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This newsletter is intended to summarize significant cases impacting the insurance practice since the Fall 2010 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.

CONTRACTUAL LIABILITY EXCLUSION APPLIES TO INSURED'S ASSUMPTION OF ITS *OWN* LIABILITY

Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London, 327 S.W.3d 118 (Tex. 2010).

Texas Supreme Court abrogated *Lennar Corp. v. Great American Insurance Co.*, 200 S.W.3d 651 (Tex. App—Houston [14th Dist.] 2006, pet. denied), holding that contractual liability exclusion in CGL policy excludes coverage when the only basis for liability is that the insured contractually agreed to be responsible for the damage.

During a Dallas Area Rapid Transit Authority (DART) construction project, heavy rains resulted in water damage to a building adjacent to the construction site. The building owner, RT Realty ("RTR"), sued the general contractor, Gilbert Texas Construction ("Gilbert"), asserting tort and breach of contract claims, the latter of which being premised on RTR's alleged third-party beneficiary status to the contract between Gilbert and DART. The trial court granted summary judgment on all tort claims asserted against Gilbert on the basis of governmental immunity, leaving only RTR's breach of contract claim.

Gilbert settled the breach of contract claim for $6.175 million and sought indemnity from its excess insurer, Underwriters at Lloyd's London ("Underwriters"). Underwriters denied coverage pursuant to the Contractual Liability Exclusion (the "exclusion"), which excluded coverage for:

> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of *the assumption of liability* in a contract or agreement. This exclusion does not apply to liability for damages:
>
> (1) Assumed in a contract or agreement that is an "insured contract;" or
>
> (2) That the insured would have in the absence of the contract or agreement. (emphasis added).

The policy defined "insured contract" as consisting of seven types of agreements, the last of which including the assumption of another's liability:

> Insured contract means:
>
> . . .
>
> (g) That part of any other contract or agreement pertaining to your business under which you assume the tort *liability of another* to pay damages because of "bodily injury" or "property damage" to a third person or organization, if the contract or agreement is made prior to the "bodily injury" or "property damage." Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. (emphasis added).

Gilbert argued the exclusion was inapplicable, as it only applied to Gilbert's assumption of *another's* liability – as opposed to its own. In addition, Gilbert argued that Underwriters waived its right and was estopped to deny coverage by assuming Gilbert's defense. Both parties moved for summary judgment. The trial court granted Gilbert's motion as to coverage, and granted Underwriters motion as to Gilbert's statutory, waiver, and estoppel claims.

The court of appeals reversed and rendered judgment for Underwriters, holding that: 1) the breach of contract claim fell within the policy's contractual liability exclusion, and was not excepted from the exclusion; and 2) Underwriters had not waived its policy defenses of non-coverage because Underwriters had not assumed Gilbert's defense.

Before the Texas Supreme Court, Gilbert argued that under existing precedent, including *Lennar Corp. v. Great American Insurance Co.*, 200 S.W.3d 651, 693 (Tex. App—Houston [14th Dist.] 2006, pet. denied), the phrase "assumption of liability" as used in the exclusion necessarily involved the assumed liability *of another*. Essentially, Gilbert argued that the exclusion should be interpreted as stating: "assumption of *another's* liability." The Texas Supreme Court rejected this argument, recognizing that if the exclusion's use of the phrase "assumption of liability" had "been intended to be so narrow as to apply *only* to an agreement in which the insured assumes liability of another party by an indemnity or hold-harmless agreement, it would have been simple to have said so." (emphasis original).

The Court based its holding on both the plain meaning of the policy terms, and the fact that the "insured contract" exception to the exclusion actually contained the limiting language that Gilbert urged the Court to read into the exclusion itself (i.e., liability of another), which demonstrated that the parties were capable of using such narrow, specific language when that was their intent.

The Court then recognized that while other jurisdictions and Texas appellate courts have interpreted the exclusion differently, it believed that its interpretation was in accord with longstanding principles of insurance contract interpretation.

The Court rejected Gilbert's argument that its current decision was in conflict with *Lamar Homes*, 242 S.W.3d at 13, stating that *Lamar Homes* did not involve the consideration or interpretation of the contractual liability exclusion, and, unlike the current case, involved the duty to defend, which is a distinct a separate duty than the duty to indemnify.

The Court also rejected Gilbert's argument that the second exception to the exclusion, which brought back into coverage claims that had an independent basis in tort, applied. The Court explained that because RTR's tort claims were properly dismissed, the only viable claim underlying Gilbert's settlement was for breach of contract. Thus, the Court refused to entertain Gilbert's argument that, although it was successful in obtaining summary judgment on all tort claims on the basis of governmental immunity, that Gilbert would not have enjoyed governmental immunity in the absence of the contract. As stated by the Court, "Gilbert would have us disregard the actual facts underlying its settlement and hold that the exception applies even to potential liability that Gilbert *might* have had if it had not entered into a contract with DART. We decline to do so." (emphasis original).

Finally, the Court rejected Gilbert's argument that Underwriters was liable for damages under an estoppel theory based on Underwriters' alleged assumption of control over Gilbert's defense by directing Gilbert to seek summary judgment on the basis of governmental immunity, but not informing Gilbert of Underwriters' position that the insurance policy did not cover breach of contract claims. In rejecting this argument, the Court recognized that even assuming the validity of Gilbert's assertions, Gilbert was not prejudiced, as there was no evidence that Underwriters would have settled the claim or had a duty to indemnify if Gilbert had decided not to pursue summary judgment on the tort claims, as the trial court had already ruled that all contractors were immune. The Court of Appeals decision was affirmed.

Ewing Constr. Co., Inc. v. Amerisure Ins. Co., No. C-10-256 (S.D. Tex. Apr. 28, 2011).

The district court applied *Gilbert*, holding that when underlying lawsuit involves claims against insured couched in terms of tort, but which sound in contract, contractual liability exclusion in CGL policy precludes coverage.

On February 25, 2010, Ewing was sued for allegedly deficient construction of a tennis facility in Corpus Christi, Texas pursuant to a contract between Ewing and Tuloso–Midway (the "contract"). Ewing sought a defense from its insurer, Amerisure. Amerisure denied coverage. Ewing then sued Amerisure, seeking a declaration that Amerisure was obligated to provide a defense to Ewing in the underlying lawsuit, and damages for breach of contract and violations of the Texas Prompt Payment of Claims Statute. Amerisure filed a counterclaim seeking declaration that it owed no duty to defend or indemnify, and both parties moved for summary judgment.

In considering the cross motions for summary judgment, the Court found that the general coverage provision of the policy afforded coverage for the type of property damage claimed in the underlying lawsuit. However, based on *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex. 2010), the court then found that coverage was excluded by the Contractual Liability Exclusion (the "exclusion"), which provided in pertinent part:

> "[B]odily injury" or "property damage" for which the insured is obligated to pay damages by reasons of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> (1) That the insured would have in the absence of the contract or agreement; or
>
> (2) Assumed in a contract or agreement that is an "insured contract" ....

Quoting the Texas Supreme Court's opinion in *Gilbert*, the district court explained that the exclusion is not limited to situations where "'the insured assumes the liability of another, such as in an indemnity or hold-harmless agreement,'" but rather "'the exclusion's language applies without qualification to liability assumed by contract [with two exceptions.]'" (modification original). Turning to the facts of the case before it, the district court found that allegations made in the underlying lawsuit sufficiently demonstrated that Ewing assumed liability with respect to its own work on the subject matter of the contract, the tennis courts, such that it would be liable for failure to perform under the contract if that work was deficient. Accordingly, the district court found the exclusion precluded coverage, unless an exception applied.

