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Insurance Law

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INSURANCE LAW

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I. INTRODUCTION

During this Survey period, the Texas Supreme Court issued a significant opinion addressing key concepts of insurance law, including application of the “voluntary payments” condition and allocation among insurers in continuing loss situations. Additionally, one Texas appellate court discussed the rights of a loss payee under a commercial property policy. Lastly, the Fifth Circuit demonstrated application of the “eight-corners” rule in the context of “additional insured” determinations along with vague pleadings and elaborated on the parameters of the Stowers doctrine.

II. COMMERCIAL PROPERTY INSURANCE

A. RIGHTS OF A LOSS PAYEE

In a recent opinion, the Dallas Court of Appeals put building owners on notice that simply being named a loss payee under their tenants’ policies may be

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insufficient to confer contractual rights to the building owner under their tenants' policies. More specifically, the court of appeal in *Ostrovitz & Gwinn, LLC v. First Specialty Insurance Company* affirmed a summary judgment ruling against a commercial landlord, holding that the landlord was not entitled to sue under a commercial property policy naming the landlord only as a loss payee.¹

Ostrovitz & Gwinn, LLC (Ostrovitz) leased real property to a pallet manufacturer tenant beginning in 1998, with the lease requiring the tenant to insure the buildings and name Ostrovitz as an additional insured on that policy.² However, when the lease was renewed in 2003 for an additional five-year term, the 2003 lease did not contain any such insurance requirements. After a fire damaged the buildings in September 2006, the tenants' insurer—First Specialty Insurance Company (First Specialty)—informed Ostrovitz that it was not insured under the policy. Aggrieved, Ostrovitz sued the tenant, First Specialty, First Specialty's agent, and the person who allegedly started the fire, asserting claims for breach of contract, various violations of the Texas Insurance Code and Deceptive Trade Practices Act, negligence, negligent misrepresentation, promissory estoppel, and declaratory judgment. Thereafter, First Specialty counterclaimed for declaratory judgment that Ostrovitz could not recover under the policy.

First Specialty moved for summary judgment challenging all of Ostrovitz's claims on various grounds, including some no-evidence grounds under Texas Rule of Civil Procedure 166a(i).³ Ultimately, the trial court granted First Specialty's traditional motion for summary judgment on all of Ostrovitz's claims except for declaratory judgment. The trial court later granted a no-evidence summary judgment for First Specialty, but again expressly denied the motion on Ostrovitz's claim for declaratory judgment. All remaining claims were disposed of by separate orders, and as part of this process, Ostrovitz non-suited its declaratory judgment claim against First Specialty. Ostrovitz timely appealed.

The court of appeal began with Ostrovitz's breach of contract claims, noting that the general law of contracts applicable to insurance policies requires either privity or third-party beneficiary status in order to have standing to sue for breach of contract.⁴ Under Texas law, privity exists where the defendant "was a party to an enforceable contract with either the plaintiff or someone who assigned his or her cause of action to the plaintiff."⁵ Applying these principles, and considering only the policy language itself, the court concluded that Ostrovitz was not a party to the policy and, therefore, not in privity with First Specialty.⁶ Texas courts have generally held that a property insurance policy is a personal contract between the insured and the insurer.⁷ Because Ostrovitz was

1. *Ostrovitz & Gwinn, LLC v. First Specialty Ins. Co.*, 393 S.W.3d 379, 392 (Tex. App.—Dallas 2012, no pet.).

2. *Id.* at 383.

3. *Id.* at 384.

4. *Id.* at 387 (citing *OAIC Commercial Assets, L.L.C. v. Stonegate Vill., L.P.*, 234 S.W.3d 726, 738 (Tex. App.—Dallas 2007, pet. denied)).

5. *Id.*

6. *Id.* at 387–88.

7. *Id.* at 388 (citing *Travelers Fire Ins. Co. v. Steinmann*, 276 S.W.2d 849, 851 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.)).

neither a named insured nor an additional insured under the policy, and did not allege that it was assigned a breach-of-contract claim by someone in privity with First Specialty, there was no privity between Ostrovitz and First Specialty.⁸

Next, the court of appeal proceeded to determine whether Ostrovitz had standing as a third-party beneficiary to the policy. Under Texas law, in order to qualify as a third-party beneficiary, “a third party must show that it is either a donee or creditor beneficiary of the contract, and not one who is benefited only incidentally by its performance.”⁹ In ascertaining this status, the intention of the contracting parties controls: “[t]he intention to contract or confer a direct benefit to a third party must be clearly and fully spelled out or enforcement by the third party must be denied.”¹⁰ Further, all doubt must be resolved against conferring third-party beneficiary status.¹¹ In *Ostrovitz*, the court explained that any rule requiring that ambiguities in an insurance policy be resolved in favor of coverage does not apply to the third-party beneficiary analysis.¹² Accordingly, the court began its third-party beneficiary analysis with the clear and express language of the policy.¹³

Here, the court of appeal quoted the policy’s “Loss Conditions” Section E., 4., “Loss Payment,”¹⁴ which the court read to mean that the insurer “reserves the right—but assumes no obligation—to adjust losses with and pay an owner of covered property who is not a named insured.”¹⁵ In other words, the provision did not “clearly show an intent by [the tenant named insured] and First Specialty to confer a direct benefit on [Ostrovitz].”¹⁶ Rather, the provision merely conferred a *right* on First Specialty by providing the option to pay owners of covered property where the owners are not named insureds, and in satisfaction of the named insured’s claim for loss to the owner’s property.¹⁷ Lastly, the court discussed the policy’s “loss payable” provision¹⁸, which the court again

8. *Id.* at 387–88.

9. *Id.* at 388 (citing *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999)).

10. *Id.* (accord *Basic Capital Mgmt., Inc. v. Dynex Commercial, Inc.*, 348 S.W.3d 894, 900 (Tex. 2011)).

11. *Id.* (quoting *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011)).

12. *Id.* (citing *McBroome-Bennett Plumbing, Inc. v. Villa France, Inc.*, 515 S.W.2d 32, 37 (Tex. Civ. App.—Dallas 1974, writ ref’d n.r.e.)).

13. *See id.* at 389–90.

14. The provision, commonly found in standard commercial property policies, provides:

d. We will not pay you more than your financial interest in the Covered Property.

e. We may adjust losses with the owners of lost or damaged property if other than you. If we pay the owners, such payments will satisfy your claims against us for the owners’ property. We will not pay the owners more than their financial interest in the Covered Property.

Id. at 389.

15. *Id.*

16. *Id.*

17. *Id.* (emphasis added).

