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AUGUST/SEPTEMBER 2019 TEXAS INSURANCE LAW UPDATE

THE SUPREME COURT OF TEXAS ACCEPTS CERTIFIED QUESTION FROM THE FIFTH CIRCUIT TO ADDRESS THE EXTRINSIC EVIDENCE QUESTION.

By recently accepting a certified question from the Fifth Circuit Court of Appeals, the Texas Supreme Court may finally address and clarify the state of Texas law with regard to the existence of an "extrinsic-evidence" exception to the "eight-corners rule." Under the eight-corners rule, an insurer's duty to defend is determined by the claims alleged in the petition and the coverage provided in the policy. As the Fifth Circuit explained, the rule takes its name from the fact that only two documents are ordinarily relevant to the determination of the duty to defend: the policy and the pleadings of the third-party claimant.

In *State Farm Lloyds v. Richards*, No. 18-10721, 2019 WL 4267354 (5th Cir. Sept. 9, 2019), a child died in an all-terrain vehicle accident while in the temporary care of his grandparents, the Richards. The boy's parents sued the grandparents. State Farm provided a defense to the Richards under their homeowner's policy under reservation of rights and then sought a declaration in federal court that it had not duty to defend. In its summary judgment motion, State Farm argued that that two exclusions barred coverage:

The first is the "motor-vehicle exclusion" which exempts coverage for bodily injury "arising out of the ... use ... of ... a motor vehicle owned or operated by or loaned to any insured." The policy defined

"motor vehicle" to include an "all-terrain vehicle ... owned by an insured and designed or used for recreational or utility purposes off public roads, *while off an insured location*." The policy defined "insured location" to mean "the residence premises." Thus, the policy excludes coverage for bodily injury arising from the use of an ATV while off the Richards' premises. In support of its summary-judgment motion, State Farm attached a vehicle crash report showing that the accident occurred away from the Richards' premises, as well as the Richards' admissions that the accident occurred off an insured location.

The other exclusion—the "insured exclusion"—excludes coverage for bodily injury to any insured "within the meaning of part a. or b. of the definition of insured." The policy defines "insured" to mean "you and, *if residents of your household*: a. your relatives; and b. any other person under the age of 21 who is in the care of a person described above." State Farm thus attached the Richards' admission that they were Jayden's grandparents, as well as an order appointing them as joint-managing conservators in order to show that Jayden was a "resident of [the Richards'] household."

The Richards argued that, under Texas's eight-corners rule, State Farm could not rely on extrinsic evidence to prove up a policy exclusion. The district court disagreed and, finding that the extrinsic evidence satisfied both exclusions, granted summary judgment for State Farm.

State Farm's homeowner's insurance policy requires State Farm to provide a defense "[i]f a claim is made or a suit is brought against an insured for damages because of bodily injury ... to which this coverage applies, caused by an occurrence." The policy did not require plaintiff to defend all actions against its insured no matter if the allegations of the suit are groundless, false or fraudulent. Rather, the duty to defend arises only if suit is brought "to which the coverage applies." The Fifth Circuit stated that the district court concluded that State Farm's duty to defend in this case arose only if a suit was brought to which the coverage applies, therefore reasoning that extrinsic evidence was admissible to make that determination.[1]

The Fifth Circuit noted that in an earlier case, it had suggested that if the Texas Supreme Court were to recognize an extrinsic-evidence exception to the eight-corners rule, it would do so only "when it is initially impossible to discern whether coverage is potentially implicated *and* when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case."[2] However, the Texas Supreme Court has never expressly adopted this two-pronged exception, nor has it decided a case that fits within this exception.

> The specific question certified to the Texas Supreme Court is:
>
> Is the policy-language exception to the eight-corners rule articulated in *B. Hall Contracting Inc. v. Evanston Ins. Co.*, 447 F. Supp. 2d 634 (N.D. Tex. 2006), a permissible exception [to the eight-corners rule] under Texas law?[3]

However, the Fifth Circuit "disclaim[ed] any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the question certified."

[1] *Id*. at *2.
[2] *Id*., citing *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 531 (5th Cir. 2004).
[3] *Id.* at *3.