Ewing argued that because claims for negligence were asserted in the underlying lawsuit, which involved liability that "the insured would have in the absence of the contract or agreement," the exception brought the claim back into coverage. Noting that Texas courts characterize actions as tort or contract by focusing on the source of liability and the nature of the plaintiff's loss, the district court found that the underlying lawsuit only involved claims in contract, despite the attempt to couch them in terms of tort, rendering the exception inapplicable. Accordingly, Amerisure had no duty to defend or indemnify Ewing, and the court entered summary judgment in favor of Amerisure.

BUSINESS RISK EXCLUSIONS

VRV Dev. L.P. v. Mid-Continent Cas. Co., 630 F.3d 451 (5th Cir. 2011)

The Fifth Circuit held that there was no duty to defend or indemnify in connection with a suit to recover property damage to homeowners' backyards and a public utility easement caused by the collapse of retaining walls designed and built by subcontractors of the insured. The court held that the damage to the retaining walls themselves, while occurring during the policy period, was excluded pursuant to the "your work" exclusions. Although the damage to the homeowners' backyards and the utility easement was potentially covered "property damage," the retaining walls did not collapse until after the expiration of the policy period. Therefore, this damage did not occur during the policy period and was not covered either.

VRV, Inc. was the named insured under two successive CGL policies issued by Mid-Continent. The first policy had a policy period from May 25, 2004 through May 25, 2005. The second policy had a policy period from May 25, 2005 through May 25, 2006.

VRV, Inc. converted into a limited liability partnership, but upon renewal of the CGL policy, VRV, Inc. continued to be listed as the named insured and there was no evidence that Mid-Continent was informed of VRV's conversion into a limited liability partnership. The district court granted summary judgment to Mid-Continent solely on the ground that VRV, L.P. was not an insured. The Fifth Circuit affirmed on different grounds.

VRV, Inc. contracted to develop residential lots in Dallas. VRV hired subcontractors to design and build retaining walls on the property. Eventually, homes were built on the lots and sold to homeowners. According to the allegations in the underlying pleadings, sometime between May and July of 2006, cracks began to appear in one of the retaining walls. The retaining walls collapsed in January and March of 2007, causing the property damage to homeowners' backyards and the utility easement.

The CGL policies contained an exclusion for "'property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'" In addition, the policies contained an additional exclusion to the extent that property damage was not included in the "products-completed operations hazard" for "that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it."

Applying an eight corners analysis to the determination of the duty to defend, the court noted that the plaintiffs alleged that VRV or its subcontractors negligently designed and built the retaining walls during the policy periods. They further alleged that they discovered a crack in one of the retaining walls between May and July of 2006. Although most of this period was after the expiration of the policy period, for purposes of the duty to defend analysis, the court assumed that a crack developed during the policy period. However, the court concluded that the policy exclusions precluded coverage for damage to the work completed by VRV and its subcontractors. Accordingly, the damage to the retaining walls themselves was excluded.

The property damage to the homeowner's backyards and the utility easement was not alleged to occur until the retaining walls collapsed in 2007, after the expiration of the policy period. Therefore, this property damage did not trigger a duty to defend.

The Fifth Circuit also rejected what it characterized as a "bootstrapping argument" by the insured that the later property damage to the backyards and the easement should be deemed to have occurred at the same time as the damage to the retaining walls. Relying on the Texas Supreme Court's recent opinion in *Don's Building*, the court stated that it must focus on when the "actual physical damage" to the property occurred and not the time of the "negligent conduct" or the "process … that later results in" the damage.

Finally, the Fifth Circuit applied the reasoning of *Griffin*, holding that without evidence of property damage within the policy period, there was no possibility that Mid-Continent could ever have a duty to indemnify. The Court noted that VRV had the burden on summary judgment of setting forth specific facts demonstrating that its claim for indemnity was covered and that it failed to satisfy that burden. Therefore, the court affirmed the district court's summary judgment, albeit on different grounds. Interestingly, the Fifth Circuit did not discuss or cite the Texas Supreme Court's opinion in *D.R. Horton.*

STOWERS: **MULTIPLE INSUREDS, PRIMARY AND EXCESS POLICIES**

Pride Transp. v. Cont'l Cas. Co., No. 4:08-CV-007-Y (N.D. Tex. March 31, 2011)

In settling the claims against one of its two insureds, the insurers were not liable for breach of contract for failing to settle the claims against the other insured because both insurers exhausted policy limits to satisfy the settlement amount demanded from the first insured.

The underlying litigation in this insurance dispute involved an automobile accident in which Defendant Harbin, a driver for an interstate motor carrier, Defendant Pride, rear-ended the truck being driven by one of the plaintiffs, Hatley, rendering him (Hatley) a paraplegic. Hatley and his wife then sued Harbin and Pride. Pride, along with Harbin as an additional insured, was covered by policies issued by Continental (primary) and Lexington (excess). Continental assumed the defense of both of the insureds, and ultimately tendered policy limits after the plaintiffs made a settlement demand to only Harbin for the limits under both the Continental and Lexington policies. Lexington then began handling all negotiations pertaining to the settlement. After Lexington unsuccessfully attempted to settle all claims against both of the insureds, it accepted the plaintiffs' demand on Harbin. Lexington then withdrew from the defense, as its policy limits had been exhausted.

Once Pride settled, it filed suit against Continental and Lexington, asserting a claim for, *inter alia*, breach of contract. Pride alleged that the insurers failed to provide an adequate defense for Pride in the underlying lawsuit. Specifically, Pride contended that the insurers were under no *Stowers* duty when they settled on behalf of Harbin, which left Pride exposed. For example, according to Pride, *Stowers* was not triggered because the demand against Harbin did not propose to release all claims. On summary judgment, the court rejected Pride's argument, explaining that all of the claims against Harbin arising from the incident made the basis of the underlying litigation were released, and that Pride failed to cite any Texas authorities holding that every potential claim against an insured must be settled in order for a *Stowers* duty to arise. Pride also argued that because the demand exceeded the limits of each policy, when taken individually, the demand was not a valid *Stowers* demand. The court rejected this argument, as well, because the amount demanded was for the combined policy limits under both policies.

Although the court noted that "[t]he application of the *Stowers* doctrine becomes more difficult when multiple claimants or insureds are involved," it quoted *Travelers Indemnity Co. v. Citgo Petroleum Corp.*, 166 F.3d 761 (5th Cir. 1999), which held that "Texas law permits an insurer . . . 'to favor a claim by one claimant over a claim by another claimant in pursuit of this [*Stowers*] duty.'" Additionally, both policies at issue specifically allowed the insurers to withdraw their defense as soon as policy limits had been exhausted. Lastly, the court concluded that whether the insurers were under a *Stowers* duty was immaterial because, ultimately, the insurers acted reasonably in settling the claims against Harbin, regardless of the fact that Pride was left exposed. The court reached this conclusion because it determined that the claims against Harbin were clearly covered, that the amount demanded was within the combined limits of the policies, and that the demand was reasonable.