18. The provision, also commonly found in standard commercial property policies, provides:

For Covered Property in which both you and a Loss Payee shown in the Schedule or in the Declarations have an insurable interest, we will:

1. Adjust losses with you; and

concluded was “not a clear promise by First Specialty to pay a loss payee for covered damage to covered property To the contrary, in [the “loss payable” provision], First Specialty assumes the duty of adjusting losses only with the named insured.”¹⁹

In conclusion, the court in *Ostrovitz* explained that the proper legal test was whether the policy “clearly and fully spells out an intention by [the named insured] and [the insurer] to confer a direct benefit on [the loss payee].”²⁰ In cases of “any reasonable doubt,” the court must rule against the purported third-party beneficiary.²¹ Because the policy in this matter did not “clearly and fully spell out the necessary intention,” the landlord’s breach of contract claim failed as a matter of law.²²

Ostrovitz may signal to landlords and their agents that it is in their best interest to procure their own property insurance, even if there is a perceived financial advantage in shifting this burden to the tenant. Furthermore, tenants required to provide property insurance coverage for their landlords’ buildings may wish to obtain a separate policy in the landlord’s name, or add the landlord to the tenant’s own policy as an additional insured using ISO Endorsement Form CP 12 19, entitled “Additional Insured—Building Owner.”²³ Landlords may also consider including a provision within the lease agreement allowing the landlord to inspect the tenant’s insurance policies to ensure compliance with any lease requirement of “additional insured” coverage for the landlord. Where the tenant breaches such an express requirement of the lease agreement, the landlord may have a valid claim for breach of contract against the landlord.²⁴

III. COMMERCIAL GENERAL LIABILITY INSURANCE

During the Survey Period, insurance litigation lasting nearly ten years finally reached the Texas Supreme Court in *Lennar Corporation v. Markel Insurance Company*.²⁵ Here, the Supreme Court addressed multiple interpretative issues, including whether a commercial general liability insurance policy’s “voluntary payments” condition and “loss establishment” provision excused the insurer’s liability absent a showing of prejudice by the insurer.²⁶ The Supreme Court also analyzed whether an insurer is liable for costs incurred to locate “property

2. Pay any claim for loss or damage jointly to you and the Loss Payee, as interests may appear.

Id. at 390.

19. *Id.*

20. *Id.* at 393 (citing *MCI Telecomms. Corp.*, 995 S.W.2d at 651).

21. *Id.* (citing *First Union Nat’l Bank*, 168 S.W.3d at 929).

22. *Id.*

23. By way of example, a 2007 sample version of this endorsement—CP 12 19 06 07—would list the building owner(s) within a schedule, and provide that “The building owner identified in this endorsement is a Named Insured, but only with respect to the coverage provided under this Coverage Part or Policy for direct physical loss or damage to the building(s) described in the Schedule.”, available at nationalunderwriterpc.moss.nuco.com/sites/fconline/commlin/formandend/ifor/commproend/geneendser1/documents/CP%2012%2019%2006%2007.pdf (last visited Feb. 4, 2015).

24. See, e.g., *Bott v. J.F. Shea Co., Inc.*, 299 F.3d 508, 513 (5th Cir. 2002).

25. *Lennar Corp. v. Market Ins. Co.*, 2013 WL 4492800 (Tex. Aug. 23, 2013).

26. *Id.* at *3–4.

damage” and costs to remediate “property damage” that began before and continued after the insurer’s policy period.²⁷ In arguably the most significant Texas insurance decision in recent years, the Supreme Court held: (1) prejudice must be shown before an insurer may deny coverage based on the “voluntary payments” condition and (2) the “all-sums” approach to allocation of indemnity payments applies over the “pro rata” allocation approach.²⁸ Additionally, the Supreme Court held that costs incurred to locate damage are damages “because of ‘property damage’”²⁹

A proper understanding of the Supreme Court’s decision requires an examination of the relevant facts surrounding the coverage dispute. From the early 1990s until 1998, Lennar Corporation and its subsidiaries (Lennar) built approximately 800 homes using synthetic exterior insulation and finish systems (EIFS).³⁰ After a special on the NBC television show *Dateline* exposed the problems with EIFS in 1999, Lennar was flooded with homeowner complaints. Thereafter, Lennar’s investigation revealed that the problems were “frequent and substantial”; accordingly, Lennar decided to contact all of its homeowners—not just the aggrieved ones—and offer to remove the EIFS and replace it with conventional stucco. Almost all of the homeowners accepted Lennar’s offer. During the early stages of the process, Lennar notified its insurers that it would seek indemnification for the costs of replacing the EIFS. The insurers, however, refused to participate in these efforts, preferring instead to address complaints as Lennar received them.

Ultimately, all of Lennar’s insurers denied coverage, and after subsequent coverage litigation and settlement, Markel American Insurance Company (Markel) was the only remaining non-settling insurer. Markel insured Lennar under a commercial umbrella policy with a \$25 million limit, with effective dates of coverage from June 1, 1999 through October 19, 2000. Markel had denied coverage for various reasons, including:

- Lennar’s failure to comply with the “voluntary payments” condition requiring Lennar to obtain Markel’s consent prior to entering any settlements or assuming other obligations, along with the “loss establishment” provision prohibiting Lennar from independently determining a loss;
- Any costs to remove and replace EIFS were preventative measures not incurred “because of . . . ‘property damage’”; and
- Markel’s liability extended only to those damages occurring during its policy period.³¹

On appeal, the Fourteenth Court of Appeals examined whether Lennar’s expenses to remove and replace EIFS as a “preventative measure” were incurred “because of . . . property damage” and, therefore, covered under the policy.³²

27. *Id.* at *5-7.

28. *See id.* at *3-7.

29. *Id.* at *5.

30. *Id.* at *1.

31. *Id.* at *2.

32. *Id.* (citing *Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651, 671 (Tex. App.—Houston [14th Dist.] 2006, no pet.) [hereinafter *Lennar I*]).

