THOMPSON, COE, COUSINS & IRONS, L.L.P.

PROFESSIONAL LIABILITY NEWS

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ADDITIONAL INSURED MUST CONDUCT ADDITIONAL DILIGENCE

In *Via Net v. TIG Ins. Co.*, 211 S.W.3d (Tex. 2006), the Texas Supreme Court held that due diligence requires that a party confirm its status as an "additional insured." In that case, Safety Lights alleged breach of contract arising from Via Net's failure to list Safety Lights as an "additional insured" on Via Net's general liability policy, despite the fact that Via Net's insurance agent had issued a Certificate of Insurance showing Safety Lights as an "additional insured." Via Net argued that the statute of limitation began to run when the breach of contract occurred and that the discovery rule did not extend limitations, because the breach could have been discovered by the exercise of reasonable due diligence. Noting that Certificates of Insurance are merely intended to acknowledge that an insurance policy exists and to set forth the terms of that policy, the Texas Supreme Court held that contracting parties generally have a duty to protect their own interests and that a failure to obtain verification of contractual performance is failure to exercise due diligence. Recognizing that reliance on Certificates of Insurance is not unusual, the Texas Supreme Court warned that "those who take such certificates at face value do so at their own risk," requiring parties to do more to verify insured status.

> *. . . Court warned that "those who take such certificates at face value do so at their own risk" . . .*

Although the Via Net case addresses only "additional insureds," the language in the opinion suggests that all contracting parties have a duty to verify insured status, which would arguably apply to any named insured as well. Reliance on a Certificate of Insurance does not satisfy a party's obligation to protect its own interests by reasonable due diligence.

Alison H. Moore

RECOVERABLE DAMAGES IN LEGAL MALPRACTICE ACTION

In *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development and Research Corporation*, No. 05-06-01024-CV (Tex. App.—Dallas August 29, 2007), the Dallas Court of Appeals recently reiterated that attorney's fees incurred in litigation with a third party are not recoverable as damages in a subsequent legal malpractice action. And, in a case of first impression in Texas, the court further held that a contingent fee that would have been paid in underlying litigation may not be deducted from a legal malpractice award.

. . .attorney's fees incurred in litigation with a third party are not recoverable as damages in a subsequent legal malpractice action.

Akin Gump represented NDR in an underlying declaratory judgment action involving termination of a letter agreement with Panda Energy Corporation. The case was tried to a jury, which returned a verdict partially in favor of NDR and partially in favor of Panda. The trial court, however, granted Panda's motion for judgment notwithstanding the verdict because NDR had failed to submit jury questions to support the verdict in its favor. (Specifically, NDR failed to submit questions on whether Panda failed to comply with provisions of the letter agreement and a related shareholder's agreement and whether NDR was damaged by any failure to comply.) NDR appealed the trial court's final judgment, but the Dallas Court of Appeals affirmed and the Supreme Court denied review.

Thereafter, NDR sued Akin Gump for malpractice in failing to submit jury questions to support the verdict. A jury found Akin Gump negligent and awarded NDR damages, including $216,590 in attorney's fees and expenses NDR paid to appeal the Panda case (fees and expenses that NDR asserted it would not have incurred but for Akin Gump's negligence). Akin Gump requested that the trial court offset the damages in the amount of a ten percent contingency fee it would have earned had it prevailed in the Panda case, but the court refused.

Among other things, Akin Gump appealed the award of attorney's fees and expenses as damages. It argued that there was no evidence to support the award because NDR did not plead, prove, or obtain jury findings to support a fee forfeiture; and, in any event, fee forfeiture should be determined by the trial court, not a jury. In resolving the issue, the Dallas Court of Appeals did not discuss Akin Gump's fee forfeiture argument. Instead, it acknowledged that Texas's intermediate appellate courts disagreed on whether attorney's fees and expenses incurred in prior litigation with a third party could serve as measure

