit alleged that "despite the work performed by Siplast's designated contractor, the School continued to suffer from additional leaks and water damage."