***STOWERS*: NO CAUSE OF ACTION AGAINST INSURER FOR NEGLIGENCE OR TORTIOUS INTERFERENCE**

Taylor v. Allstate Ins. Co., No. 01-09-00457-CV (Tex. App.—Houston [1st Dist.] March 31, 2011)

When the insured is dissatisfied with the third-party defense provided by counsel, Texas law does not recognize common law causes of action against the insurer for negligence, tortious interference with fiduciary duty, or tortious interference with contract. However, this does not foreclose an insured's claims for breach of the insurance policy or the insurer's breach of statutory duties.

The Texas Supreme Court has held that an insurer's common law duty in a third-party defense context is limited to the *Stowers* duty to protect the insured by accepting a reasonable settlement offer within policy limits. *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625 (Tex. 1998). This precedent holds that, due to the duty of loyalty and unfettered control in the attorney-client relationship, an insurer does not exercise the requisite level of control over the attorney's representation to be vicariously liable for the attorney's misconduct. Thus, the *Traver* and *Head* courts refused to recognize a negligence or breach of the duty of good faith and fair dealing claim against an insurer for mishandling the defense of an insured, outside of a *Stowers* claim. The Texas Supreme Court reiterated this principle in *Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co.*, 236 S.W.3d 765 (Tex. 2007), and Texas Courts of Appeals have applied this reasoning to foreclose any negligent mishandling of the defense claim against the insurer other than a *Stowers* claim. *See, e.g., Methodist Hosp. v. Zurich Am. Ins. Co.*, 2009 WL 3003251 (Tex. App.—Houston [14th Dist.] July 7, 2009, pet. denied); *Cain v. Safeco Lloyds Inc. Co.*, 239 S.W.3d 895 (Tex. App.—Dallas 2007, no pet.); *Duddleston, Inc. v. Highland*, 110 S.W.3d 85 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

Here, the insured was sued by a third party in connection with an automobile accident. The insurer provided a defense by assigning counsel. The insured settled the case for an amount that exceeded policy limits, and the insurer paid its policy limits. The insured sued his attorney and the insurer to recover the amount the insured paid to settle the litigation, alleging his defense was mishandled. The insured's claims against the insurer were under various causes of action, including negligence, tortious interference with a fiduciary relationship, and tortious interference with contract. The insured did not assert a *Stowers* claim.

The insurer filed a motion for summary judgment on the insured's claims, and the trial court granted the motion. Applying the reasoning from *Traver* and *Head* and their progeny, the Houston Court of Appeals held that the attorney-client relationship prevents Texas law from recognizing a negligence, tortious interference with a fiduciary duty, or tortious interference with contract cause of action against an insurer in a third-party defense context. The court held that such a claim was foreclosed by the special duties owed by the defense attorney to the insured with which the insurer cannot interfere. Accordingly, the court held that the trial court properly granted summary judgment on these claims.

The insured also sued the insurer for breach of the insurance contract and alleged breaches of statutory duties under the Texas Insurance Code. The court held that nothing in *Traver* or *Head* or their progeny foreclosed these causes of action in this context. Those cases concerned common law tort claims against the insurer, and some even expressly discussed the insurer's duties under the insurance policy. Accordingly, the court held that the insurer failed to meet its summary judgment burden to defeat these causes action with its general "no cause of action" motion.

PRIOR LITIGATION AND INTERRELATED WRONGFUL ACTS

Valley Int'l Country Club Homeowners Assoc., Inc. v. Fed. Ins. Co., No. 1:09-CV-00244 (S.D. Tex. Jan. 3, 2011)

When the underlying complaint fails to allege a causal connection between the events leading to separate lawsuits, neither "prior litigation" nor "interrelated wrongful acts provisions" negated the insurers' duty to defend.

In *Valley International Country Club*, the court examined a prior litigation exclusion in relation to two lawsuits, one filed in 2001 and another filed in 2009. Both lawsuits complained of the Defendants' attempts to amend covenants and restrictions related to maintenance of a residential subdivision. The 2009 lawsuit stated that it was an "exact replica" of the 2001 lawsuit and it involved most of the same parties, the same type of wrongdoing, and alleged the same theories of recovery.

The "prior litigation" exclusion excluded claims against the insured "based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving" prior litigation. When examining the "arising out of" language, the court first looked to the Texas Supreme Court's holding that "arising out of" means "there is simply a causation or relation, which is interpreted to mean that there is but for causation, though not necessarily direct or proximate causation." Ut*ica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198 (Tex. 2004). The Court also examined the Fifth Circuit's holding that "arising out of" only requires a claim to bear an incidental relationship to the other injury. *Gemini Ins. Co. v. Andy Boyd Co., LLC*, 243 Fed. Appx. 814 (5th Cir. 2007). The court noted, however, that neither the Texas Supreme Court nor the Fifth Circuit distinguished between an "incidental relationship" and a "causal connection."

The court held that the events leading to the 2001 and 2009 lawsuits were not causally connected. The 2009 lawsuit did not occur "but for" the 2001 lawsuit. The court recognized that the parties and the theories of recovery were mostly the same, but noted that the factual allegations concerning the origin of the damages in the 2001 lawsuit and the origin of the damages in the 2009 lawsuit were distinct. While the defendants attempted to make the same amendments to the covenants in both occasions, the attempts to amend the covenants as described in the 2009 lawsuit did not arise from the attempts to amend the covenants as described in the 2001 litigation. Finally, the court found it relevant that the two lawsuits claimed different damages.

In examining this issue, the court looked to precedent from the First Circuit regarding the "based upon" language in the prior litigation exclusion. The First Circuit applied the exclusion where there was a "substantial but not complete overlap" of the facts between the prior and current litigation. *Fed. Ins. Co. v. Raytheon Co.*, 426 F.3d 491 (1st Cir. 2005). The court distinguished this precedent on the grounds that the policy in *Raytheon* included "substantially similar" language not found in the policy at issue and, unlike the two matters in *Raytheon*, the 2001 lawsuit could not be said to be the "foundation or logical basis" for the 2009 lawsuit.

The court also examined the "in any way involving" language in the prior litigation exclusion. In examining this language, the court distinguished precedent from the Iowa Supreme Court, Southern District of New York, and Eleventh Circuit applying similar language. The court distinguished the Iowa Supreme Court case on the basis that the two lawsuits in that case had similar legal theories and similar damages. *See Monroe Cnty. v. Int'l Ins. Co.*, 609 N.W.2d 522 (Iowa 2000) (holding that prior litigation exclusion applied because part of lost profits damages sought in second lawsuit were tied to loss in the first lawsuit). The court distinguished the Southern District of New York opinion on the basis that it was primarily a prior notice issue and the facts in that case involved an overlap in the time periods of the two lawsuits. *See Zunenshine v. Executive Risk Indem. Inc.*, 1998 WL 483475 (S.D.N.Y. 1998), *aff'd*, 182 F.3d 902 (2nd Cir. 1999). The court distinguished the Eleventh Circuit opinion on the basis that the relevant language was "in any way related to" (rather than "in any way involving") and that pleadings of the two lawsuits in that case alleged a fraudulent scheme connecting the two lawsuits. *See HR Acquisitions I Corp. v. Twin City Fire Ins. Co.*, 547 F.2d 1309 (11th Cir. 2008).