The court of appeal ultimately held that they were not, and that “Lennar must apportion the EIFS-related damages between its costs to remove and replace EIFS as a preventative measure and its costs to repair water damage to the homes.”³³ Additionally, citing *Hernandez v. Gulf Group Lloyds*,³⁴ the appellate court held that Markel’s liability was not excused pursuant to the “voluntary payments” condition or “loss establishment” provision “unless it could prove, as a matter of fact, that it had been prejudiced by Lennar’s settlements with homeowners.”³⁵ After eight days of trial, the jury had failed to find prejudice to Markel, finding instead that the EIFS issues “‘create[d] an imminent threat to the health and safety of the inhabitants of the homes,’ and that Lennar took ‘reasonable steps to cure the construction defect as soon as practicable and within a reasonable time.’”³⁶ However, the court of appeal reversed and rendered judgment for Markel, concluding that Lennar did not show “its legal liability to the homeowners to trigger Markel’s coverage.”³⁷ More specifically, the policy prohibited Lennar from showing legal liability to the homeowners through settlements to which Markel did not consent.³⁸

On Lennar’s petition for review, the Texas Supreme Court began its analysis with the “voluntary payments” condition and “loss establishment” provision.³⁹ Here, the Supreme Court discussed its decision in *Hernandez*, where the Supreme Court found that one party’s breach of contract does not excuse the other party’s performance, unless the breach is material and prejudices the non-breaching party.⁴⁰ The Supreme Court held that unless Markel could show that it was prejudiced by virtue of a settlement to which it did not agree, the “voluntary payments” condition and “loss establishment” provision could not bar coverage for Lennar.⁴¹ The Supreme Court reasoned that “[t]o allow [Markel] to argue that Lennar cannot use those non-prejudicial settlements to establish the amount of its loss would plainly subvert the requirement that Markel show that Lennar’s non-compliance was material.”⁴² Markel argued that it had been prejudiced as a matter of law because Lennar had solicited claims and, therefore, made repairs to homes where the homeowners would have likely never sought redress if Lennar had left them alone.⁴³ At trial, the jury had not found Markel’s position convincing or concluded that Lennar’s remediation program was “anything other than a reasonable approach to a serious problem.”⁴⁴ Because the Supreme Court found that prejudice is a question of fact, it refused to look behind the jury’s decision.⁴⁵

33. *Id.* (quoting *Lennar I*, 200 S.W.3d at 679–80).

34. *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692–94 (Tex. 1994).

35. *Lennar Corp.*, 2013 WL 4492800 at *2 (citing *Lennar I*, 200 S.W.3d at 695).

36. *Id.* at *3.

37. *Id.* (citing *Markel Am. Ins. Co. v. Lennar Corp.*, 342 S.W.3d 704, 712–16 (Tex. App.—Houston [14th Dist.] 2011, pet. filed) [hereinafter *Lennar III*], *rev’d*, 2013 WL 4492800).

38. *Id.* (citing *Lennar II*, 342 S.W.3d at 714–16).

39. *Id.* at *3.

40. *Id.* (citing *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692–94 (Tex. 1994)).

41. *Id.*

42. *Id.* at *4.

43. *Id.*

44. *Id.*

45. *Id.*

Markel also attempted to use the policy's "loss establishment" provision to argue that it should not be required to show prejudice to be excused from its indemnification obligations.⁴⁶ Here, the provision required Markel to pay Lennar's "ultimate net loss" defined as "the total amount of [property] damages for which [Lennar] is legally liable," and provided that such loss "may be established by adjudication, arbitration, or a compromise settlement to which we have previously agreed in writing."⁴⁷ Thus, Markel contended that because it did not provide consent to Lennar's settlements with the homeowners, Lennar could not establish a covered loss.⁴⁸ The Supreme Court, however, disagreed, holding that prejudice was required and Lennar's breach of the "loss establishment" provision was not material.⁴⁹ The Supreme Court did not consider the "loss establishment" provision to be essential to coverage, and found that its purpose was effectively the same as the "voluntary payments" condition.⁵⁰

In analyzing the second and third issues, the Supreme Court first considered whether the policy provided coverage for the total amount of damages assessed by the jury.⁵¹ Pursuant to the policy's insuring agreement, Markel was required to pay "the total amount' of Lennar's loss 'because of' property damage that 'occurred during the policy period,' including 'continuous or repeated exposure to the same general harmful conditions.'"⁵² In focusing on the "because of" language, the court of appeals held that coverage applied only to the cost to repair damages at the homes, and not the cost to locate the damages.⁵³ Further, because Lennar did not isolate these two categories of damages, the court of appeal held that Lennar could not recover *anything*.⁵⁴ The Supreme Court, however, quickly dismissed this reasoning, explaining that:

Under no reasonable construction of the phrase can the cost of finding EIFS property damage in order to repair it not be considered to be "because of" the damage. We are not confronted with a situation in which the existence of damage was doubtful. Markel concedes that each of the 465 homes for which Lennar sought to recover remediation costs was actually damaged. Nor could Lennar have located all the damage, which was hidden from sight, without removing all the EIFS. The court of appeal's characterization of efforts to determine all the damaged areas of homes as preventative measures is not supported by the record.⁵⁵

Lastly, the Supreme Court considered Markel's argument that, because

46. *Id.* ("Markel argues that this Loss Establishment Provision, unlike [the "voluntary payments" condition] is central to the policy because of its 'unmistakable language' and its purpose in preventing insureds from determining loss unilaterally, and therefore any breach is material.")

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at *4-5 ("Absent prejudice to Markel, Lennar's settlements with homeowners establish both its legal liability for the property damages and the basis for determining the amount of loss.")

51. *Id.* at *5.

52. *Id.*

53. *Id.* (citing *Markel Am. Ins. Co. v. Lennar Corp.*, 342 S.W.3d 704, 711 (Tex. App.—Houston [14th Dist.] 2011, pet. filed), *rev'd*, 2013 WL 4492800).

54. *Id.* (citing *Markel*, 342 S.W.3d at 712 n.5) (emphasis added).

55. *Id.*

Lennar could not seek coverage for damages occurring outside its policy period, and Lennar did not offer evidence distinguishing between damages occurring outside and within Markel's period of coverage, Lennar could not recover anything.⁵⁶ Evidence put forth at trial showed that Lennar quit using EIFS in 1998, and that water damage from EIFS usually starts within six to twelve months after construction is finished.⁵⁷ After first noting that a "fair inference" from the record indicated that most of the damages began either before or during Markel's policy period and continued afterward, the Supreme Court explained that the policy "expressly includes damage from a continuous exposure to the same general harmful conditions."⁵⁸ Thus, "[f]or damage that occurs during the policy period, coverage extends to the 'total amount' of loss suffered as result, not just the loss incurred during the policy period."⁵⁹ According to the Supreme Court, this meant that Markel had to pay all of the costs and expenses incurred in investigating and remediating the homes.⁶⁰

