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This newsletter is intended to summarize significant cases impacting the insurance practice since the Fall 2015 newsletter. It is not a comprehensive digest of every case involving insurance issues during this period or of every holding in the cases discussed. This newsletter was not compiled for the purpose of offering legal advice. Any opinions expressed herein are those of the authors and do not necessarily reflect the views of Beirne, Maynard & Parsons, L.L.P.

INCORPORATION OF DEFECTIVE COMPONENT IS NOT "PHYSICAL INJURY"

U.S. Metals, Inc. v. Liberty Mut. Ins. Corp., No. 14-0753 (Tex. Dec. 4, 2015).

On certified questions from the Fifth Circuit, the Texas Supreme Court held that incorporation of a defective component does not constitute a covered "physical injury" until the component actually fails and causes damage to other property. While removal of a permanently installed component can cause "physical injury," if replacement of the defective component restores the property to use, the impaired property exclusion applies to preclude coverage both for the cost of repair and loss of use damages.

U.S. Metals sold Exxon 350 weld-in flanges for use in constructing two diesel refineries in Texas and Louisiana. The parties' contract called for the flanges to meet industry specifications. The flanges were designed to be permanently welded to the piping which would then be covered with coating and insulation. After installation of the flanges, but before the refineries were put into production, Exxon's testing revealed that the flanges were defective and did not meet the applicable specifications. Exxon determined that it was necessary to replace all of the flanges to avoid the risk of fire and explosion.

In order to replace the flanges, the temperature coating and installation had to be stripped off the flange, destroying the coating in the process. Each flange then had to be cut out of the pipe, removing gaskets, which were also destroyed in the process. Then a new flange was welded into the pipe and the gaskets and coating were replaced, restoring the refineries to use.

Exxon incurred over $6 million in costs to replace the flanges and over $16 million in damages for the loss of use of the refineries while the repairs were completed. U.S. Metals settled with Exxon for $2.2 million and then sought indemnification from its CGL insurer, Liberty Mutual. Liberty Mutual denied coverage and U.S. Metals sued in federal court.

The Liberty Mutual policy applied to damages because of "property damage", which was defined as "physical injury to tangible property, including all resulting loss of use" and "loss of use of tangible property that is not physically injured." The policy also contained typical "your product" and "impaired property" exclusions.

In granting Liberty Mutual's motion for summary judgment, the district court held that the "your product" exclusion barred coverage for the flanges, as well as the costs incurred in investigating the defect, and removing and replacing the flanges. However, the court held that the "your product" exclusion did not preclude coverage for the loss of use damages.

The district court also held that the "impaired property" exclusion precluded any duty to indemnify not only for the loss of use damages, but also for the cost to remove and replace the defective flanges.

On appeal, U.S. Metals argued that the term "physical injury" in the definition of "property damage" was ambiguous, offering two alternative meanings of the term. First, U.S. Metals contended that the mere incorporation of the defective flanges into the refineries by welding them to the piping resulted in "physical injury" because the work of the welders, pipefitter and other craftsmen was rendered useless. Second, U.S. Metals argued that the process of cutting the defective flanges out of the piping

resulted in "physical injury" to a third-party's property because the insulation had to be removed and the pipe had to be cut and ground to accept the new flange and weld.

U.S. Metals also argued that the term "replacement" in the "impaired property" exclusion required that the unusable property must be restored to use solely by the replacement of "your product" and since the replacement of the defective flanges required additional work, such as removal of insulation and welding, the "impaired property" exclusion did not apply.

The Fifth Circuit certified four questions to the Texas Supreme Court:

1. In the "your product" and "impaired property" exclusions, are the terms "physical injury" and/or "replacement" ambiguous?[1]
2. If yes as to either, are the aforementioned interpretations offered by the insured reasonable and thus, must be applied pursuant to Texas law?
3. If the above question 1 is answered in the negative as to "physical injury," does "physical injury" occur to the insured's product at the moment of incorporation of the insured's defective product or does "physical injury" only occur to the third party's product when there is an alteration in the color, shape, or appearance of the third party's product due to the insured's defective product that is irreversibly attached?
4. If the above question 1 is answered in the negative as to "replacement," does "replacement" of the insured's defective product irreversibly attached to a third party's product include the removal or destruction of the third party's product?

