

# The Defense Chronicles

A Newsletter Update from Thornton, Summers, Biechlin, Dunham & Brown, L.C.

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**Highlights**

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## Duty to Defend and the “Eight Corners Rule” – Will the Rule Withstand an Appeal to the Texas Supreme Court?

*Fielder Road Baptist Church v. Guideone Elite Insurance Company,  
139 S.W.3d 384 (Tex. App. – Fort Worth May 20, 2004, pet. filed).*

Effective March 31, 1993, Guideone Elite Insurance Company issued a commercial general liability policy to Fielder Road Baptist Church. “Jane Doe” filed a sexual misconduct lawsuit against the church in June 2001, alleging she was sexually abused and exploited by Evans, an associate youth minister of the church. In September 2001, Guideone filed this declaratory judgment action seeking a construction of the CGL policy and a declaration that it had no duty to defend or indemnify the church in the underlying sexual misconduct lawsuit. In the declaratory judgment action, Guideone and the church filed a stipulation that Evans ceased working for the church before the Guideone policy went into effect.

Having considered the stipulation of the parties, the trial court granted summary judgment to Guideone, rendering a declaratory judgment declaring that Guideone had no duty to defend the church in the underlying sexual misconduct case. But the Fort Worth Court of Appeals reversed because the trial court’s decision violated the “eight corners” or “complaint allegation rule” when it considered the parties’ stipulation on the duty to defend issue. Under that 40-year old rule, the duty to defend is to be considered based only on the four corners of the insurance policy plus the four corners of the plaintiff’s petition, without regard to the truth or falsity of the plaintiff’s allegations. In short, according to the appeals court, the parties’ stipulation that Evans was not employed within the church’s policy period went beyond the eight corners, and was extrinsic evidence that should not have been considered by the trial court in determining the duty to defend.

This case has been appealed to the Texas Supreme Court. And according to the October 18, 2004 issue of the *Texas Lawyer*, lawyers believe the Texas Supreme Court will likely accept the case for review because the Fort Worth Court of Appeals issued a similar opinion in 2001 that was accepted for review, but the litigants in that case settled before the Texas Supreme Court heard oral arguments. 

- Richard C. Harrist

### **PIP Coverage Applied Since Insured's Fall While Exiting Parked Truck Was A "Motor Vehicle Accident"**

*Texas Farm Bureau Mutual Insurance Company v. Sturrock*, 2004 WL 1908330 (Tex. August 27, 2004).

Jeff Sturrock drove his truck to work, parked, and turned off the engine. While exiting the truck, he entangled his left foot on the raised portion of the truck's door facing. Mr. Sturrock injured his neck and shoulder while attempting to keep himself from falling from the vehicle. He filed a Personal Injury Protection ("PIP") claim under his Texas Farm Bureau auto policy.

The *Texas Insurance Code* requires that every automobile insurance policy issued within Texas provide PIP coverage, unless rejected by the insured. It is Texas public policy to provide injured occupants of the insured vehicle with up to \$2,500 in PIP benefits – without regard to the fault of the insured. Sturrock's policy provided for the payment of PIP benefits because of bodily injury "resulting from a *motor vehicle accident* . . . [and] . . . sustained by a covered person." (*Emphasis added.*)

Texas Farm Bureau denied Sturrock's injuries resulted from a "motor vehicle accident." The trial court held, as a matter of law, Sturrock's injuries resulted from a "motor vehicle accident," and the Beaumont Court of Appeals affirmed.

The Texas Supreme Court also affirmed, holding that a "motor vehicle accident" occurs when: (1) one or more vehicles are involved with another vehicle, an object, or a person; (2) the vehicle is being used, including exit or entry, as a motor vehicle; and (3) a causal connection exists between the vehicle's use and the injury-producing event.



- Richard C. Harrist

### **Notice of Lawsuit By The Insured is Required to Trigger Duties to Defend and Indemnify**


*L'Atrium on the Creek I, L.P. v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania*, 326 F.Supp.2d 787 (N.D. Tex. April 28, 2004).

The plaintiff, an apartment complex owner was sued in an *underlying* lawsuit by LaToya Ball, who asserted that she was sexually molested by the plaintiff's uniformed employee on June 8, 1998. Ball filed her lawsuit on June 1, 2000. The apartment complex owner hired its own counsel to answer and defend the lawsuit, and did not tender its defense to its insurance carrier, National Union. The apartment complex did not tender its defense because its counsel believed that National Union did not have defense or indemnification obligations in reference to the *underlying* lawsuit until the Texas Supreme Court's decision, on August 29, 2002, in *King v. Dallas Fire Insurance Co.*, 85 S.W.3d 185 (Tex. 2002).