We will continue to monitor this case and will report once the Texas Supreme Court has answered the certified question.

FEDERAL MAGISTRATE REFUSES TO CONSIDER EXTRINSIC EVIDENCE TO DETERMINE DATE DAMAGE OCCURRED, WHERE EVIDENCE OVERLAPPED WITH MERITS OF UNDERLYING CASE.

In *Bitco Gen. Ins. Corp. v. Monroe Guar. Ins. Co.*, SA18CV00325FBESC, 2019 WL 3459248 (W.D. Tex. July 31, 2019) (slip op.), a San Antonio federal magistrate applied the eight-corners rule to conclude that an insurer had a duty to defend the insured, finding that the extrinsic evidence offered with regard to coverage overlapped with the merits of the underlying case and would not be considered.

In the underlying lawsuit, Jones asserted claims for negligence and breach of contract against 5D and Davenport, alleging that they failed to properly drill an irrigation water well on his farm. Jones alleged that 5D's faulty workmanship damaged his property and the Edwards Aquifer, which flows under his property. In the underlying lawsuit, 5D and Davenport asserted that their insurers, BITCO and Monroe Guaranty ("MGIC") had a duty to defend them against Jones's claims. The coverage case only concerned the MGIC Policy and whether it gave rise to a duty to defend in the underlying lawsuit.

MGIC argued it had no duty to defend for two reasons: (1) the alleged "property damage" occurred outside the policy period and (2) two business-risk exclusions applied and excluded Jones's claims from coverage. After applying the "eight-corners rule," the magistrate found that neither reason was persuasive.

In *Bitco*, MGIC argued that the alleged "property damage" occurred outside the policy period. The relevant pleading alleged that, "[i]n the summer of 2014," Jones entered into a contract with 5D to drill a water well and that "[o]n or about August 14, 2014, Plaintiffs obtained from Defendants an invoice for drilling a well through the Edwards aquifer [sic]...." However, the petition contained no other factual allegations regarding the date on which Jones's property was allegedly damaged. The underlying lawsuit was commenced on June 30, 2016. Presumably, then, the alleged "property damage" occurred between "the summer of 2014" and June 30, 2016. The court held that because the MGIC Policy ran from October 6, 2015 to October 6, 2016, the alleged "property damage" could have occurred during the policy period.

MGIC argued that, if the Court looks beyond the "eight corners" of the complaint and the insurance policy, it should consider the parties' stipulation that the drill bit became stuck in the borehole in November 2014, eleven months before the policy period began. The magistrate disagreed. The magistrate recognized that the Fifth Circuit has articulated a limited exception to the eight-corners rule that allows a court to consider extrinsic evidence "only when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim." The magistrate found that it was impossible to discern from Jones's state-court petition when the alleged "property damage" occurred. However, because the extrinsic evidence showed only when the drill bit became stuck in the borehole, and there were allegations of other property damage beyond the lodging of the drill bit in the borehole, such evidence was not dispositive of the coverage issue.

Concluding that no policy exclusion applied to negate MGIC's duty to defend, because there was *potentially* a claim in the live pleading within the coverage of the MGIC Policy, MGIC's duty to defend was triggered.

TEXAS FEDERAL COURT CONSIDERS EXTRINSIC EVIDENCE TO FIND BUSINESS USE EXCLUSION IN NON-TRUCKING POLICY PRECLUDED COVERAGE, NEGATING INSURER'S DUTY TO DEFEND AND INDEMNIFY.

In *Hudson Ins. Co. v. Alamo Crude Oil, LLC,* No. SA-19-CV-137-XR, 2019 WL 3322867 (W.D. Tex. July 24, 2019), the driver, Michael Johnson, was driving a truck owned by Alamo Crude Oil and hit a pedestrian who filed suit. A Non-Trucking Liability Policy (a "bobtail" policy) issued by Hudson to Alamo provided coverage only when the truck was used for "non-commercial operations." That is, "when driven without a trailer and without any intent to perform business related activity for the motor carrier that leased the Truck." The coverage supplemented Alamo's commercial trucking liability coverage and applied when the truck was driven without a trailer attached and without any intent to perform business-related activity for the motor carrier that leased the truck. The policy excluded coverage for "bodily injury or property damage arising from the use of a covered auto…while used to carry property in any business or en route for such purpose." The policy applied to scheduled vehicles for which, at the time of the accident or loss, there was a valid long term lease agreement existing between the named insured and a motor carrier.