The Court concluded that the definitions of "physical injury" and "replacement" were not ambiguous. In response to the final two questions, the Texas Supreme Court provided a detailed explanation, which can be briefly summarized as follows:

The mere incorporation of a defective product into a larger project or product is not a "physical injury" or an "occurrence." Rather, "physical injury" requires tangible, manifest harm, which in this case did not occur because the defect was detected and corrected before the flanges leaked. Based upon the reasoning of *Don's Building* – that "occurred" means when the damage occurred not when it was discovered – "a defective product that causes damage is not an occurrence until the damage actually happens."

However, the Court recognized that "physical injury" to the refinery did occur when the defective flanges had to be cut out and replaced. Thus, the Court had to analyze the application of the "impaired property" exclusion. U.S. Metals argued that because the flanges were "welded in" and because replacement necessitated replacement of insulation and gaskets as well, restoring the refineries to use involved much more than simply replacing the defective flanges. Therefore, U.S. Metals, argued, the refineries were not "impaired property."

The Texas Supreme Court disagreed, describing the replacement of the insulation and gaskets as "wholly incidental" and stating that "[c]overage does not depend on such minor details of the replacement process but rather on its efficacy in restoring the property to use." Accordingly, both the costs to replace the flanges and the loss of use damages were excluded.

However, the Court did conclude that the insulation and gaskets that were destroyed during the replacement process could not be restored to use and thus, were not "impaired property" to which the "impaired property" exclusion applied. Therefore, the cost of replacing the gaskets and insulation was covered by the policy.

INDEPENDENT INJURY

In Re: Deepwater Horizon; Cameron Int'l Corp. v. Liberty Insurance Underwriters, Inc., No. 14-31321 (5th Cir. Nov. 19, 2015).

The Fifth Circuit certified question to the Texas Supreme Court, asking whether insured must allege and prove an injury independent from the denied policy benefits in order to state a cause of action under Chapter 541 of the Texas Insurance Code.

BP contracted with Transocean to drill the Macondo oil well in the Gulf of Mexico and to indemnify Transocean for liability related to the drilling of the well. Transocean purchased a blowout preventer manufactured by Cameron. The blowout preventer

[1] It should be noted that neither "physical injury" nor "replacement" appears anywhere in the "your product" exclusion.

attached the *Deepwater Horizon* to the Macondo well. Transocean agreed to indemnify Cameron for liability associated with the blowout preventer.

Cameron also purchased a $500 million tower of liability insurance. The layer at issue in this coverage action was Liberty's $50 million layer excess of $100 million.

After the spill, thousands of lawsuits were filed against BP, Transocean and Cameron. Cameron sought indemnity from Transocean and Transocean sought indemnity from BP. Transocean refused to indemnify Cameron and BP refused to indemnify Transocean. Cameron sued Transocean, which then counterclaimed against Cameron and sued BP seeking indemnity. BP sued Transocean and Cameron.

BP and Cameron proposed a settlement whereby BP would indemnify Cameron in exchange for $250 million. However, the settlement proposal required Cameron's insurers to waive their subrogation rights and that Cameron waive its indemnity claim against Transocean. All of Cameron's insurers, save Liberty, agreed to the settlement proposal. Liberty refused to waive its subrogation rights and refused to consent to Cameron's waiver of its indemnification rights against Transocean. Further, Liberty contended that the Other Insurance Clause in its policy made the Liberty policy excess to Cameron's indemnification rights because "other insurance" was defined to include "any type of self-insurance, indemnification or other mechanism by which an Insured arranges for funding of legal liabilities."

Cameron went forward with the settlement, funding Liberty's $50 million layer with its own money. Cameron then sued Liberty asserting claims for breach of contract and under Chapter 541 of the Texas Insurance Code. On cross motions for summary judgment, the district court held that Liberty breached its contract and awarded Cameron $50 million. The district court granted Liberty's motion for summary judgment as to the Chapter 541 claims, holding that Cameron could not assert an Insurance Code claim given that its only actual damages were the policy benefits that Liberty had refused to pay. In a later order, the district court denied Cameron's request for attorneys' fees. Both parties appealed.