Recoverable Damages in Legal Malpractice Action, cont'd

of damages in a subsequent malpractice case. Although some courts have recognized an equitable exception if a claimant had to prosecute or defend litigation as a consequence of the defendant's wrongful act, *see, e.g.*, *Lesikar v. Rappeport*, 33 S.W. 3d 282, 306 n.1 (Tex. App.—Texarkana 2000, pet. denied) (op. on reh'g), the Dallas Court has consistently held that attorney's fees are not recoverable as damages for legal malpractice. *See, e.g.*, *El Dorado Motors, Inc. v. Koch*, 168 S.W.3d 360, 366 (Tex. App.—Dallas 2005, no pet.) (declining to award attorney's fees in legal malpractice suit because fees expended in prior litigation are recoverable only when provided for by contract or by agreement between parties); *Newton v. Meade*, 143 S.W.3d 571, 573-75 (Tex. App.—Dallas 2004, no pet.). Based on the binding authority of its previous decisions, the Dallas Court concluded that the trial court erred in awarding NDR its appellate attorney's fees as an element of damages and modified the judgment to delete those damages.

In another point of error, Akin Gump raised a question of first impression in Texas courts —whether damages in a malpractice suit should be reduced by a contingency fee, citing authority from jurisdictions holding that damages should be reduced by the amount of a contingency fee because to not do so would violate the basic tort rule that damages are compensatory only and must not put the plaintiff in a better position than it would have been absent the tort. *See, e.g.*, *Moores v. Greenberg*, 834 F.2d 1105, 1111-13 (1st Cir. 1987) (applying Maine law). Other jurisdictions have refused to do so because such an offset would (1) credit the negligent attorney with a fee he failed to earn, rewarding his wrongdoing, and (2) fail to fully compensate the plaintiff, who had to incur new attorney's fees and expenses to recover the judgment it should have won in the trial court. *See, e.g.*, *Campagnola v. Mulholland, Minion & Roe*, 148 A.D.2d 155, 543 N.Y.S.2d 516, 518-19 (N.Y. App. 1989). Still other jurisdictions, have adopted a "middle-road approach," allowing some reduction on a quantum meruit basis. *See Schulteis v. Franke*, 658 N.E.2d 932, 941 (Ind. Ct. App. 1995)

The Dallas Court of Appeals agreed with those jurisdictions that have refused to allow an offset, noting that the ordinary route to recover a contingency fee is through a breach of contract claim or a quantum meruit theory. The court held that Akin Gump could not have prevailed on a breach of contract theory (because it did not prevail in the underlying litigation) or on the basis of quantum meruit (because the jury found that it did not render any compensable services to NDR in the Panda case). As a result, the court found that NDR had to pay attorneys twice to be in the same position it would have been in absent Akin Gump's malpractice and, therefore, should not be compelled to "pay" a contingency fee that Akin Gump did not earn.

Alison H. Moore

THIRD PARTY TO INSURANCE CONTRACT IS BOUND BY REPRESENTATIONS WITHIN FOUR CORNERS OF POLICY

In conjunction with the Texas Supreme Court's decision in *Via Net v. TIG Insurance Company*, the Houston Court of Appeals recently held that a person who is not a party to an insurance policy cannot recover from the insurance company or its agent based on information outside of the actual policy. *Brown & Brown of Texas, Inc. v. Omni Metals, Inc.*, No. 01-05-01190-CV., Tex. App.—Houston [1st Dist.], March 20, 2008. The central issue in *Brown* was whether a third party to an insurance policy can nonetheless recover from the insurance company or its agent because of incorrect information regarding the scope of coverage.

Omni Metal, Inc. was a buyer and seller of steel coils. Port Metal Processing, Inc. stored steel belonging to Omni, processed that steel into coils, and temporarily stored the finished coils for Omni. Port Metal purchased insurance from Transcontinental Insurance Company through Brown & Brown of Texas, Inc. Port Metal's president, Blake McKnight, testified that he asked Danny Sparks, an agent for Brown & Brown, to insure the Port Metal warehouse and its inventory, including steel that Port Metal's customers were storing at the warehouse. However, the original policy written in 1992 excluded from coverage property held in storage or property for which a storage charge is made, as did the 1993, 1994, and 1995 renewals. McKnight said he asked Sparks about the exclusion and was told that it meant Port Metal could not store property on its premises that was unrelated to its business. Sparks testified that by June 1993 he knew Port Metal was charging a storage fee to its customers like Omni and that he failed to explain to McKnight that the insurance policy excluded the steel Port Metal was storing at Omni. McKnight testified that he did not read the 1995 insurance policy in effect at the time of the fire and that he was aware that Brown & Brown had recommended that he review the policy carefully.