The underlying suit's pleadings did not allege why Johnson was traveling westbound on IH-20 at the time of the accident. However, in the underlying pleading, he is alleged to have acted within the course and scope of his employment for Alamo, driving in furtherance of a mission for Alamo's benefit and/or was subject to Alamo's control, and working as Amtrans' agent and/or was subject to Amtrans' control.

In the coverage suit, Hudson alleges it is not disputed that Johnson was on his way to pick up and haul a load for Amtrans; Johnson had a trailer attached to the Truck; Johnson exclusively hauled for Amtrans when he drove the Truck; and Amtrans' placard was on the Truck when Johnson drove the truck and at the time of the collision. The summary judgment evidence showed that when the collision happened, Johnson was driving the truck, which was owned by Alamo and leased or rented to Amtrans.

Hudson argued it had no duty to defend Alamo for three reasons. First, Hudson argued the stipulated facts in the parties' joint Rule 26 report, if properly considered under the exception to the eight-corners rule, showed that the business exclusion applies. Second, Hudson argued the petition in the underlying suit does not sufficiently allege facts bringing Alamo within the scope of an "insured" under the Policy. Finally, Hudson argued Alamo cannot meet its burden to show it is an "insured" under the Policy. The court concluded that the first ground was sufficient to decide the motion in Hudson's favor, declining to reach the other arguments.

Hudson, argued that it was impossible to determine whether coverage is potentially implicated because, on the face of the pleadings, it is impossible to tell whether the business coverage exclusion applies. Hudson asked the Court to consider, as extrinsic evidence, the stipulated facts set out in the parties' Rule 26 report.

Relying on *Sentry Select Ins. Co. v. Drought Transportation, LLC*, 2016 WL 6236375 (W.D. Tex. Oct. 24, 2016), the court held that it was impossible to discern whether coverage is potentially implicated under the petition as alleged, meeting the first prong of the extrinsic evidence exception. The court also found that the extrinsic evidence - the parties stipulated facts - did not overlap with the underlying petition's merits. Relying on the stipulated evidence, the court determined that Hudson had no duty to defend under the business purpose exclusion and because the same reasons that precluded a duty to defend also precluded a duty to indemnify, Hudson was entitled to a declaration that it had no duty to defend or indemnify Alamo in the underlying lawsuit.

SAN ANTONIO COURT OF APPEALS HOLDS UDJA ACTION IS PROPER DEVICE TO USE TO ESTABLISH ENTITLEMENT TO UM/UIM BENEFITS AND THAT ATTORNEY'S FEES ARE RECOVERABLE UNDER THE UDJA FOR UM/UIM CLAIMS.

In *Allstate Insurance Company v. Irwin*, No. 04-18-00293-CV, 2019 WL 3937281, (Tex. App.—San Antonio, August 21, 2019), after a car wreck with an underinsured motorist (UIM), Daniel Wes Irwin, the insured, sued his auto insurer, Allstate Insurance Company ("Allstate"), seeking a declaration that he was entitled to recover damages resulting from the wreck under the UIM coverage portion of his policy. Irwin had settled with the tortfeasor, Alonso, for her $30,000 policy limits. Irwin demanded the policy limits of his UIM coverage ($50,000) for the remaining damages Alonso's policy did not cover. At the time of the demand, Irwin's medical bills alone exceeded the amount he recovered from Alonso. Allstate offered to settle for $500. Irwin sued Allstate under the Uniform Declaratory Judgments Act ("UDJA") seeking a declaration that he was entitled to recover his remaining damages under his UIM policy. He also sought attorney's fees under the UDJA.

The sole issue presented to the jury was whether Irwin was legally entitled to recover his excess damages. The parties stipulated to coverage under the UIM policy and the $30,000 offset from Irwin's settlement with Alonso. The jury returned a verdict in Irwin's favor, awarding him $498,968.36 in damages. The trial court signed a judgment awarding Irwin the Allstate policy limit of $50,000, plus court costs, and $45,540 in attorney's fees. Allstate appealed.