Here, the Supreme Court cited *American Physician Insurance Exchange v. Garcia*⁶¹—which rejected pro rata allocation, instead requiring insurers sharing liability for a loss to allocate among themselves according to their subrogation rights—in support of its holding.⁶² In *Garcia*, the plaintiffs alleged that the defendant insured physician's negligent treatment spanned more than two years, during which the physician was covered by four non-overlapping policies, one with \$100,000 in limits and the other three with \$500,000 in limits.⁶³ The plaintiffs took the position that the policies could be "stacked" to provide \$1.6 million in total coverage, and demanded settlement in that amount.⁶⁴ The carriers rejected the demand, the plaintiffs obtained an excess judgment against the physician, the physician assigned his rights against the carriers to the plaintiffs, and the plaintiffs sued the carriers.⁶⁵ Ultimately, the Texas Supreme Court rejected the plaintiff's stacking theory, stating:

If a single occurrence triggers more than one policy, covering different policy periods, then different limits may have applied at different times. In such a case, the insured's indemnity limit should be whatever limit applied at the single point in time during the coverage periods of the triggered policies when the insured's limit was highest Once the applicable limit is identified, all insurers whose policies are triggered must allocate funding of the indemnity limit among themselves according to their subrogation rights.⁶⁶

Although Markel characterized the quoted language as dicta, the Supreme

56. *Id.* at *6.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Am. Physician Ins. Exch. v. Garcia*, 876 S.W.2d 842 (Tex. 1994).

62. *Lennar Corp.*, 2013 WL 4492800 at *6.

63. *Garcia*, 876 S.W.2d at 843-44.

64. *Id.* at 845.

65. *Id.* at 845-46.

66. *Id.* at 855.

Court disagreed, refusing to reconsider *Garcia* in light of recent cases in Massachusetts, New Hampshire, and South Carolina applying pro rata allocation principles.⁶⁷

This opinion is important because it confirms that, under Texas law, absent prejudice caused by a settlement to which the insurer did not agree, the “voluntary payments” condition and “loss establishment” provision do not apply to bar coverage.⁶⁸ Additionally, the case may have a significant impact on construction claims, as the Supreme Court has now seemingly opened the door for contractors to perform significant remediation of allegedly defective work without first obtaining consent from their insurers. Such covered costs may include “rip-and-tear” damages and other expenses associated with locating and remediating “property damage.”⁶⁹ Notably, however, Lennar’s claim for “rip-and-tear” damages only involved those homes that had actually been damaged by the defective EIFS.⁷⁰ Thus, insurers may distinguish *Lennar* in cases where the insured submits a claim for costs to locate “property damage,” but it is ultimately determined that no “property damage” exists.

Furthermore, *Lennar* provides a clear statement from the Supreme Court that the burden falls on the insurers sharing liability for a loss—not the insured—to allocate liability for the loss amongst themselves.⁷¹ Although this aspect of the high court’s ruling appears straightforward, unanswered questions remain regarding its application in this context, as the other carriers had already settled,⁷² seemingly leaving Markel with no real opportunity to negotiate with the other carriers regarding allocation. In *Mid-Continent Insurance Company v. Liberty Mutual Insurance Company*,⁷³ the Texas Supreme Court held that insurers may not seek reimbursement under their “other insurance” clauses through contribution or subrogation from a non-paying co-insurer for amounts paid to indemnify their common insured.⁷⁴ In light of this limitation on the rights of insurers to demand contribution or subrogation from non-contributing insurers, it will be interesting to see how courts apply the *Lennar* holding that insurers must allocate liability among themselves where the loss spans multiple policy periods.

It is anticipated that this opinion will lead to further litigation and legislation regarding these issues. In *Garcia*, the Texas Supreme Court held that “consecutive policies, covering distinct policy periods, could not be ‘stacked’ to multiply coverage for a single claim involving indivisible injury.”⁷⁵ Instead, the insured’s indemnity limit will be “whatever limit applied at the single point in

67. *Id.* at *6–7 (citing *Boston Gas Co. v. Century Indem. Co.*, 454 Mass. 337, 910 N.E.2d 290 (2009); *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd’s*, 156 N.H. 333, 934 A.2d 517 (2007); *Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011)).

68. *Id.* at *4–5.

69. *See id.* at *5–6.

70. *See id.* at *5.

71. *See id.* at *6–7.

72. *Id.* at *1.

73. *Mid-Continent Ins. Co. v. Liberty Mutual Ins. Co.*, 236 S.W.3d 765 (2007).

74. *Id.* at 775–76.

75. *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 853 (Tex. 1994).

time during the coverage periods of the triggered policies when the insured's limit was highest."⁷⁶ Therefore, although the Supreme Court in *Lennar* held that insurers with consecutive policies triggered by injuries spanning multiple policy periods must allocate the loss among themselves, by relying on *Garcia*, the Supreme Court seemingly implied that the insurers here would not be required to "stack" their policies; rather, the highest individual policy limit would apply.

In addition, the Supreme Court's seeming break from a strict policy-language driven analysis to a more results-oriented public policy approach may trigger modifications to existing policy language. According to Justice Boyd's concurring opinion, and as a matter of jurisprudential philosophy, it may be that "the better choice for courts, as the Court noted in [*Members Mutual Insurance Company v. Cutaia*⁷⁷], is if changes to insurance policy language are to be mandated . . . the changes should be left to the Legislature and regulatory agencies."⁷⁸ However, given that the decision was unanimous with only this sole concurring justice, *Lennar* may signal a broader shift in the Texas Supreme Court's insurance jurisprudence from freedom-of-contract principles to a more policyholder-friendly or results-oriented approach, so that even express policy language modifications would not alter future interpretation and application of *Lennar*.

IV. THE EIGHT-CORNERS RULE

Over the past few years, several cases have addressed application of the eight-corners rule (sometimes known as the complaint-allegation rule) in determining an insurer's duty to defend. Based on these cases, it appeared that for the time being, Texas state and federal courts would strictly adhere to the eight-corners rule and would only deviate from the rule under limited circumstances. As evidenced by additional Fifth Circuit jurisprudence during the Survey Period, it appears that federal courts applying Texas law will continue to strictly follow this traditional analysis framework. However, in ascertaining whether basic, threshold contract requirements have been satisfied—such as whether a party qualifies as an additional insured—the federal courts may be more willing to look to extrinsic evidence in analyzing the duty to defend.

A. GENERAL RULE & INTERPRETATION

In an important decision rendered nearly a decade ago in *Farmers Texas County Mutual Insurance Co. v. Griffin*, the Texas Supreme Court explained that a principal feature of the eight-corners rule is the focus on factual allegations rather than the legal theories pleaded.⁷⁹ In that case, the Supreme Court analyzed a pleading containing a conclusory allegation of "negligence," but refused to find that a conclusory "negligence" label was sufficient to trigger the

76. *Id.* at 856.