Here, the case involved similar parties and similar acts, but each lawsuit was based on a distinct set of facts and sought different damages. Neither lawsuit alleged a fraudulent scheme connecting the two. Accordingly, the court held that the prior litigation exclusion in one of the insurance policies did not apply.

The court applied a similar analysis in holding that the 2001 and 2009 lawsuits were not "causally connected" and, thus, did not allege "interrelated wrongful acts" within the meaning of the other insurance policy. The court looked to precedent from the Fifth and Tenth Circuits applying similar "causally connected" definitions of "interrelated wrongful acts." *See Stauth v. Nat'l Union Fire Ins. Co.*, 1999 WL 420401 (10th Cir. 1999) (finding a fraudulent scheme causally connected the earlier litigation to the present litigation); *Fed. Deposit Ins. Corp. v. Mmahat*, 907 F.2d 546 (5th Cir. 1990) (holding that "a single motive does not make a single act"). Here, while the two lawsuits related to each other at some level, they failed to portray a continuous unbroken sequence of events.

Accordingly, the court held that neither the "prior litigation" in one policy nor "interrelated wrongful acts" provision in the other policy applied.

EIGHT CORNERS RULE

Atl. Cas. Ins. Co. v. Gonzalez, 402 Fed. Appx. 953 (5th Cir. 2010) (per curiam)

Exception to eight corners rule in duty to defend analysis applies when complaint in underlying litigation contains only conclusory allegations.

The Fifth Circuit applied an exception to the eight corners rule in the duty to defend context, holding that reference to extrinsic evidence is permissible when a petition's factual allegations are insufficient to determine if there is a possible case for coverage. In *Gonzalez*, the Fifth Circuit applied the exception because the applicability of a policy exclusion could not be determined by the allegations in the complaint.

The policy at issue in *Gonzalez* excluded coverage for a claim based on injuries to employees or contractors for the insured. The plaintiff alleged he was not an employee or contractor of the insured. However, the Fifth Circuit noted that those allegations were conclusory because no facts were alleged supporting those conclusions. The complaint contained no facts describing what the plaintiff was actually doing or his relationship with the insured. Because the facts alleged were insufficient to determine whether the exclusion was applicable, the Fifth Circuit held it was appropriate to consider extrinsic evidence in the record to determine whether the insurer had a duty to defend.

Valley Int'l Country Club Homeowners Assoc., Inc. v. Fed. Ins. Co., No. 1:09-CV-00244 (S.D. Tex. Jan. 3, 2011)

Exception to eight corners rule in duty to defend context applied to allow consideration of interrogatory answers going to a pure coverage issue.

In *Valley Int'l Country Club*, the insurers sought to use the alleged insureds' answers to interrogatories as evidence in support of their motions for summary judgment. The insurers argued that the interrogatory answer at issue was an admission by the purported insureds that the entity bringing the coverage action was a different entity than that which was covered by the policy. The purported insureds objected to this summary judgment evidence, arguing that the court was limited by the eight corners rule to only consider the underlying petition and insurance policy when determining the duty to defend.

After noting that interrogatory responses were proper summary judgment evidence, the court applied the Fifth Circuit's exception to the eight corners rule, which applies when (1) it is impossible to discern whether coverage is potentially implicated, and (2) extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case.

Interestingly, the opinion states that the insurers did not offer the interrogatory answers for the purpose of determining coverage, but instead for the purpose of arguing that the alleged insureds' had taken prior inconsistent positions. Still, the court overruled the objection to the evidence, finding that the interrogatory answer was evidence of a pure coverage issue and, therefore, fit within the exception.

DUTY TO INDEMNIFY

Burlington N. & Santa Fe Ry. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., No. 10-0064 (Tex. Feb. 25, 2011)

Under the facts of this case, the Texas Supreme Court reiterated that, in deciding whether there is a duty to indemnify, the court is not limited to the eight corners of the petition and the policy and must consider all evidence presented.

The railroad contracted with Mobley, National Union's insured, to control vegetation along its right of way for a term from 1994 through 1996. The contract required Mobley to purchase CGL coverage naming the railroad as an additional insured. During 1995, there was a collision between an automobile and a train, resulting in two deaths and injuries to one of the vehicle's passengers. Suit was filed and the railroad tendered the defense to National Union. National Union denied coverage and the railroad filed a declaratory judgment action seeking a determination that National Union owed a duty to defend and indemnify.

While the declaratory judgment action was pending, the railroad settled the claims resulting from the death of the driver. The other plaintiffs' claims were tried to verdict and, pursuant to a high-low agreement, the railroad paid $8 million in satisfaction of those claims.

Ultimately, the trial court in the declaratory judgment action granted summary judgment in favor of the insurer. In affirming the trial court's judgment, the Court of Appeals first determined that the insurer did not have a duty to defend based upon an eight corners analysis and application of the "completed operations" exclusion. The Court of Appeals then concluded that there was no duty to indemnify because the railroad's assertions to the contrary were "based entirely on its duty to defend arguments." The Court of Appeals did not consider any evidence extrinsic to the policy and the pleadings in reaching this determination.

The Supreme Court stated that, unlike the situation presented in *Griffin*, the pleadings "do not show that contractual provisions and other extrinsic evidence cannot possibly bring Mobley's vegetation control operations within coverage of [the] policy for the 1995 accident when Mobley's contract unquestionably extended through 1996." Relying on its reasoning in *D.R. Horton*, the Supreme Court reversed the Court of Appeals and remanded the case for the Court of Appeals to consider all of the evidence presented by the parties in determining whether there is a duty to indemnify.

KNOWN-LOSS EXCLUSION, EXTRINSIC EVIDENCE ALLOWED, NO DUTY TO INDEMNIFY

Colony Nat'l Ins. Co. v. Unique Indus. Prod. Co., L.P., No. 4:10-cv-01234 (S.D. Tex. Apr. 7, 2011)

In a dispute involving whether a carrier had a duty to defend or indemnify its insured in two underlying lawsuits, the court found that there was no duty to defend as the alleged occurrences in the suits were excluded by the CGL policies' known-loss exclusion and, thus, the carrier also had no duty to indemnify the insured. The court also considered extrinsic evidence in determining the duty to defend.

Unique Industrial Product Co., an importer and supplier of plumbing parts, supplied Uponor, Inc., a seller of plumbing supplies to plumbers and customers, with swivel nuts and brass fittings for Uponor to sell for residential plumbing in 2002 and 2003. In 2004, Uponor notified Unique that the nuts were failing and damaging houses. Uponor also knew of additional failed fittings in houses. In August 2006, Unique agreed to pay Uponor for any current and future claims arising from defective nuts and fittings. In exchange, Uponor agreed to accept additional inventory from Unique. In November 2006, Uponor notified Unique that one customer had made claims for failed fittings and that another customer demanded replacement nuts. Uponor paid the first customer's damages and asked Unique for reimbursement. Unique did not pay. Since 2006, Uponor sought reimbursement from Unique for claims about the defective hardware under the agreement reached in August 2006 to no avail.

In September 2005, Unique requested liability coverage from Colony National Insurance Co. In its application, Unique disclosed its knowledge of failed fittings and 56 pending claims against it and also reported that additional claims were expected. In October 2005, Colony issued Unique a CGL policy and later extended it through October 2007. In December 2006, Colony advised Unique that it was canceling the second policy in February 2007.