On appeal, Allstate claimed the trial court abused its discretion in awarding Irwin declaratory relief and attorney's fees under the UDJA. It argued the UDJA is not the proper procedural vehicle for pursuing claims for UIM coverage, and because declaratory relief was inappropriate, Irwin cannot recover his attorney's fees under the UDJA. Relying on *Brainard v. Trinity Universal Insurance Co.*, 216 S.W.3d 809 (Tex. 2006), Allstate argued that an insured must file suit and establish the amount he is legally entitled to recover from the other motorist to trigger an insurer's contractual duty to pay UIM benefits. It contended that only after the contractual duty to pay is established may an insured pursue a breach of contract claim against the insurer to recover UIM benefits. According to Allstate, an insured cannot file a claim for declaratory relief to obtain the judgment required by *Brainard.* Irwin countered that the UDJA is appropriate for pursuing his UIM claim for coverage.

The court noted that an insured's use of the UDJA to declare that he is legally entitled to recover damages from his UIM carrier—and to determine the amount of those damages—is an issue of first impression for the court and that the Texarkana Court of Appeals is the only Texas appellate court to have

addressed the issue to date.[4] Relying on the *Jordan* case, the court held that "nothing in *Brainard* precludes the use of a declaratory judgment when establishing prerequisites to recover in a UIM benefits case."

> Without the options of an agreed judgment, a settlement, or an admission of liability from the UM/UIM, an insured faces the unduly burdensome and inefficient task of rejecting the tortfeasor's policy limits offer and instead participating in a full-blown adversarial trial to obtain a judgment so he can then turn around and make a claim *against his own insurer to recover benefits for which he paid.* That is simply unreasonable where, as here, the tortfeasor has already paid policy limits to settle her claim and there is no real dispute that the insured's damages exceed his recovery from the tortfeasor.[5]

Allstate also argued the trial court abused its discretion by awarding Irwin attorney's fees, contending attorney's fees are not recoverable in UIM claims unless and until a breach of contract is established, which cannot occur until after a judgment establishes the insurer's duty to pay. Allstate argued that Irwin's "claim for declaratory relief is nothing more than a creative attempt to find a basis for recovering attorney's fees where one does not actually exist." Irwin responded that Allstate's reliance on *Brainard* was misplaced because *Brainard's* holding is limited to breach of contract cases under Chapter 38 of the Code. Irwin argued he properly asserted a declaratory judgment claim under Chapter 37 of the Code, and the plain language of that statute authorizes the recovery of attorney's fees. The Court of Appeals agreed with Irwin, reasoning that because the UDJA is to be "liberally construed and administered" there is nothing preventing the award of reasonable attorney's fees. The court distinguished the *Brainard* decision because it was based on a breach of contract claim and not a claim for declaratory judgment.

> If a dispute is resolved under the UDJA, Chapter 37 grants the trial court discretion to award reasonable and necessary attorney's fees to either party "as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. The Act is remedial, and unlike Chapter 38 of the Code upon which the plaintiffs in *Brainard* and *Jordan* relied, nothing in the UDJA requires a matured breach of contract claim. *See id.* § 37.001, *et seq.* The fact that Irwin pled *only* a declaratory judgment action to determine his rights under the insurance contract distinguishes this case from both *Brainard* and *Jordan.*[6]

FEDERAL COURT REMANDS UIM BAD FAITH CASE BACK TO STATE COURT, FINDING THAT ADJUSTER WAS NOT IMPROPERLY JOINED AND THEREFORE, THERE WAS NO FEDERAL JURISDICTION.

In *Trejo v. Allstate Fire and Casualty Ins. Co*., No. SA19CV00180FBESC, 2019 WL 4545614 (W.D. Tex. Sept. 19, 2019), the federal magistrate for the district court for the Western District of Texas recommended that the court grant an insurer's motion to remand the bad faith case back to state court, finding that the Texas Allstate adjuster who was also sued as a defendant, was not improperly joined. Trejo is an underinsured motorist ("UIM") case where Trejo, an Allstate insured who was involved in an

[4] See *Allstate Ins. Co. v. Jordan*, 503 S.W.3d 450, 455 (Tex. App.—Texarkana 2016, no pet.).
[5] *Irwin*, at *3.
[6] *Id.* at *4.

auto accident, sought and was denied UIM benefits. After filing her lawsuit against Allstate and the adjuster, Hess, in state court, Allstate removed the case to federal court based on diversity jurisdiction.