The Fifth Circuit found the Other Insurance clause in Liberty's policy to be ambiguous given that Cameron's interpretation was reasonable. Therefore, Liberty's policy was not excess to Cameron's mere claim for indemnification from Transocean. The Fifth Circuit then rejected Liberty's argument that Cameron lost coverage by breaching the policy's subrogation clause when it settled with BP because it found that at the time of settlement, Liberty had already breached the policy by denying coverage. The Fifth Circuit reversed the district court's denial of Cameron's motion for attorneys' fees and remanded for a determination of the amount of such fees.

Most importantly, the Fifth Circuit certified the following question to the Texas Supreme Court:

"Whether, to maintain a cause of action under Chapter 541 of the Texas Insurance Code against an insurer that wrongfully withheld policy benefits, an insured must allege and prove an injury independent from the denied policy benefits?

In doing so, the Fifth Circuit recognized that it previously held that an insured was required to plead and prove some injury other than policy benefits in order to assert a Chapter 541 claim in *Great American Insurance Co. v. AFS/IBEX Financial Services, Inc.*, 612 F.3d 800, 808 & n.1 (5th Cir. 2010). Cameron relied on *Vail v. Texas Farm Bureau Mutual Insurance Co.*, 754 S.W.2d 129 (Tex. 1988), which held that an insured need not show any injury independent of policy benefits in order to recover on an extra-contractual theory. While the district court agreed with Cameron, it was constrained by *Great American* to grant Liberty's motion for summary judgment on this issue.

The Fifth Circuit had based its decision in *Great American* on *Provident American Insurance Co. v. Castaneda*, 988 S.W.2d 189, 198-99 (Tex. 1998), which it determined changed the rule announced in *Vail*. While the Texas Supreme Court has been silent on the issue since the Fifth Circuit's *Great American* opinion, the Court noted that two intermediate courts of appeal have held that *Vail*, not *Castaneda*, governs the issue.

COVERAGE FOR DISGORGEMENT

Burks v. XL Specialty Ins. Co., No. 14-14-00740-CV (Tex. App. – Houston [14th Dist.] Nov. 10, 2015).

Fact issues precluded summary judgment for insurer on its duty to advance defense costs or indemnify the insured for a settlement of a bankruptcy plan agent's claim against a former officer seeking disgorgement

of past salary and bonuses and to avoid future obligations to the former officer.

Burks was an officer of Superior Offshore International, which was issued a claims-made D&O policy by XL. Superior reorganized through a Chapter 11 bankruptcy. After XL declined to advance defense costs or indemnify him for claims brought against him by the bankruptcy plan agent, Burks settled the claims and brought suit against XL for reimbursement. XL moved for summary judgment on two grounds: (1) the plan agent's claim was brought outside the policy period and it was not interrelated with prior shareholder derivative actions; and (2) XL had no duty to advance defense costs or indemnify for the settlement because the plan agent's claim sought disgorgement and thus was not within the definition of "loss." The trial court granted summary judgment for XL without specifying the grounds.

It was undisputed that the plan agent's claim was not made until after the policy period. However, Burks contended that the plan agent's claim was interrelated to earlier derivative actions and thus would be deemed first made when the first such claim was filed. XL contended that the court could not consider the complaints filed in the earlier derivative actions under the eight corners rule to evaluate whether they were interrelated to the plan agent's claim.

In resolving the eight corners dispute, rather than relying on *Pendergest-Holt's*[2] statement that parties were free to contract around judge-made rules such as the eight corners rule, the Court relied on *Weingarten Realty Mgmet. Co. v. Liberty Mut. Fire Ins. Co.*, 343 S.W.3d 859, 862 (Tex. App. – Houston [14th Dist.] 2011, pet. denied), for the proposition that Texas recognizes a limited exception to the eight corners rule to resolve a "pure coverage question." Then, noting the similarities in the allegations in the derivative actions and the allegations in the plan agent's claim, the Court determined that there were fact issues as to whether the claims were interrelated, so XL was not entitled to summary judgment on that basis.

The plan agent's claim sought to recover transfers of money and stock to Burks and to avoid future obligations to Burks under a separation agreement on the ground that Superior Offshore did not receive reasonably equivalent value under the Bankruptcy Code and the Texas Uniform Fraudulent Transfers Act ("TUFTA"). With respect to the advancement of defense costs, the Court held that even if disgorgement is uninsurable under Texas law, XL did not establish that the D&O Policy did not require advancement of defense costs.