77. *Members Mut. Ins. Co. v. Cutaia*, 476 S.W.2d 278, 278 (Tex. 1972).

78. *Lennar Corp. v. Markel Amr. Ins. Co.*, 2013 WL 4492800, at *11 (Tex. 2013) (Boyd, J., concurring) (quoting *Prodigy Comm. Corp. v. Ag. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 388-89 (Tex. 2009) (Johnson, J., dissenting)).

79. *Farmers Tex. Cty. Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82-83 (Tex. 1997).

duty to defend where the alleged facts concerned an intentional shooting.⁸⁰ Interestingly, through the new *Twombly/Iqbal* plausibility standard, federal courts have taken a similar approach in analyzing motions to dismiss, holding that legal labels and conclusory allegations are insufficient to withstand such motions.⁸¹ In combination, the Supreme Court of the United States in *Bell Atlantic Corporation v. Twombly*⁸² and *Ashcroft v. Iqbal*⁸³ departed from the broad notice pleading standard, which provided that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁸⁴ Instead, *Twombly/Iqbal* created a more rigorous pleading standard that—like the eight-corners rule—demands reliance on facts as opposed to mere legal labels or conclusions.

Although it appears that neither the Texas federal courts nor the Fifth Circuit have expressly noted the similarities between the *Griffin* rule and this new federal pleading standard, a recent Fifth Circuit decision may signal a resurgence in this important principle that courts must focus on the *factual* allegations—not conclusory *legal* statements—in applying the eight-corners rule.

In *PPI Technology Services, L.P. v. Liberty Mutual Insurance Company*, Royal Production Company, Inc. retained PPI to assist in planning and drilling oil and gas wells at three lease locations in Louisiana.⁸⁵ After a well was dug, plugged, and abandoned at an incorrect lease, Royal and the non-operator working interest owners filed suit against PPI.⁸⁶ Here, the underlying plaintiffs alleged that PPI had negligently drilled the well, thereby resulting in a dry hole. Additionally, the underlying plaintiffs alleged that PPI caused “‘property damage to Royal as an owner in the property where the well was being drilled’ including ‘physical injury to tangible property, including all resulting loss of use of the property.’”⁸⁷ Liberty Mutual Insurance Company (Liberty Mutual) provided commercial general liability insurance coverage to PPI, which included liability coverage for “property damage” caused by an “occurrence.”⁸⁸ The policy defined “property damage” as:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

80. *Id.*

81. See, e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In applying this analysis to the complaint at issue in *Iqbal*, the U.S. Supreme Court held that the complaint failed to cross “the line from conceivable to plausible.” *Iqbal*, 556 U.S. 662 at 680. More specifically, the Court concluded that the complaint’s “bare assertions, much like the pleading of conspiracy in *Twombly* amount to nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim.” *Id.* at 681 (quoting *Twombly*, 550 U.S. at 555). Thus, the Court in *Iqbal* found that dismissal was warranted under Federal Rule of Civil Procedure 8. *Id.* at 683.

82. *Twombly*, 550 U.S. 544.

83. *Iqbal*, 556 U.S. 662.

84. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

85. 515 Fed. App’x 310, 311-12 (5th Cir. 2013).

86. *Id.* at 312.

87. *Id.*

88. *Id.* at 311.

- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

Thus, the pleading expressly alleged the literal definition of “property damage” commonly found in commercial general liability policies.

After PPI tendered defense of the lawsuit to Liberty Mutual, Liberty Mutual refused and denied coverage to PPI.⁸⁹ PPI then sued Liberty Mutual, alleging breach of contract, breach of the Texas Insurance Code, and breach of the duty of good faith and fair dealing. After Liberty Mutual removed the case to federal court, PPI filed a motion for partial summary judgment regarding Liberty Mutual’s duty to defend. Liberty Mutual filed a cross-motion for summary judgment, asserting (among other things) that the underlying lawsuits did not include factual allegations of “property damage” caused by an “occurrence.” Ultimately, the district court concluded that the allegations concerning “property damage” were legal—rather than factual—allegations, as they “concern the definition and categorization of certain conduct and objects, rather than the facts giving rise to the alleged actionable conduct.”⁹⁰ Thus, as “mere legal assertions,” the statements did not qualify as “allegations” for purposes of applying the eight-corners rule.⁹¹

On appeal, the Fifth Circuit agreed with the district court’s analysis, holding that mere allegations of “property damage” without some factual allegations of physical injury or loss of use of tangible property cannot trigger the insurer’s duty to defend.⁹² The court began by reciting the policyholder-friendly eight-corners rule, which provides that “[i]f there is a ‘doubt as to whether or not the allegations of a complaint against the insured state a cause of action within the coverage of a liability policy sufficient to compel the insurer to defend the action, such doubt will be resolved in the insured’s favor.’”⁹³ However, the Fifth Circuit concentrated on the language from *Griffin* that “[a] court must focus on the factual allegations rather than the legal theories asserted in reviewing the underlying petition.”⁹⁴ Returning to the allegations literally tracking the policy’s definition of “property damage,” the court found that the allegations were “either for economic damages, and thus are not covered, or are legal conclusions, rather than factual allegations” as required under the eight-corners rule.⁹⁵ Because the underlying pleadings “did not allege facts supporting” these bare assertions of “property damage,” the court found that Liberty Mutual did not owe PPI a defense.⁹⁶

Although the Fifth Circuit in *PPI* did not delve into the apparent similarities

89. *Id.* at 312.

90. *Id.* (quoting *PPI Tech. Servs., LP v. Liberty Mut. Ins. Co.*, 2012 WL 130389, at *11 (S.D. Tex. 2012) (emphasis in original) (internal citations omitted)).

91. *Id.* at 312–13.

92. *Id.* at 313–14.

93. *Id.* at 313 (quoting *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997) (internal citations omitted)).

94. *Id.* at 314 (quoting *Farmers Tex. Cnty. Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997)).

95. *Id.*

96. *Id.*

of the eight-corners rule and *Twombly/Iqbal* pleading standard, the opinion's language tracks that previously used by Texas federal courts in deciding motions to dismiss under the plausibility standard.⁹⁷ Further, the Fifth Circuit's finding in *PPI* that the underlying pleadings "did not allege facts supporting" the conclusory assertions echoes similar language used by the Fifth Circuit in deciding motions to dismiss under *Twombly/Iqbal*.⁹⁸ Therefore, even if the Fifth Circuit will not expressly draw the connection between the eight-corners rule and *Twombly/Iqbal*, the court's renewed focus on factual allegations rather than conclusory legal labels in the duty to defend analysis appears supported by the shift in federal pleading standards set forth in *Twombly/Iqbal*.