In the live petition, Trejo alleged claims for breach of contract, unjust enrichment, breach of the common-law duty of good faith and fair dealing, and statutory violations of Chapter 541 of the Texas Insurance Code and the Texas Deceptive Trade Practices-Consumer Protection Act ("the TDTPA"), Tex. Bus. & Com. Code §§ 17.41–17.63. Allstate did not dispute that Hess, like Trejo, is a citizen of Texas. However, Allstate argued that the court should ignore the in-state and non-diverse citizenship of Hess because he was improperly joined to defeat diversity. Because Allstate did not allege actual fraud in the pleadings, the court held the applicable test for improper joinder was "whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant."

Based on the live pleadings, the magistrate determined that Trejo stated a claim against Hess for bad faith under Chapter 541 of the Texas Insurance Code, which prohibits bad-faith claim denial. The prohibited conduct includes "failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear." Tex. Ins. Code Ann. § 541.060(a)(2)(A). The magistrate stated that although there is some uncertainty regarding which specific provisions of Chapter 541 expose an independent adjuster to liability, numerous courts, including the Western District, have held that § 541.060(a)(2)(A) provides a cause of action against insurance adjusters, because adjusters engage in the business of insurance by investigating, processing, evaluating, approving, and denying claims. The magistrate noted that because a few courts have held that § 541.060(a)(2)(A) applies only to insurers and not to adjusters, the courts are split on whether an insurance adjuster may be held liable under § 541.060(a)(2)(A). But because the removal statute is to be strictly construed and any doubt about the propriety of removal must be resolved in favor of remand, in the context of Trejo's Motion to Remand, the magistrate reasoned that the split in authority regarding the scope of an insurance adjuster's liability under the Texas Insurance Code must be resolved in favor of remand, concluding there was a reasonable basis for predicting that Texas law would impose liability on Hess in the case.

In addition, Allstate argued that Trejo failed to state a bad-faith claim against Hess because she had not obtained a judgment establishing the liability and underinsured status of the other motorist. The magistrate held that the Fifth Circuit explicitly rejected this argument in *Hamburger v. State Farm Mut. Auto. Ins. Co.*, 361 F.3d 875 (5th Cir. 2004). According to the magistrate, in *Hamburger*, the Fifth Circuit observed that if bad-faith claims were available only after an insured's legal entitlement to recovery was established, an insured could never successfully assert a bad faith claim against his insurer for failing to attempt a fair settlement of a UIM claim and that is because an insurer's common-law and statutory duties of good faith and fair dealing do not extend beyond entry of judgment in favor of its insured (that is, an insured does not have a bad-faith cause of action against an insurer after there is a judgment against the insurer, at which time there are no longer duties of good faith and the relationship becomes one of judgment debtor and creditor).

The magistrate discussed the fact that *Hamburger* was decided two years before *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006), in which the Texas Supreme Court held that "the [UIM] insurer's contractual obligation to pay benefits does not arise until liability and damages are

determined."[7] Allstate, citing *Brainard*, argued that Trejo failed to state a bad-faith claim against Hess because she had not obtained a judgment establishing the liability and underinsured status of the other motorist. The magistrate held that Allstate's reliance on *Brainard* was misplaced.