In reaching this conclusion, the Court distinguished case law to the contrary on the grounds that those cases involved a duty to defend and this policy provided only for advancement of defense costs. The Court then discussed the profit or advantage exclusion which required advancement of defense costs until final adjudication and the policy provisions that required the insured to reimburse any advanced defense costs in the event it was determined that there was no coverage.

Finally, in determining that there were fact issues with respect to whether Burks' settlement was uninsurable, the Court noted that while *In re TransTexas Gas Corp.*, 597 F.3d 398, 309-311 (5th Cir. 2010), stood for the proposition that a judgment that is "restitutionary in nature" is "uninsurable under Texas law," "no Texas court has held that insuring a settlement of a claim seeking restitution or disgorgement is against public policy or otherwise generally 'uninsurable under the law' of Texas." (emphasis added). The Court then noted that in addition to seeking restitution, the bankruptcy agent also sought to recover attorneys' fees under TUFTA. Accordingly, there was a fact issue as to whether the entire settlement was paid for restitution, and the Court reversed XL's summary judgment and remanded to the trial court, presumably for a trial allocating the settlement between restitution and other damages, if any.

CATCH-ALL LANGUAGE IN AN EXCLUSION STILL INTERPRETED NARROWLY

Evanston Ins. Co. v. Gene by Gene, Ltd., 2016 WL 102294 (S.D. Tex. Jan. 6, 2016)

In this declaratory judgment action filed by Evanston, the Southern District of Texas granted summary judgment in favor of the insured, Gene by Gene, Ltd. ("Gene"), finding that the exclusion sought to be relied upon by Evanston did not in fact apply to deny a duty to defense or indemnify Gene in an underlying lawsuit.

Gene was the owner of a website that, for a fee, would utilize users' DNA in order to provide

[2] *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562, 574 (5th Cir. 2010).

genealogy information. In the underlying action for which Gene sought coverage, Gene was sued for wrongful dissemination and publication of the plaintiffs' DNA information.

Evanston had issued four policies to Gene, two professional liability policies and two excess. Evanston argued that the policies did not provide coverage to Gene pursuant to an exclusion in the Policies titled "Electronic Data and Distribution of Material in Violation of Statutes Exclusion." ("Exclusion"). The Exclusion precluded coverage for a claim based upon or arising out of any violation of:

> (a) the Telephone Consumer Protection Act of 1991 (TCPA) and amendments thereto or any similar or related federal or state statute, law, rule, ordinance or regulation;
>
> (b) the CAN-SPAM Act of 2003 and amendments thereto or any similar or related federal or state statute, law, rule, ordinance, or regulation; or
>
> (c) any other statute, law, rule, ordinance, or regulation that prohibits or limits the sending, transmitting, communication or distribution of information or other material.

Evanston contended the claim in the underlying lawsuit falls under the plain language of section C of the Exclusion because the suit was brought pursuant to a statute—the Genetic Privacy Act. Gene contended that such construction was too broad and unreasonable in light of the rest of the Exclusion, and entire policy, and counter-claimed for coverage.

Specifically, Gene contended the canon of construction of *ejusdem generis* should apply to Section C: "Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objection similar in nature to those objections enumerated by the preceding specific words." The TCPA generally regulates the use of unsolicited phone calls and faxes to consumers. The CAN-SPAM Act of 2003 generally regulates the use of unsolicited, fraudulent, abusive, and deceptive emails to consumers. Accordingly, Gene contended Section C also referred generally to other forms of unsolicitated communication to consumers "that intrude[ ] into one's seclusion." The court held that Gene's construction did not render the "or any similar or related" potions of Sections A and B redundant, but stated that it was reasonable to construe that language as meaning any similar or related statutes or law that govern communication over the phone or fax machine (Section A) or email (Section B), while Section C covers other, similarly unsolicited forms of communication that may be regulated by statute law, rule, ordinance, or regulation.

Finding that because Gene's interpretation was reasonable, and that the court therefore had to apply the insured's reasonable interpretation, the court held that the Exclusion did not operate to bar coverage. The facts upon which the claim was based dealt solely with Gene's alleged improper disclosure of DNA test results on its public website and to third-parties. The facts alleged therefore did not address the type of unsolicited seclusion invasion contemplated by the Exclusion. Thus, coverage existed.