B. ADDITIONAL INSURED STATUS

In last year's Article, we discussed a Fifth Circuit decision concerning the use of extrinsic evidence in determining whether the "known loss" provision bars coverage.⁹⁹ In *Colony National Insurance Company v. Unique Industrial Product Company*, the Fifth Circuit held that the district court improperly considered extrinsic evidence in applying the known-loss provision to a commercial general liability insurance policy, thereby refusing to apply any exception to the eight-corners rule.¹⁰⁰ However, in *ACE American Insurance Company v. Freeport Welding & Fabricating, Inc.*, the U.S. Court of Appeals for the Fifth Circuit seemingly examined extrinsic evidence in determining whether Freeport Welding & Fabricating, Inc. qualified as an additional insured, although the Fifth Circuit did not expressly state that it was considering extrinsic evidence in reaching its conclusion.¹⁰¹ Because the operative contract did not impose an obligation to procure additional insured coverage, the court held that that the carrier had no duty to defend Freeport.¹⁰²

In 2008, Brand Industrial, L.L.C. (Brand Industrial)—a subsidiary of Brand Energy—entered into a purchase order agreement (the 2008 Purchase Order) with Freeport for the installation of a lining inside a quench chamber being constructed by Freeport.¹⁰³ In January 2009, Brand Energy informed Freeport via letter that the project was turned over to Brand Energy; accordingly, Freeport and Brand Energy entered into a purchase agreement (the 2009 Purchase Agreement), effective January 1, 2009 until one of the parties canceled the

97. See, e.g., *Reddish v. J.P. Morgan Chase*, 2011 WL 573413, at *3 (W.D. Tex. Jan. 3, 2011), report and recommendation adopted, 2011 WL 573411 (W.D. Tex. Feb. 15, 2011) ("a court need not accept as true 'conclusory allegations, unwarranted factual inferences, or legal conclusions,' which will not defeat a Rule 12(b)(6) motion to dismiss.") (internal citations omitted); *McManaway v. KBR, Inc.*, 906 F. Supp. 2d 654, 661 (S.D. Tex. 2012) (for purposes of motion to dismiss, "legal conclusions masquerading as factual conclusions need not be treated as true.").

98. See, e.g., *Greenhill v. U.S., ex rel. Fed. Bureau of Prisons*, 275 Fed. Appx. 315, 316 (5th Cir. 2008).

99. J. Price Collins, Blake H. Crawford, & William H. Craven, *Annual Texas Survey—Insurance Law*, 66 SMU L. REV. 949, 966–70 (2013 ed.) (citing *Colony Nat. Ins. Co. v. Unique Indus. Product Co.*, 2012 WL 3641523 (5th Cir. 2012)).

100. *Colony Nat'l Ins. Co. v. Unique Indus. Prod. Co.*, 487 F. App'x 888 (5th Cir. 2012).

101. See *ACE Am. Ins. Co. v. Freeport Welding & Fabricating, Inc.*, 699 F.3d 832, 840–44 (5th Cir. 2012).

102. *Id.* at 843.

103. *Id.* at 836.

agreement. The 2009 Purchase Agreement required Brand Energy to procure commercial general liability coverage naming Freeport as an additional insured; however, the 2008 Purchase Order contained no such requirement. Brand Energy and its subsidiaries were covered under a commercial general liability policy issued by ACE, effective September 30, 2008, until September 30, 2009.¹⁰⁴ The policy had three additional insured provisions, all of which required that a written contract be entered into before the date of loss obligating Brand Energy to obtain additional insured coverage for the purported additional insured.¹⁰⁵

Installation of the lining began in May 2009, and was complete in August 2009.¹⁰⁶ In May 2009, several workers installing the lining for the quench chamber were injured and brought suit alleging negligence against Freeport and Brand Energy. The lawsuit did not mention the 2009 Purchase Agreement, or its requirement that Brand Energy provide additional insured coverage to Freeport. Freeport nevertheless sought defense and indemnity from ACE as an additional insured under the policy.¹⁰⁷ ACE refused Freeport's tender and brought a declaratory judgment action in the U.S. District Court for the Southern District of Texas. After both parties moved for summary judgment, the district court held that ACE had no duty to defend Freeport because Freeport was not an additional insured under the policy.¹⁰⁸ In addition, because the underlying lawsuit had not been resolved, the district court refused to determine whether ACE had a duty to indemnify Freeport.¹⁰⁹

On appeal, the Fifth Circuit began by noting that, under Texas law, a court performing a duty to defend analysis must first determine whether the party claiming additional insured status qualifies as an additional insured under the policy.¹¹⁰ Where that party qualifies as an additional insured, "the court must then determine whether, under Texas's eight-corners rule, the facts alleged in the underlying state court proceedings are sufficient to trigger the duty to defend under the policy."¹¹¹ The purported additional insured bears the burden of proof on these two issues, and "an affirmative answer to both is required to hold that there is a duty to defend."¹¹² After setting forth a comprehensive statement

104. *Id.* at 838.

105. More specifically, the policy included the following three additional insured endorsements:

(1) "Any person or organization whom you have agreed to include as an additional insured under a written contract, provided such contract was executed prior to the date of loss"; (2) "Any person or organization the insured is required by contract to provide said coverage"; and, (3) "Any Owner, Lessee or Contractor whom you have agreed to include as an additional insured under a written contract, provided such contract was executed prior to the date of loss."

Id.

106. *Id.* at 837.

107. *Id.* at 838.

108. *Id.* Interestingly, the Fifth Circuit did not state the district court's basis for its holding.

109. *Id.*

110. *Id.* at 839 (citing *Gilbane Bldg. Co. v. Admiral Ins. Co.*, 664 F.3d 589, 594 (5th Cir. 2011)).

111. *Id.* (citing *Gilbane Bldg. Co.*, 664 F.3d at 594).

112. *Id.* (citing *Gilbane Bldg. Co.*, 664 F.3d at 594).

of the standard for eight-corners review, the Fifth Circuit noted that “[o]nly a few Texas appellate courts have held that the examination of extrinsic evidence was warranted under an exception to the eight-corners rule.”¹¹³ More specifically, the exception applies only where “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 the truth or falsity of any facts alleged in the underlying case.”¹¹⁴

Significantly, the Fifth Circuit began its additional insured analysis by stating that *Gilbane Building Company v. Admiral Insurance Company* required the court to review the 2009 Purchase Agreement—i.e., extrinsic evidence—in making its determination.¹¹⁵ Although the court had just stated the rule providing an exception to the strict eight-corners analysis, the court did not state that it was resorting to the exception by examining extrinsic evidence in making its additional insured determination. Thus, it is somewhat unclear whether the court was doing just that, or if the court was simply stating that the additional insured determination *in this particular case* required resort to extrinsic evidence.