In September 2007, Uponor sued Unique. Unique tendered the defense to Colony in January 2009, but Colony declined that March. In May 2009, a class action was brought against Uponor. In September 2009, Unique advised Colony that it would be added as a third-party defendant in the class action suit. In March 2010, Unique tendered its defense and indemnity in the class action suit to Colony, but Colony denied a defense in April. In October 2010, Colony moved for summary judgment on the issue of whether it had a duty to defend and indemnify Unique in the underlying suits.

In analyzing Colony's duty to defend, the court noted that underlying complaints and the Colony policies showed that the occurrences happened before the start of the policy period. It explained that in June 2004, Unique knew that nuts it had sold Uponor were failing and that Unique's notifications of failed nuts and failed fittings continued through 2006. The Colony CGL policies covered property damage from occurrences, but the court stated that the occurrences were not unique instances for Unique, as Unique knew that an entire supply of nuts and fittings were defective before seeking coverage from Colony. As the court noted, the "entire universe of failures arising from this batch of failed nuts and failed fittings is excluded from coverage by the plain language of the policy."

Indeed, the Colony policies contained an exclusion for property damage Unique knew of, in whole or in part, before the policy period. As the court explained, a critical component of insurance is fortuity. Fortuity precludes coverage of a loss that is known or in progress at the time the policy is purchased, and an insured cannot seek coverage for a loss that has already begun and which is or should be known to have begun. It then noted that at law, Unique knew of an occurrence when it reported part of that property damage to Colony, when it received a demand or claim for damages because of the property damage, or when it otherwise became aware that property damage existed. As evidenced by its application, Unique knew of the losses before buying insurance from Colony. Thus, the court held that the policies' known-loss exclusion precluded coverage for the occurrences set out in the underlying suits.

Unique argued that consideration of its application would violate the eight corners rule. While the court conceded that Unique's application was neither the policy nor the facts alleged in the underlying suits, it stated that an application is the foundation of an insurance policy and reveals facts which determine coverage. As such, because Unique's application went directly and solely to the question of coverage, it was necessary to discern whether coverage existed, and it addressed only the fundamental issue of coverage. Thus, the court held that it may be considered.

Finally, in analyzing Colony's duty to indemnify, the court stated that the question of indemnity may be decided before the insured's liability is determined if it is established that the insurer has no obligation to defend the suit. Because Colony had no duty to defend Unique in the underlying suits, the court held that Colony also did not have a duty to indemnify Unique.

ANTI-ASSIGNMENT CLAUSES

Keller Founds., Inc. v. Wausau Underwriters Ins. Co., 626 F.3d 871 (5th Cir. 2010)

Nautilus Ins. Co. v. Concierge Care Nursing Ctrs., Inc., No. H-10-2243 (S.D. Tex. Dec. 28, 2010)

Ford, Bacon & Davis, L.L.C. v. Travelers Ins. Co., 635 F.3d 734 (5th Cir. 2011)

Insurance coverage for a seller's pre-acquisition liability does not transfer by operation of law to the purchaser who assumed those liabilities by contract. Anti-assignment provisions are enforceable in Texas even for assignments made post-loss, and the insurer is not required to show prejudice in order to enforce such clauses.

As a matter of first impression, the Fifth Circuit addressed the issue of whether insurance coverage for pre-acquisition liabilities transfers by operation of law to the purchasing company that assumed those liabilities by contract. The asset purchase agreement excluded the transfer of the seller's insurance coverage, but the agreement included a transfer of liability to the purchaser. The district court held that insurance coverage for the liability transferred to the purchaser as either a chose in action or by operation of law under the purchase agreements general catch-all transfer of "all other assets."

On appeal, the Fifth Circuit rejected the insured's argument that it should adopt the Ninth Circuit's holding in *Northern Insurance Co. of New York v. Allied Mutual Insurance Co.*, 955 F.2d 1353 (9th Cir. 1992). In *Northern Insurance*, the Ninth Circuit considered whether (1) a purchaser of "substantially all assets of a firm assumes, with some limitations, the obligation for product liability claims arising from the selling firm's pre-sale activities," and (2) if so, whether a right to defense from the selling company's insurer followed the liability. The court first held that, "irrespective of any clauses to the contrary in the asset purchase agreement," California and Washington law applied the rule of product-line successor liability. Finding that liability transferred to the successor entity, the Ninth Circuit held that the right of defense transferred by operation of law as well when the successor entity purchased "substantially all" of the predecessor company's assets.

The Fifth Circuit predicted that "Texas courts would reject the *Northern Insurance* rule where, as here, the liabilities in question were assumed through a contract that also specifically excluded the transfer of the insurance policy covering those liabilities." The Court further noted that unlike California, Texas law does not have a product-line successor liability rule, explaining that Texas law explicitly states that an acquiring company may not be held responsible for a liability of the transferring entity that it does not expressly assume.

Separately, the *Keller Foundations* court addressed whether the non-assignment clause in the policy prohibited post-loss assignments. While the majority rule in other jurisdictions is otherwise, the Fifth Circuit interpreted Texas law to enforce non-assignment clauses even for assignments made post-loss. The court primarily relied on *Texas Farmers Insurance Co. v. Gerdes*, 800 S.W.2d 215 (Tex. App.—Fort Worth 1994, writ denied), *Texas Pacific Indemnity Co. v. Atlantic Richfield Co.*, 846 S.W.2d 580 (Tex. App.—Houston [14th Dist.] 1993, writ denied), and its own holding in *Conoco Inc. v. Republic Insurance Co.*, 819 F.2d 120 (5th Cir. 1987), all of which enforced an anti-assignment clause involving post-loss assignment. Given these precedents, the court held that no transfer of the insurance coverage for the pre-acquisition losses could have been valid without the consent of the insurer.

Additionally, the Fifth Circuit refused to extend the prejudice requirement applied to different clauses, such as "settlement-without-consent" and similar clauses, to anti-assignment clauses, noting that no Texas court had applied a prejudice requirement to such clauses. At least one Texas federal district court has directly applied this rule, noting that the *Keller Foundations* court "squarely rejected" the insured's argument that the insurer must show prejudice in order to enforce a non-assignment clause. *See Nautilus Ins. Co. v. Concierge Care Nursing Ctrs., Inc.*, No. H-10-2243 (S.D. Tex. Dec. 28, 2010).

In *Ford, Bacon & Davis, L.L.C. v. Travelers Insurance Co.*, the Fifth Circuit applied its reasoning in *Keller Foundations* to hold that when the entity purchasing assets pursuant to an asset purchase agreement did not expressly assume liability for the assets it purchased, coverage for such liability will not extend under "operation of Texas law."

WAIVER OF SUBROGATION

Reliance Ins. Co. v. Hibdon, No. 14-09-00092-CV (Tex. App.—Houston [14th Dist.] Jan. 20, 2011) (op. on reh'g)

Insurer's agreement to waive its subrogation rights against party contracting with insured does not necessarily extend waiver to that party's employees.

In *Hibdon*, a petroleum company contracted with a drilling company to drill a well. The parties' contract required the drilling company to maintain insurance and secure a waiver of subrogation in favor of the petroleum company. The contract did not specify whether the petroleum company's employees were to be included in the waiver. The drilling company's insurer agreed not to enforce its subrogation rights against "[a]ny person or organization" in whose favor the drilling company was required to obtain such a waiver.