PRIORITY OF POLICIES AND RESPONSIBILITY FOR DEFENSE COSTS

Liberty Mutual Fire Ins. Co. v. ACE American Ins. Co. and HCA, Inc., 2015 WL 1355551 (W.D. Tex. Dec. 8, 2015).

This declaratory judgment action arose from a single-vehicle accident that occurred on June 23, 2009 in San Antonio, Texas. Elizabeth Easley sustained injuries when a shuttle bus driven by Roel Ybarra collided with a pole in the parking lot of Methodist Hospital. Ybarra was an employee of Ampco System Parking, Inc. n/k/a ABM Parking Services, Inc. ("Ampco"), a subsidiary of ABM Industries Incorporated ("ABM"). Methodist owned the shuttle bus. Ms. Easley filed suit against Ybarra, Ampco and ABM (the "Underlying Defendants") alleging negligence and respondeat superior (the "Underlying Lawsuit").

Liberty issued a Business Auto Policy to ABM (the Liberty Policy). Ampco is an additional insured under the Liberty Policy.

ACE issued Business Auto Policy to HCA for the same period (the ACE/HCA Policy). Methodist Hospital is an additional insured under the ACE/HCA Policy. The Underlying Defendants were not additional named insureds under the ACE/HCA Policy and were not affiliates or subsidiaries of HCA.

ACE also issued a Business Auto Policy to ABM for the same period (the ACE/ABM Policy). Ampco was an additional insured under the ACE/ABM Policy.

The ACE/HCA Policy and the ACE/ABM are collectively herein the "ACE Policies." The ACE Policies each had a $1M deductible that would be eroded by defense costs.

The Liberty Policy and the ACE Policies all contained the same "other insurance' clause that provided primary coverage for vehicles owned by a named insured and excess coverage for non-owned vehicles. The Policies further stated that they provided primary coverage for any liability assumed under an "insured contract," as that term was defined, regardless of the owned auto provision.

ABM, Ampco, and Ybarra were using the shuttle bus involved in the accident with the permission of Methodist Hospital. ABM tendered the Underlying Suit to Liberty under the Liberty Policy. Liberty had been providing a defense to the Underling Defendants. Because Methodist owned the vehicle Ybarra was driving, Liberty tendered the underlying suit to ACE as the alleged primary carrier under the ACE/HCA Policy. ACE rejected the tender, alleging that the Liberty Policy provided primary coverage and it had no duty to defend until the ACE/HCA Policy's $1M deductible was satisfied. Liberty also tendered defense of the Underlying Suit to Methodist Hospital, which likewise rejected Liberty's tender. The Underlying suit was settled, and the cost of the settlement and defense costs were within the $1MM deductible of the ACE Policies.

Liberty sought a declaration that the ACE/HCA Policy provided primary coverage, while the Liberty Policy provided excess coverage. For this contention, Liberty first argued the Underlying Defendants were using the shuttle bus with Methodist Hospital's permission and therefore were omnibus insureds under the ACE/HCA Policy. For the purposes of liability, coverage under the ACE/HCA Policy, "insureds" is defined as "Anyone else while using with your permission a 'covered' auto you own, hire, or borrow."

Second, Liberty argued the ACE/HCA Policy provided primary coverage and points to the fact that the Liberty Policy and the ACE Policies all contain the same "other insurance" clause that provides primary coverage for vehicles owned by a named insured and excess coverage for non-owned vehicles. Because Methodist Hospital is a named insured under the ACE/HCA Policy and owned the shuttle bus, Liberty argued the ACE/HCA Policy provides primary coverage, and Liberty's coverage for the non-owned vehicle is excess. The court agreed.

Liberty argued it is entitled to recover the costs it incurred in defending the Underlying Defendants after the tender to Methodist Hospital and ACE because as the excess liability carrier, it has a right of both contractual and equitable subrogation against the primary carrier that should have assumed the defense. Liberty argued its right to recover in subrogation the defense costs it incurred is enforceable against whichever party –ACE or HCA—the Court determined was liable for funding that defense.

Though the court held the ACE/HCA policy was primary, the court found ACE did not have a duty to front defense costs or indemnity payments under the ACE/HCA Policy –even though primary—until the $1MM deductible was exhausted. Liberty was therefore subrogated to seeking the defense costs from the Underlying Defendants who owed the deductible – and could not recover directly from ACE as Liberty wanted to do.