Based on its review of the 2009 Purchase Agreement, the Fifth Circuit ultimately found that Freeport qualified as an additional insured, but only for purchase orders made pursuant to the 2009 Purchase Agreement.¹¹⁶ More specifically, the court reasoned that the 2009 Purchase Agreement became effective January 1, 2009, and applied to purchase orders issued after the effective date.¹¹⁷ Furthermore, the 2008 Purchase Order pre-dated the 2009 Purchase Agreement, and the 2009 Purchase Agreement did not reference the 2008 Purchase Order or the lining project.¹¹⁸ The court therefore rejected Freeport’s argument that the 2009 Purchase Agreement applied retroactively, or applied to “all purchase orders.”¹¹⁹ Instead, the Fifth Circuit found that the work made the subject of the underlying lawsuit arose under the 2008 Purchase Order, and that the 2008 Purchase Order did not require Brand Energy to procure additional insured coverage for Freeport.¹²⁰ As such, Freeport was not an additional insured under the policy with respect to the underlying lawsuit.¹²¹

The Fifth Circuit’s decision in *Freeport* is significant in that it raises important questions regarding Texas insurance law, and the Fifth Circuit’s approach to contract interpretation generally. By way of example, the court seemingly ignored Brand Energy’s letter to Freeport (i.e., a piece of extrinsic evidence), stating that Brand Industrial had turned the work requested in the 2008 Purchase Order over to Brand Energy. Here, an argument exists that the letter

113. *Id.* at 840 (citing *Ooida Risk Retention Group, Inc. v. Williams*, 579 F.3d 469, 475 (5th Cir. 2009) (citing *Mid-Continent Cas. Co. v. Safe Tire Disposal Corp.*, 16 S.W.3d 418, 421 (Tex. App.—Waco 2000, *pet. denied*); *State Farm Fire & Cas. Co. v. Wade*, 827 S.W.2d 448, 452–53 (Tex. App.—Corpus Christi 1992, *writ denied*); and *Gonzales v. Am. States Ins. Co.*, 628 S.W.2d 184, 187 (Tex. App.—Corpus Christi 1982, *no writ*)).

114. *Id.* (quoting *Ooida*, 579 F.3d at 475) (emphasis in original).

115. *Id.* at 840–41 (citing *Gilbane*, 664 F.3d at 594).

116. *Id.* at 841.

117. *Id.*

118. *Id.* at 841–42.

119. *Id.* at 842–43.

120. *Id.* at 840–42.

121. *Id.* at 842.

demonstrated the parties' mutual understanding that at least some of the work to be performed pursuant to the 2009 Purchase Agreement was the work out of which the underlying plaintiffs' injuries arose, especially given that the 2008 Purchase Order stated the work would begin in the "2nd quarter of 2009."¹²² The Fifth Circuit never expressly said that it was excluding the letter as extrinsic evidence, but devoted substantial attention to eight-corners jurisprudence within the opinion. To the extent neither the district court nor the Fifth Circuit applied the eight-corners rule to limit or exclude review of something, extensive citation to those rules would be meaningless. Overall, however, practitioners may agree that the court applied a rigid construction of the parties' agreement, thereby signaling that the contract drafting process should be similarly rigid so that no essential terms are omitted from the final draft.

V. THE STOWERS DOCTRINE

For the greater part of the last century, Texas insureds caught in the cross-hairs of liability disputes have enjoyed the protections created by the Texas Supreme Court in *Stowers Furniture Company v. American Indemnity Company*, which imposed a duty of reasonable care on a liability insurer considering an offer of settlement.¹²³ Texas courts subsequently applying *Stowers* have held that an insurer may be held liable in excess of the policy limits for rejecting a settlement demand where (1) the claim is within the scope of coverage; (2) the settlement demand is within the policy limits; and (3) the terms are such that an ordinary prudent insurer would accept the demand, in light of the likelihood and degree of the insured's potential exposure to a judgment in excess of the policy limits.¹²⁴ During the Survey Period, the Fifth Circuit clarified the *Stowers* duties of insurers defending multiple insureds under the same policies, holding that insurers do not violate the *Stowers* doctrine by settling and exhausting policy limits on behalf of a single insured.¹²⁵

In *Pride Transportation v. Continental Casualty Company*, an employee of Pride Transportation—an interstate motor carrier—rear-ended a pickup truck, rendering the driver a paraplegic.¹²⁶ At the time of the accident, Pride carried \$1 million in primary and \$4 million in excess automobile liability insurance. The injured driver and his wife ultimately sued Pride and its employee, and the primary carrier assumed the defense of both. The employee's counsel placed the value of the case between \$8 and \$10 million, and Pride's counsel recognized the "real possibility" that liability exceeded \$5 million. Further, the plaintiffs' counsel had recently obtained a \$25 million verdict in a similar case in the county. Especially damaging for Pride's employee, during discovery, the parties found out that the employee had falsified her driver logs to avoid work restrictions, thereby likely increasing her liability exposure and, accordingly, the

122. *Id.* at 843.

123. *Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544 (Tex. 1929).

124. *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994) (citing Robert E. Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1143-48 (1954)).

125. *Pride Transp. v. Cont'l Cas. Co.*, 511 F. App'x 347, 352-53 (5th Cir. 2013).

126. *Id.* at 348.

insurers' potential risk.¹²⁷

Prior to trial, the underlying plaintiffs made an expiring settlement offer to Pride's employee for the full policy limits (i.e., \$5 million), in exchange for a full release of the employee.¹²⁸ Thereafter, Pride's primary insurer tendered its limits to Pride's excess insurer, and the excess insurer assumed control of the defense. Pride requested that the excess insurer seek a counter-offer of \$5 million to release both insureds; however, the excess insurer refused to do so unless both insureds consented to the counteroffer. The employee rejected this proposal and insisted that the excess carrier accept the initial settlement offer, which it did. Pride then filed a cross-claim for indemnity against the employee in the underlying lawsuit. Because the settlement exhausted Pride's policy limits, both insurers notified Pride that they were withdrawing from the defense. Both the excess insurer and Pride then brought declaratory judgment actions seeking a determination of the insurers' obligations under the policies, which were consolidated in the U.S. District Court for the Northern District of Texas.¹²⁹ The district court granted summary judgment in favor of the insurers, and Pride appealed.