> *Brainard* did not address whether an insured may assert a bad-faith claim against her insurer before litigating the other motorist's liability and underinsured status. Instead, *Brainard* held only that a plaintiff may not be awarded pre-judgment interest on a breach-of-contract claim against her insurer for failure to pay benefits before securing a judgment establishing a third party's liability for the damages resulting from the third party's negligence. Per *Brainard*, Trejo's breach-of-contract claims based on Allstate's refusal to pay UIM benefits do not accrue until she obtains a judgment establishing the other driver's liability and his status as an UIM. But Trejo's claims for unfair settlement practices under the Texas Insurance Code are subject to no such limitation.
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> As noted above, *Brainard* construed the phrase "legally entitled to recover" in the UIM statute to mean that the insured must establish the UIM's fault and the extent of the resulting damages before becoming entitled to recover UIM benefits. In contrast, an insurer violates § 541.060(a)(2)(A) by "failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear." The UIM insurer is obligated to pay only those damages that the insured is "legally entitled to recover" from the UIM, which requires a legal judgment against that motorist; however, to prevail on a bad-faith claim, a plaintiff need demonstrate only that an insurer wrongfully withheld payment of benefits when the insurer's obligation to pay was "reasonably clear." Allstate's interpretation of *Brainard* would require this Court to ascribe the same meaning to the phrases "legally entitled to recover" and "reasonably clear," thereby "violat[ing] the axiomatic rule that when a legislature uses different text in adjacent statutes it intends that the different terms carry a different meaning." *Fowler v. Gen. Ins. Co. of Am.*, No. 3:14-CV-2596-G, 2014 WL 5879490, at *3 (N.D. Tex. Nov. 13, 2014) (internal quotation marks, citation, and alterations omitted). Such an interpretation would also "render § 541.060(a)(2)(A) entirely superfluous," as the lack of a judgment would bar claims pre-judgment and the transformation of the parties' legal relationship would bar claims post-judgment. *Id.* (citing *Hamburger*, 361 F.3d at 880–81).
>
> In short, because *Hamburger* focuses specifically on § 541.060 claims containing the phrase "reasonably clear," and *Brainard* addresses only § 1952.101 claims containing the phrase "legally entitled to recover," "*Brainard* does not address or call into doubt *Hamburger*'s holding." *Woods v. Argonaut Midwest Ins. Co.*, No. 6:15-CV-139, 2016 WL 3653518, at *3 (E.D. Tex. Mar. 18, 2016) (quoting *Accardo v. Am. First Lloyds Ins. Co.*, No. CIV.A. H-11-0008, 2012 WL 1576022, at *5 (S.D. Tex. May 3, 2012)); *see also Terry v. Safeco Ins. Co. of Am.*, 930 F. Supp. 2d 702, 710 (S.D. Tex. 2013) ("*Brainard* does not appear to call into doubt *Hamburger*'s holding.").[8]

The magistrate then noted that the Dallas Court of Appeals and a few federal district courts have adopted the interpretation of *Brainard* advanced by Allstate but that the San Antonio Court of Appeals

[7] *Id.* at *8.
[8] *Id*.

recently rejected such an interpretation, as had a number of federal district courts. However because this issue was being decided in the context of a motion to remand, any ambiguities of Texas law had to be resolved in Trejo's favor.[9]

FEDERAL COURT RULES PLEADINGS DID NOT TRIGGER CONTRACTUAL INDEMNITY; GRANTS SUBCONTRACTOR'S INSURER'S MOTION TO SPLIT DEFENSE COSTS FOR ADDITIONAL INSURED, GENERAL CONTRACTOR, 50/50.

In *Employers Mutual Casualty Company v. Amerisure Insurance Company*, No. 4:18-CV-00330, 2019 WL 3717634, (E.D. Tex., August 7, 2019), two insurers disputed who must assume the defense of an underlying personal injury lawsuit. As part of a construction project, a general contractor ("Mycon") hired a subcontractor ("Hatfield") to perform drywall work. Hatfield and Mycon had a written agreement that required Hatfield to defend and indemnify Mycon against certain claims and to procure liability insurance that named Mycon as an additional insured. Mycon's CGL carrier was Employers and Hatfield's CGL carrier was Amerisure. Under a subcontract and work order agreements, Hatfield named Mycon as an additional insured in the Amerisure policy.

Hatfield employed a drywall mechanic named Chavez during the construction project. Chavez allegedly sustained injuries during the construction project when a steel beam broke and struck him in the head. Consequently, Chavez sued Mycon and Lloyd Plyler Construction, L.P. ("Plyler")—a third party to the coverage suit—in state court asserting claims of negligence and gross negligence (the "Underlying Suit").