In July 2001, LaToya Ball's attorneys informed National Union of the ongoing, underlying lawsuit, and that the Ball case had been set for mediation. National Union declined to participate in any settlement negotiations.

On September 19, 2002, for the first time, the apartment complex owner asked National Union to provide them a defense in the Ball lawsuit. On October 17, 2002, National Union responded that it would defend and indemnify the apartment complex owner, and that it would reimburse defense costs of the Ball lawsuit incurred from September 19, 2002 forward. The apartment complex owner insisted National Union pay all of its attorneys' fees, including fees incurred before its notice to National Union, because National Union could not show it was prejudiced by the lack of notice. The apartment complex owner filed this lawsuit to recover from National Union its unreimbursed attorneys' fees. National Union moved for summary judgment.

The United States District Court for the Northern District of Texas (Fort Worth Division) granted

National Union's motion for summary judgment on the basis that the insured's notice of suit to the insurer is a condition precedent to the insurer's liability on the policy. Rejecting the apartment complex's argument that Ball's attorneys had notified National Union of the suit earlier, the district court stated, "it is the action *by the insured* in sending the suit papers to the insurer that triggers the insurer's obligation to tender a defense and answer the suit." 

- Richard C. Harrist


### **Prime Contractor Waived its Right to Enforce Provision in Subcontract That Required Subcontractor to Procure Insurance Naming Prime Contractor as Additional Insured**

*Bott v. Shea/Keefe v. Gulf Coast Grouting, Inc., 2004 WL 2340016 (5<sup>th</sup> Cir. October 19, 2004).*

The City of Houston awarded a bid for sewer construction to the joint venture of Shea/Keefe. Shea/Keefe was a joint venture formed by J.F. Shea Company, Inc., and L.J. Keefe Company. Shea/Keefe, the prime contractor, hired subcontractor, Gulf Coast Grouting, Inc., to perform a portion of the work. The subcontract required Gulf Coast to procure insurance to indemnify Shea/Keefe from liability, and specifically provided that the additional insured on the policy was to be Shea/Keefe, the joint venture. The contract administrator for Shea/Keefe, however, used J.F. Shea Company, Inc., forms that directed Gulf Coast to obtain insurance naming J.F. Shea Company, Inc. (as opposed to Shea/Keefe) as the additional insured.

After Gulf Coast's performance under the subcontract was completed, a lawsuit was brought by John Bott, an employee of Gulf Coast, against Shea/Keefe for personal injuries he suffered while working for the subcontractor. After Bott filed suit, Shea/Keefe joined Gulf Coast and Gulf Coast's insurer, Mid-Continent, as third-party defendants, seeking indemnity from Gulf Coast or, alternatively, asserting a breach of contract claim against Gulf Coast for failure to procure insurance naming Shea/Keefe as an additional insured.

The jury determined that Bott's injuries were the result of the sole negligence and willful misconduct of Shea/Keefe, rendering the indemnity issue moot. Thereafter, Shea/Keefe filed a motion for summary judgment against Gulf Coast on Shea/Keefe's breach of contract claim. Gulf Coast admitted it failed to comply with the subcontract, but asserted Shea/Keefe waived its rights when (a) its contract administrator gave erroneous instructions to Gulf Coast on the procurement of insurance, (b) Shea/Keefe received two non-conforming certificates of insurance and did not object, (c) Shea/Keefe allowed Gulf Coast to start and complete its work on the project, and (d) Shea/Keefe paid Gulf Coast in full without any objections. Ultimately, the federal district court granted Shea/Keefe's motion, but the U.S. Court of Appeals, Fifth Circuit reversed and rendered a take nothing judgment in favor of Gulf Coast.

The Fifth Circuit concluded that "the undisputed facts established as a matter of law that Shea/Keefe waived the insurance requirement both by intentional conduct inconsistent with claiming the right to have Shea/Keefe named as an additional insured, and by its silence and inaction, for so long a period as to show an intention to yield the right to have Shea/Keefe named as an additional insured." 

- Richard C. Harrist


### **Only the Insurance Commissioner-Approved Rate May be Charged to Policyholders**

Under the Texas Insurance Code, the Commissioner of Insurance annually adopts a benchmark, or presumptive, rate of insurance for various classes of business and terms of coverage – and insurers may charge up to thirty percent (30%) above or below the presumptive rate. In promulgating this rate, the Commissioner may consider a number of factors, including past and prospective loss experience, the peculiar hazards and experience of individual risks, a reasonable margin of profit, insurers' expenses of operation, the level and range of rates among insurers, and insurers' investment and

underwriting experience. An insurer must file its proposed rate of insurance with the Commissioner, including evidence that the rate does not include any disallowed expenses. Only allowable costs may be included in the rate filing, which includes, among other things, premiums, taxes, and finance charges. Filed rates within the 30% “flexibility band” are presumed valid.