On appeal, the Fifth Circuit affirmed the district court's decision, holding that the excess insurer was within its rights to withdraw its defense of Pride after the insurer exhausted its limits through the \$5 million settlement.¹³⁰ According to the Fifth Circuit, "insured parties have limited recourse against insurers in Texas for the handling of third-party insurance claims," because "[t]here is no duty of good faith and fair dealing owed to the insured in this context . . ."¹³¹ Rather, an insurer's "common law duties are limited to contractual obligations and the *Stowers* duty to accept a reasonable settlement demand."¹³² Here, the Fifth Circuit first noted a line of cases—beginning with *Farmers Insurance Company v. Soriano*—that held that an insurer faced with a settlement demand "arising out of multiple claims and inadequate proceeds" may reasonably settle one of the multiple claims, "even though such settlement exhausts or diminishes the proceeds available to satisfy other claims."¹³³ Further, the "reasonableness" of such a settlement is determined solely by the merits of the settled claim, and the insured's potential liability on that claim.¹³⁴ The Fifth Circuit explained that it had previously interpreted *Soriano* as extending to cases with multiple insured defendants.¹³⁵

127. *Id.* at 349.

128. *Id.*

129. *Id.* at 349–50.

130. *Id.* at 352–53.

131. *Id.* at 350 n.11 (citing *Med. Care Am., Inc. v. Nat'l Union Fire Ins. Co.*, 341 F.3d 415, 425 (5th Cir. 2003); *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 776 (Tex. 2007); *Taylor v. Allstate Ins. Co.*, 356 S.W.3d 92, 97–98 (Tex. App.—Houston [1st Dist.] 2011, pet. denied)).

132. *Id.* (internal citations omitted).

133. *Id.* at 351 (quoting *Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 315 (Tex. 1994)).

134. *Id.* (quoting *Soriano*, 881 S.W.2d at 316).

135. *Id.* (quoting *Travelers Indem. Co. v. Citgo Petroleum Corp.*, 166 F.3d 761, 768 (5th Cir. 1999) ("an insurer is not subject to liability for proceeding, on behalf of a sued insured, with a reasonable settlement . . . once a settlement demand is made, even if the settlement eliminates . . . coverage for a co-insured as to whom no *Stowers* demand has been made.")).

Thus, pursuant to *Soriano*, Pride's excess insurer could not be liable for failing to settle the remaining claims against Pride *unless* there was evidence that either (1) the excess insurer negligently rejected the plaintiffs' demand for settlement within policy limits or (2) the original settlement demand was itself unreasonable.¹³⁶ Here, the parties agreed that the insurers did not reject any settlement demands made to Pride or its employee; rather, Pride sought to impose liability on its insurers for *accepting* a demand, and the Fifth Circuit refused to extend the *Stowers* duty to impose liability in that scenario.¹³⁷ Pride's common law claims therefore rested on its insurers' contractual duties—i.e., to reasonably settle claims.¹³⁸ Further, the insurers no longer had a duty to defend once their policy limits were exhausted by judgments or settlements, and the policies clothed the insurers with the contractual right to settle claims where appropriate.¹³⁹

Although Pride attempted to argue that there was an issue of material fact concerning reasonableness of the settlement, the Fifth Circuit disagreed.¹⁴⁰ More specifically, the Fifth Circuit found that Pride had not highlighted any evidence tending to show that the settlement was unreasonable.¹⁴¹ The court quickly dismissed Pride's argument that the settlement was unreasonable based on the residual liability the employee faced by Pride's indemnity claim, as the excess policy "explicitly exempt[ed] claims or suits brought by one insured against another."¹⁴² As such, and "[b]ecause of the likelihood and degree of potential exposure to excess judgment" for the employee, the Fifth Circuit held that the settlement was reasonable as a matter of law, and did not result in a breach of the policies.¹⁴³ The court therefore affirmed the district court's ruling that Pride's insurers acted reasonably in accepting the settlement, despite the fact that unsettled claims remained against Pride.¹⁴⁴

Although *Pride* offers support for insurers encountering policy-limit settlement demands against a single insured where multiple insureds have been sued, insurers may be prudent to still explore the possibility of a general release for all insureds. Such efforts, even where rejected by the plaintiffs, may benefit the insurer to the extent the insurer is later charged with bad faith for settling on behalf of less than all insureds. Further, the decision may inadvertently provide additional *Stowers* leverage to plaintiffs in multiple-defendant cases, as the insurer may now be forced to accept policy limit demands that release some—but not all—insured defendants.

VI. CONCLUSION

During this Survey period, Texas courts continued to examine important

136. *Id.* (quoting *Soriano*, 881 S.W.2d at 315).

137. *Id.* (emphasis added).

138. *Id.*

139. *Id.*

140. *Id.* at 352–53.

141. *Id.* at 352.

142. *Id.*

143. *Id.*

144. *Id.* at 353.

issues arising under various insurance policies affecting both policyholders and insurers. Significantly, the Texas Supreme Court confirmed that, absent prejudice to the insurer caused by a settlement to which the insurer did not agree, the “voluntary payments” condition does not apply to bar coverage. Additionally, in a shift from a policy language-driven analysis to a more results-oriented public policy approach, the Supreme Court seemingly opened the door to contractors arguing that prophylactic measures are covered by their commercial general liability insurance policies.

Furthermore, a Texas appellate court held that a loss payee did not have standing to sue the named insured’s insurer for breach of contract. Rather, the insurer had the right—but was under no obligation—to adjust the loss with the loss payee. Following this opinion, Texas landlords would be wise to insist on “additional insured” rather than loss payee status under their tenants’ policies, or obtain their own policy altogether.

With respect to the federal courts, the Fifth Circuit—without expressly stating that it was doing so—demonstrated the similarities between the *Twombly/Iqbal* pleading standard and the eight-corners rule. More specifically, the court will only consider factual allegations (not legal labels or conclusions) in ascertaining the insurer’s duty to defend. Additionally, the Fifth Circuit seemingly considered extrinsic evidence, again without expressly stating that it was doing so, in making an “additional insured” determination.

Lastly, the Fifth Circuit had occasion to elaborate on application of the *Stowers* doctrine, specifically where the insurer receives a policy limit settlement demand against a single insured where multiple insureds have been sued. Although the decision held that such insurers are not liable under *Stowers* for entering into such settlements, insurers may still be prudent to explore the possibility of a general release of all insureds.