An employee of the drilling company was injured and received workers' compensation benefits under the policy. The employee sued the petroleum company and one of its employees for damages related to the injury. The petroleum company's employee paid the drilling company's employee to settle the case. The drilling company's insurer sued the petroleum company's employee asserting its subrogation rights under the workers' compensation statute. The petroleum company's employee obtained a summary judgment from the trial court that the insurer's waiver of its subrogation rights applied to him.

On appeal, the Houston Court of Appeals disagreed. The court recognized that Texas courts have generally held that it is not necessary for a waiver of subrogation to name all of the employees of an employer when the insurer waives subrogation rights in favor of a company contracting with the employer. *See, e.g., Am. Risk Funding Ins. Co. v. Lambert*, 59 S.W.3d 254 258-59 (Tex. App.—Corpus Christi 2001, pet. denied); *Lumbermens Mut. Cas. Co. v. Carter*, 934 S.W.2d 912 (Tex. App.—Beaumont 1996, no writ); *Nat'l Union Fire Ins. Co. v. Pennzoil*, 866 S.W.2d 248 (Tex. App—Corpus Christi 1993, no writ). However, such cases analyzed a waiver of subrogation rights against a third-party company, not whether the waiver extended to an employee of the third-party company, which was the situation before the court in *Hibdon*.

Thus, the court held that the plain meaning of the contract provision was to only waive subrogation in the petroleum company's favor, but it did not extend a similar waiver to the employees of the petroleum company.

SUBROGATION CLAIMS AGAINST THIRD-PARTY BENEFICIARIES TO CONTRACT WAIVED BY INSURED

Nat'l Union Fire Ins. Co. of Pittsburgh v. John Zink Co., No. 13-08-00589-CV (Tex. App.—Corpus Christi Nov. 10, 2010, pet. filed).

Waiver of subrogation and release provisions in underlying contract between owner and general contractor extended to subcontractors, barring insurer's subrogation claim.

This case arose out of a 1984 explosion and 1985 fire at Valero Energy Corporation's Corpus Christi refinery. In 1979, Valero's predecessor in interest began negotiating with M.W. Kellogg Construction Company ("Kellogg") to assist in a $500 million expansion of Valero's refinery. Kellogg engaged subcontractors (the "Contractors") and began construction on October 15, 1980. The contract between Valero and Kellogg, although executed later, was retroactive and effective on the same date.

The Valero/Kellogg contract provided for certain releases, waivers, and indemnity between the parties and for various types of insurance coverage. Included was a waiver and release by Valero for liability that may otherwise fall upon Kellogg and/or its subcontractors, which stated in pertinent part:

> 6.8 [Valero] shall release, defend, indemnify and hold harmless [Kellogg], its subcontractors and affiliates and their employees performing services under this Agreement against all claims, liabilities, loss or expense, including legal fees and court costs in connection therewith, arising out of or in connection with this Agreement or the Work to be performed hereunder, including losses attributable to [Kellogg's] negligence, to the extent [Kellogg] is not compensated by insurance carried under this ARTICLE. [Valero] shall obtain for the benefit of [Kellogg], its subcontractors and affiliates and their employees, waiver of subrogation rights under all its applicable insurance policies.
>
> 6.9 Neither [Kellogg] nor its affiliates nor its subcontractors or vendors, either individually or jointly shall be liable to [Valero] or its affiliates, irrespective of whether alleged to be due to negligence or otherwise, for loss of anticipated or non-operation of the Plant or other equipment, for loss of catalysts or chemicals or for any consequential or special loss or damage arising from any reason whatsoever.

Valero's insurers (the "Insurers") ultimately paid insurance proceeds to Valero for the claims arising from the 1985 refinery fire. Afterwards, Valero brought a lawsuit against Kellogg and Ingersoll-Rand, in which the Insurers intervened, and the Insurers brought two lawsuits against the Contractors, asserting various subrogation claims, including products liability, negligence, DTPA, and breach of contract claims. All of these cases were then consolidated.

Contractors moved for summary judgment on Insurers' subrogation claims based on the waiver and release provision in the Valero/Kellogg contract. After multiple rulings granting Contractor's motions for summary judgment, appeals, remands and amended pleadings, the trial court granted summary judgment in the Contractors favor, dismissing all claims asserted by the Insurers. The trial court based its ruling on the Contractors' "subcontractor" status, thus entitling them to the protection afforded by the waiver and release provisions contained in the Valero/Kellogg contract.

On appeal, the insurers argued that Contractors were not "subcontractors" because: (1) they did not perform services, as required by the contract (making them at most sellers or vendors); (2) there was no evidence that Valero consented to their hiring, and the contract required Valero's consent before hiring subcontractors; and (3) there was no evidence that the Contractors purchased insurance, which subcontractors were required to do under the contract. Alternatively, the Insurers argued that, even if the Contractors could be considered "subcontractors," the release and waiver was invalid as it did not satisfy the "express negligence" test, that some of their claims were based on the Contractors' purchase orders with Kellogg, which were independently viable, and that the DTPA in effect at the time of the purchase orders with the Contractors did not allow a consumer to waive its rights.

In addition, the Insurers argued that there was no discernable contract between one of the Contractors – Fisher – and Kellogg, thus negating Fisher's subcontractor status. The Court rejected this argument because the Insurers had judicially admitted the existence of a valid contract as the basis of establishing liability against Fisher, and therefore could not avoid the existence of that same contract in an attempt to defeat a contractually-based defense.

The Court then addressed and rejected each of the Insurers' arguments regarding the Contractors' subcontractor-status. First, the Court found that purchase orders established, and the Insurers judicially admitted, that the Contractors did more than merely "sell" products, thus establish the Contractors' status as subcontractors, as opposed to mere sellers or vendors. The Court reasoned that "the Insurers cannot claim that the Contractors defectively designed and manufactured these products and, at the same time, claim that the Contractors did not engage in any design or engineering services on behalf of Kellogg." Second, as to the Insurers' lack of consent argument, the Court found that consent was not a condition precedent to becoming a subcontractor, but rather a covenant; and that even if consent were a condition precedent, Valero – and thus the Insurers acting as subgroees – waived or excused the condition by accepting performance of the contract with knowledge of the failure of the condition, and without insisting on compliance. Finally, the Court held that the release and waiver provision were not contingent upon the Contractors having procured insurance.

Turning to the Insurers' express negligence argument, the Court found that the express negligence requirement did not apply because the transaction or occurrence giving rise to liability occurred prior to the execution of the Valero/Kellogg agreement. Accordingly, Valero and Kellogg were aware of the risks involved, and there was no "extraordinary shifting of risks."

As for the Insurers' claims premised on the purchase orders between Kellogg and the Contractors that pre-dated the Valero/Kellogg contract, the Court held that the parol evidence rule precluded consideration of the purchase orders, as the Contractors were third—party beneficiaries of the Valero/Kellogg contract, and that contract expressly superseded all prior contracts. Further, the Court rejected the Insurers' argument that the 1979 DTPA, which prohibited waiver of DTPA claims, applied, holding that the date the Valero/Kellogg contract was executed (October 15, 1982) mandated that the 1981 version, which allowed waiver, applied.

Finally, the Court rejected the Insurers' argument that the waiver and release provisions only released the Contractors from damages in excess of Kellogg's insurance, holding that the contract merely provided that Valero could recover from Kellogg the amount it was compensated by insurance. Thus, the Insurers' recourse under the contract was limited to suit against Kellogg for those amounts, not a limitation on the release and waiver to allow for an action against the subcontractors. Accordingly, summary judgment in favor of the Contractors was affirmed.

