

TIG Insurance Co. v. Aon Re, Inc.

Fifth Circuit ruling may require parties to bring suits against their brokers/intermediaries even before disputes mature over the placing of reinsurance.

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TIG v. Aon Re, Cause No. 05-11450 (5th Cir. March 13, 2008) involves a dispute between TIG and its reinsurance broker, Aon Re, arising from a rescission of a reinsurance treaty brokered by Aon Re. Here, TIG retained Aon Re to solicit proposals for reinsurance for a book of worker's compensation policies. TIG provided Aon Re with information, including some historical loss data, regarding its workers compensation business.

One of the quotes for reinsurance received by Aon Re was from WEB Management on behalf of U.S. Life. This quote, however, was "out of line on the low side" compared to the other quotes received. This caused people at TIG to query whether the data sent to Aon Re and passed on to WEB/U.S. Life was complete. In fact, a TIG actuary prepared a letter, reviewed by a TIG vice president, criticizing the quality of Aon Re's reinsurance submission and noting that the WEB/U.S. Life quote was quite low as compared to the other quotes. At any rate, TIG accepted the U.S. Life bid, coverage was then bound and, a treaty was executed.

Eventually, U.S. Life stopped paying claims because of the inability to audit TIG's operations and because TIG did not provide it with requested information. TIG then demanded arbitration.

In its preliminary position statement in the arbitration, U.S. Life revealed that its right of rescission arose because Aon Re provided it with "materially incomplete" loss data. The arbitration proceeding was resolved in U.S. Life's favor.

After the arbitration set back, TIG sued Aon Re for negligence, negligent misrepresentation, breach of fiduciary duty and common law indemnity. On the one hand, TIG moved for summary judgment on the basis that Aon Re should be collaterally estopped from relitigating issues resolved in the arbitration. On the other hand, Aon Re moved for summary judgment principally on the statute of limitations. The district court denied TIG's Motion for Summary Judgment and granted Aon Re's Motion for Summary Judgment.

The parties agreed that Texas law applied. Under Texas law, negligence claims must be brought within "two years after the day the cause of action accrues" and within four years for breach of fiduciary duty claims.

TIG took the position that its cause of action did not accrue until the arbitration decision rescinded the reinsurance treaty in May of 2004, or alternatively in February 2003 when U.S. Life first asserted its right to rescind based on Aon Re's misrepresentations. On the other hand, Aon Re argued that TIG's causes of action accrued when the reinsurance treaty was consummated in June of 1998.

Here, the Fifth Circuit agreed with Aon Re. In this regard, the court held:

TIG acted on Aon Re's representations that complete data regarding Virginia Surety had been provided to U.S. Life's agent when TIG accepted U.S. Life's proposal and entered into the reinsurance treaty. U.S. Life similarly relied on Aon Re's representations to it that the historical loss data was complete when in fact Aon Re omitted the Virginia Surety data. A legal injury to TIG occurred on the date the treaty with U.S. Life became binding because that agreement was impaired from the outset by Aon Re's misrepresentations. U.S. Life had the right to rescind because of those misrepresentations. Additionally, TIG's liabilities for claims made under Virginia Surety policies were accruing from the date the treaty was consummated, but because of Aon Re's conduct, the treaty afforded TIG inadequate coverage for those claims, and they remained TIG's obligations.

Relying on the Texas Supreme Court case of *Murphy v. Campbell*, 964 S.W.2d 265 (Tex 1997), the Fifth Circuit rejected TIG's argument that it would have been meaningless to file the suit before U.S. Life rescinded the policy because Aon Re would defend that case on the basis that TIG did not suffer any damages. On this point, the court reasoned:

The proper course, the Texas court explained in *Murphy v. Campbell*, is to abate the claimant's negligence suit until any proceedings involving third parties are commenced and resolved. [Footnote omitted.] The court recognized that it may take a considerable period of time for a plaintiff to resolve issues with third parties. But requiring a plaintiff to sue when its cause of action accrued will foreclose "the specter of litigating decade-old-claims." [Footnote omitted.]

The Texas court thus held that even in cases in which the discovery rule applies, as it did in *Murphy v. Campbell*, a cause of action accrues when the alleged wrong has caused a legal injury, "however slight[]." [Footnote omitted.] In the present case, TIG could have sued Aon Re at any time from June 1998 and simultaneously pursued a declaratory judgment or other action against U.S. Life to clarify or determine the validity or extent of coverage of the treaty. TIG was legally injured because of the impairment of the treaty.

Next, the court analyzed whether the discovery rule would apply to toll the statute of limitations. In rejecting TIG's argument that the discovery rule tolled the statute of limitations, the Fifth Circuit held:

"An injury is inherently undiscoverable if it is by nature unlikely to be discovered within the prescribed limitations period despite due diligence." [Footnote omitted.] The injury in this case, the consummation of an agreement between TIG and U.S. Life that was based on incomplete underwriting data, is not inherently undiscoverable because it is the type of injury that could have been discovered by the exercise of reasonable diligence. [Footnote omitted.] An entity in TIG's circumstances has numerous sources from which it could determine whether accurate information was sent to one with whom it was negotiating a contract. A starting point is the company's own files. Another source is the party with whom it is about to contract. Inquiry could be made to determine or confirm the facts and assumptions on which the bargain was to be based.

In the present case, there was summary judgment evidence that TIG's vice president in charge of its workers' compensation division sent an internal email before accepting U.S. Life's bid, stating, "I want to make sure the data AON sent to the market is good." A red flag had been raised because U.S. Life's bid was so low. The TIG vice president claims that he instructed an employee in TIG's actuarial department to follow-up on this concern, but Washburn testified that he did not recall that conversation. While fact questions exist as to exactly what follow-up occurred, the evidence exemplifies that TIG's injury is not, categorically, the type of injury that is inherently undiscoverable.

Nor was TIG relying on Aon Re for expertise that TIG did not possess. The discovery rule has been applied under Texas law to malpractice claims against accountants and attorneys because "the very reason to seek expert advice is that tax matters are often not within the average person's common knowledge." [Footnote omitted.] Professional malpractice, such as erroneous tax advice, "is inherently undiscoverable." [Footnote omitted.]

Finally, the court ruled against TIG on its common law indemnity claim reasoning that it is not available other than in very rare situations involving purely vicarious liability.

Although the court assumed that Aon Re owed TIG a fiduciary duty, it did not apply the statute of limitations rule for other fiduciaries, such as lawyers, that limitations do not begin until the underlying proceedings are completed and liability adjudged against the party. The Fifth Circuit's ruling may require the filing of a lawsuit against a broker/intermediary well before any problems surface, if a party is aware, like TIG in this case, that there are idiosyncrasies involved in the placement process. According to the Fifth Circuit's opinion, TIG should have filed suit against Aon Re within two years of the consummation of the reinsurance treaty in June of 1998.

This is so, notwithstanding the fact that U.S. Life did not stop paying claims until the summer of 2001 (almost three years out) and that U.S. Life did not reveal that its right to rescind was based on the actions of Aon Re until February of 2003 (over four years out).

The result of this case will inevitably create some awkward situations between parties and their brokers/intermediaries. Hypothetically, one way to deal with this situation would be for brokers/intermediaries to agree to waive or toll the statute of limitations as part of the broker/intermediary agreement. Another course of action would be for the party to file suit against its brokers/intermediaries within two years of the consummation of a reinsurance treaty as a matter of course and then seek to abate those suits until such time as a problem arises, if ever. The lesson of *TIG v. Aon Re* is that delay in filing suit creates the risk of losing a potential remedy.

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