Omni's president, Arthur Tomes, spoke on several occasions with McKnight and inquired if Omni's steel at Port Metal's warehouse was insured. The 1993 certificates of insurance provided to Omni contained the incorrect statement that Port Metal's insurance coverage "INCLUDES PROPERTY OF OTHERS IN CUSTODY OF INSURED." The 1994 and 1995 certificates contain the alleged misrepresentation that the insurance covers "all risk." All three certificates contain the following disclaimer: "THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS ON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW." At trial, Tomes testified that he did not read the disclaimer and that it would not have

THIRD PARTY TO INSURANCE CONTRACT IS BOUND BY REPRESENTATIONS WITHIN FOUR CORNERS OF POLICY, CONT'D

made a difference to him even if he had read it.

In late 1994, Port Metal's warehouse burned down; and Omni lost $2,600,000 in steel. Transcontinental Insurance Company denied coverage on Omni's steel that was stored at Port Metal. In turn, Omni filed suit against Transcontinental as well as Brown & Brown and alleged misrepresentation, failure to disclose, and violations of the DTPA. Transcontinental and Brown & Brown successfully moved for summary judgment on the basis there was no misrepresentation or false or misleading act.

The Houston Court of Appeals began its analysis by referring to long-standing Texas precedence that a party to an arm's length transaction must exercise ordinary care and reasonable diligence for the protection of his own interests, and a failure to do so is not excused by mere confidence in the honesty and integrity of the other party. *Thigpen v. Locke*, 363 S.W.2d 247, 251 (Tex. 1962). Even a party to a contract must exercise due diligence to protect its own interests. *See Barfield v. Howard M. Smith Co.*, 426 S.W.2d 834, 840 (Tex. 1968). In this case, Omni was not a party to the insurance contract; nor did it request a copy of the insurance policy, or read the certificate of insurance that clearly stated that the certificate could not change the terms of the insurance policy. Tomes, Omni's president, testified that he chose instead to rely on "what we are expecting to get under coverage – the coverage would be what they told us it was."

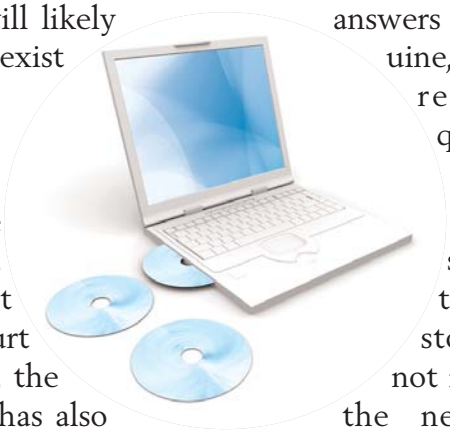
Relying on the Texas Supreme Court's holding in *Via Net*, the Houston Court of Appeals noted that, in this case, Omni chose to rely on oral representations, as opposed to the language of the policy itself — something even a party to a contract cannot do when the oral representation directly contradicts the express, unambiguous terms of a written contract. *See DRC Parts & Accessories, L.L.C. v. VM Motori, S.P.A.*, 112 S.W.3d 854, 858-59 (Tex. App.—Houston 14th Dist.] 2003, pet. denied) (en banc).

Therefore, the Court held that, as a matter of law, Omni could not detrimentally rely on either the certificates of insurance or the oral representations in order to recover on its negligent misrepresentation and DTPA claims.

Roshanak Khosravi

PITFALLS OF ELECTRONIC DISCOVERY

Electronic discovery is no longer just a concept. If an agency must deal with litigation, attorneys for all parties will likely request documents that may only exist in electronic form.



On December 1, 2006, amendments were made to the Federal Rules of Civil Procedure, including changes mandating that electronic documents in federal court are to be treated, legally speaking, the same as paper documents. Texas has also adopted rules to address electronic discovery issues.