WHO IS AN INSURED: "PRIMARY RESIDENCE"

State Farm Fire & Cas. Co. v. Lange, H-09-2011 (S.D. Tex. Jan. 18, 2011)

In this case of first impression, the court interpreted the meaning of the undefined term "primary residence" in the subject liability policy.

This declaratory judgment action arises out of a one-vehicle accident in Victoria, Texas, in which two passengers were killed. The sole issue before the court was whether the surviving driver was insured under his parent's Personal Liability Umbrella Policy (the "Policy") at the time of the accident and, thus, whether State Farm had a duty to pay on behalf of and/or indemnify the driver for damages resulting from the accident and to defend the driver against any lawsuits or claims resulting from the accident. State Farm and the Intervenors (on behalf of the deceased passengers) filed cross-motions for summary judgment.

The Policy defined "insured" in relevant part as "**you** and **your relatives** whose primary residence is **your** household," which meant the home of the driver's parents in Meyersville, Texas, but it did not define "primary residence." The parties agreed that whether the driver was covered by the Policy at the time of the accident depended solely on whether the Meyersville address was the driver's "primary residence" at that time.

In the year leading up to the accident, the driver spent the majority of nights at an apartment in Victoria rather than his parent's home. State Farm argued that the Victoria address was his primary residence and, thus, that he was not covered by the Policy. Conversely, the Intervenors argued that irrespective of the driver's use of the Victoria apartment, the Meyersville address remained the primary residence.

No Texas courts have previously interpreted the meaning of "primary residence" in the insurance context. Here, the court found that "primary residence" was unambiguous as a matter of law, noting that '"[p]rimary' means 'first in rank or importance,' 'chief,' or 'principal'" and, thus, a person can only have one "primary residence" for purposes of the Policy. Relevant factors in this inquiry include (but are not limited to):

- how often a person stays at a residence;
- how transient he is;
- how long he has resided in a residence;
- where he keeps his belongings;
- whether he lists a residence on important documents, including as his 'personal address';
- whether he owns or rents - and if he rents, the length of the lease;
- whether he has plans, or will be required, to vacate a residence;
- whether he contributes to maintenance, upkeep, property taxes, or other costs;
- whether he shares a residence with others;
- whether blood or legal relationships exist between him and others living in either residence;
- whether he has full and free access to a residence and its contents;
- the subjective views of the persons and the other people living in his residences."

Further, the court said that "[w]here a person spends the majority of his time is the most important factor, but no one factor is dispositive, and the determination of the primary residence should be based on a totality of the circumstances. Thus, although a person's 'primary residence' will generally be the dwelling in which he spends the majority of his time, strong evidence indicating that a different dwelling is in fact the 'most important' may overcome the quantitative factor."

After a lengthy discussion of various facts and testimony which could support the contention that either location could be the driver's "primary residence," the court applied the above factors to the evidence, holding that the driver's "primary residence" was the Victoria apartment. As a result, the driver was not an "insured" under the Policy.

POLLUTION EXCLUSION BARS SILICA CLAIMS

RLI Ins. Co. v. Gonzalez, No. 10-20298 (5th Cir. Jan. 11, 2011) (per curium) (not selected for publication per 5th Cir. R. 47.5)

Silica dust is unambiguously a "pollutant" under Pollution Exclusion that defines "pollutant" as including "all . . . irritants and contaminants," thus negating insurer's alleged duty to indemnify and defend insured against silica-related claims.

Decedent, Hector Gonzales, was employed by ICO, Inc. (the insured) at its Odessa, Texas facility from 1983-1988, where he was allegedly exposed to, and harmed by, silica through sandblasting activities. Mr. Gonzales and his family sued ICO in state court in 2002, which resulted in settlement and entry of an agreed judgment. Subsequently, in 2008, Mr. Gonzalez died, and his surviving heirs brought suit against ICO, alleging causes of action for ICO's alleged gross negligence in causing Mr. Gonzalez to develop silicosis which resulted in his respiratory failure and death.

RLI issued an umbrella policy to ICO, under which ICO sought a defense to the Gonzalez's lawsuit. RLI filed suit in federal court seeking a declaration that it did not have a duty to defend or indemnify ICO against the claims asserted by the Gonzalez family. The district court granted summary judgment in RLI's favor, and the Gonzalez family appealed.

The Court turned to the language of the Pollution Exclusion, which excluded from coverage bodily or personal injury arising as a result of the "contamination of the environment by pollutants that are introduced at any time, anywhere, in any way." The Exclusion further defined "pollutants" as "smoke, vapors, soot, fumes, acids, sounds, alkalis, chemicals, liquids, solids, gases, waste, … and *all other irritants and contaminants*." (emphasis added).

With this backdrop, and based on OSHA's classification of silica as an air *contaminant* and other district courts' enforcement of pollution exclusions to bar coverage of silica-related claims, the Court held that "[s]ilica dust is unambiguously a 'pollutant' under the language of the Pollution Exclusion."

The Court did not accept appellants' argument that the Pollution Exclusion was patently ambiguous due to its alleged over breadth, stating that "'neither conflicting expectations nor disputation is sufficient to create an ambiguity.'" (emphasis original). Likewise, the Court rejected appellants' argument that the existence of an Asbestos Exclusion created an inference that the general Pollution Exclusion did not include silica-dust claims, holding that, "'superfluous exceptions are commonplace' in insurance contracts, and 'have the effect merely of mak[ing] assurance doubly sure.'" (alteration original). Finally, the Court rejected appellants' argument that an ambiguity was created by an alleged conflict between the provisions of the umbrella policy and its Pollution Exclusion on the grounds that policy exclusions supersede any conflicting original policy language under Texas law. Accordingly, the Pollution Exclusion's unambiguous terms controlled, and the district court's ruling was affirmed.

SETTLEMENT OFFER MADE DURING MEDIATION DOES NOT WARRANT SEVERANCE OF EXTRA-CONTRACTUAL CLAIMS

Serv. Steel Warehouse Co., L.P. & Coastal Realty, L.L.C. v. ACE Am. Ins. Co., H-09-691 (S.D. Tex. Jan. 1, 2011)

The Southern District of Texas denied an insurer's request to sever the plaintiffs' extra-contractual and contractual claims holding that no prejudice would exist, as the insurer's settlement offer made during mediation was confidential and could not be admitted into evidence on *any* claims.

Ace American Insurance Company filed a motion for severance of the plaintiffs' contractual and extra-contractual claims arguing that it would suffer prejudice at a joint trial of the contractual and extra-contractual claims given the two settlement offers it had made to the plaintiffs. Ace's settlement offers included a payment on the undisputed portion of the claim and an offer made at mediation.

The district court noted that a court has discretion to sever claims "[f]or convenience, to avoid prejudice, or to expedite and economize." The court also noted that "[a]lthough proof of insurance contract and bad faith claims are 'largely interwoven,' and much evidence at trial will be relevant to both claims, the Texas Supreme Court has recognized that separate trials may be required if the insurer offered to settle the insured's entire contract claim." *See Liberty Nat'l Fire Ins. Co. v. Akin*. Moreover, the court noted that "when an insurer has made an offer to settle the entire contract claim, severance is required to avoid prejudice because evidence of settlement offers usually is admissible on the non-contractual claims to rebut evidence of bad faith, but inadmissible on the contract claim."