Employers and Amerisure disputed who must assume Mycon's defense in the Underlying Suit and filed dueling motions for summary judgment in the coverage case. Amerisure did not contest that Mycon was an additional insured on the policy and agreed that it possessed a duty to defend Mycon as an additional insured under the policy. However, Amerisure argued that its duty to defend Mycon as an additional insured is limited and that, examining the policy, Subcontract, and Work Order, the coverage available to Mycon as an additional insured was not primary or noncontributory, but purely excess to any other primary coverage.

Amerisure argued that because both policies contained other insurance provisions that were mutually repugnant, defense costs should be split on a pro-rata basis. Employers argued that pursuant to *American Indemnity*,[10] much of Amerisure's argument is irrelevant. Employers focused on the indemnification provision found in the Subcontract Agreement in which Hatfield agreed to defend and indemnify Mycon. Employers argued that the indemnity provision is enforceable and the Underlying Suit triggered the indemnity provision and therefore, as the indemnity provision shifted exposure for the Underlying Suit to Hatfield, and Amerisure insures Hatfield, Amerisure bore the sole duty to defend Mycon in the Underlying Suit.

The court decided it first had to determine whether the underlying suit triggered the contractual indemnity provision. If the Underlying Suit triggered the indemnity provision, the court then had to

[9] *Id.* at *9.
[10] *Am. Indem. Lloyds v. Travelers Prop. & Cas. Ins. Co.*, 335 F.3d 429 (5th Cir. 2003).

decide whether *American Indemnity* shifted exposure to Amerisure. If *American Indemnity* did not shift the exposure, then the court had to examine the "other insurance" provisions of the policies.

The court examined the allegations in the original petition, which brought claims against Mycon and Plyler only, not Hatfield. With regard to the contractual indemnity provision, the court found that Hatfield agreed to indemnify Mycon against "any and all claims" (1) "arising out of or resulting from the performance" of Hatfield's work; (2) "provided that any such claim ... is attributable to bodily injury ...;" and (3) the bodily injury is "caused in whole or in part by reasons of the acts or omissions or presence of the person or property of the Subcontractor or any of its agents [or] employees...." The court found that the allegations of the Underlying Suit did not meet the first or third factors and therefore, did not trigger the indemnity agreement.

The third triggering factor of the indemnification provision provides that the injury must be "*caused in whole or in part* by reason of the acts or omissions or presence of the person or property of Subcontractor or ... [its] employees...." In its interpretation of this provision, Employers argued that Chavez's mere presence on the construction site caused Chavez's injury, and "therefore, so long as the claim arises out of Hatfield's work on the project, is attributable to bodily injury, and caused in whole or in part by the presence of a Hatfield employee, Hatfield's indemnity obligation is triggered." The court held that Employers' argument misconstrued the causal relationship pled in the Underlying Suit.

> While it is true that Mr. Chavez was physically present at the construction site when he was injured, it cannot be said that Mr. Chavez's presence *caused in whole or in part* his injury. Examining an insurance policy containing the language "caused, in whole or in part, by" the Fifth Circuit noted, "the Texas Supreme Court has defined 'caused by' as requiring proximate causation." *** The allegations of the Underlying Suit do not demonstrate that Mr. Chavez or Hatfield's presence formed part of the natural and continuous sequence that produced his injury. Instead, it was the alleged natural and continuous sequence of the Plyler and Mycon employees that produced Mr. Chavez's injuries.[11]

Because the court found the Underlying Suit did not trigger the indemnity provision found in the Subcontract Agreement, the court did not address Employers' argument that *American Indemnity* controlled this case With regard to Employers' motion for breach of contract and for attorney's fees, because the court did not find that Amerisure breached its policy by failing to assume Mycon's sole defense pursuant to the indemnity provision, Employers' motion for summary judgment as to breach of contract and attorney fees was denied. Because Employers admitted that if *American Indemnity* did not control the case, Employers and Amerisure would both be obligated to furnish Mycon with a defense, splitting the costs on a pro rata basis, Amerisure's motion in that regard was granted by the court.

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[11] *Id.* at *6.