Though these Rules do not articulate what litigants must do to meet their common-law and statutory duties to preserve potentially relevant electronically-stored information, they make clear that not only must accessible information be preserved, but the electronic discovery which a party deems *in*accessible must also be preserved so as not to eviscerate a requesting party's right to obtain production.

Furthermore, parties must not only be prepared to swiftly produce the electronically stored information they expect to use, but they must also, very early on in litigation, be fluent and forthcoming about their preservation of such information as well as any issues relating to its disclosure or discovery. Amended Federal Rule 26(f) requires that parties meet and confer shortly after the response date to address any issues relating to electronic discovery, including its preservation and the form or forms in which it should be produced. The courts expect the conferees to arrive with answers and display a genuine, good faith effort to resolve e-discovery questions.

Even if a party satisfies the court that its electronically-stored information is not reasonably accessible, the new Rules allow a requesting party to seek production of inaccessible information through a showing of good cause. However, if the court orders the production of inaccessible information, a party may ask the court to tailor the production order to minimize the client's burden, perhaps in ways that will cause the requesting party to narrow or abandon the request (such as by cost shifting). The court may also impose conditions to minimize undue burden by, *e.g.*, granting access to less than the entire pool of potentially responsive electronic information (instead, *sampling* parts of the data to assess its value to the case) or by requiring the use of data filtering and keyword searches designed to narrow the scope of review and production.

Parties refusing to conform to the new rules regarding electronic discovery face significant sanctions, as evidenced by *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), a landmark case of discovery abuse that has caused lawyers across the country to sit up and take notice.

PITFALLS OF ELECTRONIC DISCOVERY, CONT'D

Broadcom sought discovery concerning Qualcomm's participation with regard to certain acts of patent infringement. Qualcomm responded through outside counsel, stating that it would "produce non-privileged relevant and responsive documents describing Qualcomm's participation, if any, which can be located after a reasonable search." During the trial, while preparing a Qualcomm employee to testify at trial, an outside attorney for Qualcomm discovered an e-mail pertaining to Broadcom's allegations. The attorney and employee then searched the employee's laptop and found 21 separate relevant e-mails, none of which had been produced in discovery.

Ultimately, the court found that Qualcomm had perpetrated a fraud on the court at trial. Even after this ruling, Qualcomm continued to dispute the relevance of the e-mails in question and stonewall their production. Eventually, Qualcomm's lead outside counsel and general counsel submitted correspondence to the court in which they apologized and admitted that Qualcomm had uncovered thousands of pages of relevant un-produced documents.

The court cited several provisions of the Federal Rules of Civil Procedure in support of the sanctions imposed but explained that, under the circumstances presented, the Federal Rules were inadequate to address the breadth of misconduct by Qualcomm attorneys.

In sanctioning both Qualcomm and six of its outside counsel, the court noted that, even though the discovery misconduct in question was willful in many regards, even negligent failures to provide discovery are sanctionable under the Federal Rules of Civil Procedure. For the monumental discovery failures in the case, the court sanctioned six of Qualcomm's attorneys and referred them to the California State Bar for discipline. Further, the court sanctioned Qualcomm for its failure to produce more than 46,000 e-mails and documents that were requested in discovery by ordering it to pay $8,568,633.24 to Broadcom – an amount that equaled the entire sum of Broadcom's attorneys' fees and costs throughout the litigation.

> *. . .even negligent failures to provide discovery are sanctionable. . .*

E-discovery is fast becoming a critical, legal challenge. Having a good e-discovery strategy is an organization's first line of defense in a court proceeding and will help counsel and parties protect themselves against sever sanctions.

Roshanak Khosravi

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The attorneys in the professional liability section counsel a variety of clients with regard to malpractice claims, including attorneys, accountants, insurance agents and brokers, corporate directors and officers, and other business professionals. Whether the claims relate to legal malpractice or allegations of error or omission by financial professionals and insurance specialists, Thompson Coe attorneys have the capability in terms of sophisticated knowledge and experience coupled with a practical approach which provides answers to professional liability problems at any stage.

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