Here, the district court found that neither of Ace's settlement offers would cause prejudice to Ace as to justify severance. With respect to Ace's offer at mediation, the court stated that "mediation discussions are confidential, which therefore means that a settlement offer made therein could not be admitted into evidence on *any* of the claims." It also found that Ace had advanced no argument that any waiver or exception would apply to remove the veil of confidentiality from its settlement offer at mediation. Thus, the court denied severance.

As this case helps illustrate, in the event a defendant makes the strategic decision to make a settlement offer and also seek severance of the plaintiff's extra-contractual and contractual claims, the defendant should consider making the settlement offer outside of the mediation context.

ABATEMENT GRANTED FOR FAILURE TO PROVIDE REQUIRED STATUTORY NOTICE

Greater Mount Zion Baptist Church v. Harry Blaker & Union Ins. Co., H-10-3921 (S.D. Tex. Feb. 14, 2011)

In this suit to recover insurance proceeds and damages for breach of contract, United States District Judge Lee H. Rosenthal granted abatement of the case until 60 days after the plaintiff provided written notice to the defendants as required by section 541.154 of the Texas Insurance Code.

The district court abated the case after finding, among other things, that the petition filed in state court did not relieve the plaintiff from providing defendants with written notice pursuant to section 541.154. As the court explained, the plaintiff could not argue that the petition provided the required statutory notice, as it failed to provide reasonable detail of "the [plaintiff's] specific complaint" or "the amount of actual damages and expenses, including attorney's fees reasonably incurred in asserting the claim against the other person."

DISCOVERY OF OTHER CLAIMS

In re GMAC Direct Ins. Co., No. 09-10-00493-CV (Tex. App.—Beaumont Dec. 30, 2010, no pet.)

Overly broad discovery requests regarding other claims handled by the insurance company defendants were improper. Thus, the trial court's order compelling production of such information was an abuse of discretion.

In this case involving Hurricane Ike claims brought under the plaintiffs' homeowners' policy, the plaintiffs propounded requests to the carrier seeking, *inter alia*, all files and databases related to any other property damage or hurricane claims, as well as all correspondence regarding any "catastrophe claims" from 2000 through the present.

The plaintiffs claimed that they were seeking this discovery in order to prove the existence of a "'deliberate business practice of fraudulently adjusting property-damage claims in an outcome-oriented manner so as to minimize the amounts they paid out under the homeowners' policies they issued.'" Upon the defendant's objection, the plaintiffs filed a motion to compel and the trial court ordered production of the disputed material.

The Court of Appeals determined that the discovery requests at issue were overly broad and, at best, only tenuously connected to the plaintiffs' claims. According to the court, the plaintiffs should have tailored their requests to focus on information used in adjusting their claim.

CONTRACT NEED NOT BE ENFORCEABLE TO MAKE IT AN INSURED CONTRACT

Gilbane Bldg. Co. v. Empire Steel Erectors, L.P., No. H-08-1707 (S.D. Tex. Nov. 16, 2010)

Enforceability of underlying contract is irrelevant to the analysis of whether it is an "insured contract" under the insurance policy.

Pursuant to the contract between the parties, Empire was required to have Gilbane named as an additional insured on its CGL policy and indemnify Gilbane for claims arising out of Empire's performance.

An employee of the Empire was injured on the worksite and sued Gilbane. Gilbane requested defense and indemnity under the CGL policy, but the insurer denied coverage. Gilbane settled with the injured worker for an amount the district court deemed reasonable.

In the coverage action, the insurer argued that the court must first find that the agreement between Empire and Gilbane was enforceable under Texas law before it could be considered an insured contract. Relying on *Mid-Continent Casualty Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000), the district court held that the issue of whether the indemnification provision in the contract between the parties was an enforceable indemnity contract under Texas law "is irrelevant, because the [contract] as a whole meets the definition of an 'insured contract' under the [ ] policy, and that is all that is required for coverage." Accordingly, the court held that the insurer breached the duty to defend and indemnify Gilbane.

HOSPITAL LIENS: SECURED UPON FILING

Mem'l Hermann Hosp. Sys. v. Progressive County Mut. Ins. Co., No. 01-10-00408-CV (Tex. App.—Houston [1st Dist.] March 17, 2011, no pet.)

Under the Texas Property Code, a lien is secured when the lienholder properly files with the county clerk a written notice of lien that complies with the statute; not when the clerk indexes the lien.

Progressive County Mutual Insurance Company's insured caused a car accident that injured Carlos Martinez. As a result, Martinez received treatment from Memorial Hermann for his injuries and later filed a lawsuit. Progressive and Martinez settled the lawsuit, and Progressive issued a check to Martinez and others including Memorial Hermann. The check was not cashed. Instead, Martinez's counsel asked Progressive to issue a new check that did not include Memorial Hermann as a payee. He explained that Memorial Hermann had not filed a lien notice for the cost of Martinez's treatment and, thus, his client was not required to allocate his settlement proceeds toward payment of the hospital bill. After it conducted lien searches that did not reveal the existence of a lien, Progressive re-issued the check. Thirty minutes before on that same day, Memorial Hermann had filed its notice of lien with the Harris County Clerk's Office. Memorial Hermann's lien was not indexed until five days later.

Progressive moved for summary judgment arguing that Memorial Hermann was not entitled to the settlement proceeds because it could not show that the Harris County Clerk had indexed its hospital lien before Progressive paid out the settlement. The trial court granted Progressive's motion holding that the timing of the indexing of a hospital lien controls perfection of the lien. Memorial Hermann appealed.

Section 55.002 of the Texas Property Code provides that a hospital has "a lien on a cause of action or claim of an individual who receives hospital services for injuries caused by an accident that is attributed to the negligence of another person." To secure the lien, section 55.005(a) requires that "a hospital … file written notice of the lien with the county clerk of the county in which the services were provided" and that "[t]he notice … be filed before money is paid to an entitled person." Section 55.005(c) requires that the county clerk "index the record in the name of the injured individual."

On appeal, Memorial Hermann contended that the lien was secured on filing and, thus, it was entitled to allocation of the settlement proceeds. The court agreed, noting that 55.005(a) contains the only temporal restriction relating to the lien and that the temporal language is in passive voice but refers only to the action of filing – not the county clerk's obligation. It also noted that the language proceeding the temporal language makes the hospital responsible for filing the lien notice, and the "requirement that the lien notice 'be filed before money is paid' thus applies only to the filing requirement, which falls squarely on the hospital." It further noted that Progressive's interpretation would potentially expose the county clerk to liability under similar circumstances and that it did not believe that the legislature intended that result.

Applying the plain language of the statute to the facts, the court held that Memorial Hermann's lien on Martinez's settlement proceeds was secured before Progressive executed the check for payment of the settlement. Thus, it reversed the summary judgment and remanded the case for further proceedings consistent with its opinion.

DIMINUTION IN VALUE

Landstar Homes Dallas, Ltd. v. Mid-Contintent Cas. Co., No. 3:10-CV-0014-K (N.D. Tex. Dec. 13, 2010)

Diminution in a home's property value is covered as "property damage" under a commercial general liability policy because it constitutes physical injury to tangible property.