HCA argued Liberty had no right to collect the deductible from HCA because there was no contractual relationship between the parties. The court found the argument unpersuasive, as HCA agreed in the ACE/HCA Policy to pay all sums the "insured" became legally obligated to pay within the deductible, and that ABM and Ybarra—as permissive users of the shuttle bus—were "insureds" under the ACE/HCA Policy. Therefore, Liberty, as a subrogee for the insured ABM and Ybarra, had a right to collect from HCA all sums ABM and Ybarra became legally obligated to pay in the Underlying suit that fell within the $1MM deductible.

EXTRINSIC EVIDENCE

Shanze Enterprises, Inc. d/b/a Baja Auto Ins., v. American Casualty Company of Reading, Pa., 2015 WL 1014167 (N.D. Tex. Dec. 15, 2015).

The Northern District of Texas considered cross-motions for summary judgment regarding whether the defendant-insurer ("ACCO") had a duty to defend the plaintiff-insured (Shanze Enterprises, Inc. d/b/a Baja Auto Ins., "Shanze") under a business owners' liability policy. The court concluded that the defendant did not have a duty to defend, and granted summary judgment in the defendant-insurer's favor. This case is considered here only for purposes of the court's review of the eight-corners rule, and whether extrinsic evidence could be properly considered.

The suit arose from an underlying action brought by Baja Ins. Services, Inc. ("Baja"), an insurance brokerage firm, against Shanze and other defendants for trademark infringement.

ACCO agreed under the Policy to defend Shanze against any suit seeking damages for a covered "personal and advertising injury" which "means injury . . . arising out of one or more [specified] offenses." The two "offenses" at issue were "[t]he use of another's advertising idea in your 'advertisement'" and "[i]nfringing upon another's copyright, trade dress or slogan in your 'advertisement.'" The Policy excludes coverage for "personal and advertising injury" "[a]rising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights." But "this exclusion does not apply to infringement, in [the insured's] 'advertisement' of copyright, trade dress or slogan."

When Shanze requested ACCO provide a defense and indemnity, ACCO denied, arguing Shanze was confusing trademark infringement with use of another's slogan or advertising idea.

As a threshold matter, the court addressed a preliminary question concerning what summary judgment evidence is properly considered under Texas eight-corners' rule as Shanze wanted the court to review Shanze's website as a whole, to show coverage. Only the site name and a couple of print-outs were included in the underlying petition.

Shanze contended over ACCO's objection that (1) the print-outs from the website attached as exhibits to Baja's complaint should be included because, under the eight-corners rule, the court must consider exhibits attached to the complaint; and (2) the court must consider Baja's entire website because, "[l]ike a hyperlink[, Baja's] attachment of the website attaches the entire website," since "[n]o one truly expects a plaintiff to print out each and every page of the website and attach it to the complaint." Shanze contended that attaching an entire website to a complaint would be impractical and infeasible due to content size and the fact that sites have interactive features that are not captured by a paper copy.

The court decided to assume that it must consider exhibits attached to a complaint, and that same were not extrinsic evidence, because doing so would not affect the court's decision. The court ultimately held that it would not consider the information found on the Baja website that was neither included in the Complaint nor in an exhibit to the Complaint as "the court has found no authority to support the proposition that, when ruling on the duty to defend, the court must consider an entire website when only part of the website is included in a print-out that is attached as an exhibit to the complaint in the underlying lawsuit."

The court noted that the Supreme Court of Texas has "never recognized any exception to the strict eight-corners rule" and that, at most, "the Fifth Circuit has stated that *if* the Texas Supreme Court were to recognize an exception, it would likely do so 'when it is initially impossible to discern whether coverage is potentially implicated *and* when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage in the truth or falsity of any facts alleged in the underlying case.'"

Here, though Shanze urged that the website itself was referenced in the complaint. Shanze could not point the court to any authority under Texas law allowing its consideration. But further, the court stated that consideration of the site would certainly touch on the merits of the case, because it would tend to prove Baja's trademark infringement.

Moreover, the court stated that it is not "initially impossible to determine whether coverage is potentially implicated," potentially necessitating any review of extrinsic evidence. Specifically, the court indicated it was capable of determining from a review of the complaint whether Baja alleged that its trademark is an advertising idea or slogan.