Two recent cases have made it clear that *only* the Insurance Commissioner-approved rate may be charged to policyholders in Texas.

In *Liberty Mutual Insurance Company v. Griesing*, 2004 WL 1898239 (Tex. App.—Austin August 26, 2004), as a class action representative, plaintiff Betty Griesing challenged Liberty Mutual’s billing to its policyholders of a state-mandated fee for theft prevention – in addition to auto insurance rates. The trial court granted partial summary judgment in favor of Griesing, declaring that the collection of the theft-prevention fee, *in addition to* the regulated rate is unlawful, and that Liberty Mutual breached its insurance contract with Griesing. The Austin Court of Appeals affirmed, holding that the rate approved by the Commissioner of Insurance is the *only* amount that an automobile insurer may lawfully charge a policyholder.

Similarly, the Austin Court of Appeals, in *Service Life and Casualty Insurance Company v. Montemayor*, 2004 WL 1898226 (Tex. App.—Austin August 26, 2004), held that a credit life, accident, and health insurer could not charge a \$50 “policy fee” in addition to the premium rate approved by the Commissioner of Insurance. 

- Richard C. Harrist

### Forum-Selection Clause in Policy Enforced

*In re AIU Ins. Co., No. 02-0648, 2004 WL 1966010 (Tex. Sept. 3, 2004).*


Louis Dreyfus Corporation obtained \$70 million in pollution liability coverage from AIU Corporation. At the time, both companies had their

principal place of business in New York. The insurance policy contained a forum-selection clause by which the parties agreed that all disputes would be resolved in New York. One of Louis Dreyfus’s subsidiaries, Louis Dreyfus Natural Gas Corporation, was located in Texas. Not long after the policy issued, the Texas subsidiary merged with American Exploration Company. American Exploration had wells and a pipeline gathering system in Hidalgo County, Texas. After the policy’s effective date, Louis Dreyfus was joined as a defendant in a suit brought in Hidalgo County alleging air, soil, and ground water contamination. AIU provided a defense to Louis Dreyfus under a reservation of rights, and disputed coverage. Louis Dreyfus in turn sought a declaratory judgment that the claims against it were covered. AIU responded by filing a motion to dismiss based upon the forum-selection clause. The trial court refused to enforce the clause.

In examining the validity of the forum-selection clause, the Supreme Court noted that it had never before addressed the issue because such clauses have been traditionally disfavored by American courts.

On appeal, Louis Dreyfus argued that the forum-selection clause in its insurance policy should not be enforced because: (1) litigation in New York would be unreasonable or unjust because most of the potential witnesses were in Texas; (2) the issues in the case were governed by Texas law; and (3) enforcement would contravene public policy because insurance proceeds would benefit the residents of Hidalgo County and coverage under the policy would protect Louis Dreyfus’s successor, a company that employed many people in Houston, Texas. The Supreme Court rejected these arguments.

According to the Court, Louis Dreyfus failed to show that it would be deprived of its day in court through enforcement of the forum-selection clause. Moreover, there was no indication that AIU obtained the forum-selection clause through fraud or overreaching. Furthermore, the Court explained that the Texas law issue in the case did not require

litigation to be brought in Texas. Finally, the Court rejected the public policy argument, explaining that Louis Dreyfus's argument essentially suggested that a tribunal should consider the local community in deciding the existence of insurance coverage – a position the Court found offensive to a system of justice based upon the rule of law. 

- Rebecca A. Copeland

### **Texas FAIR Plan Association Did Not Exceed Authority on Limiting Fees Agents May Charge**


*Al Boenker Ins. Agency, Inc. v. The Texas FAIR Plan Ass'n, No. 03-04-00050-CV, 2004 WL 1686598 (Tex.App.-Austin July 29, 2004, no pet.) (memo. op.).*

In 1995, the Texas Legislature passed the Fair Access to Insurance Requirements (FAIR) Plan Act giving the Texas Insurance Commissioner authority to establish a FAIR Plan Association for the purpose of delivering residential property insurance to Texans in underserved areas. Al Boenker Insurance Agency contracted with FAIR Plan to submit insurance applications. Under the terms of the contractual agreement, the contracting insurance agent is required to collect and fully remit premiums to FAIR Plan. In turn, FAIR Plan pays the agent commissions as the agent's sole compensation.

Later, FAIR Plan became aware that some agencies, including Al Boenker, were charging fees for placing FAIR Plan policies. FAIR Plan then issued a bulletin clarifying its position that charging fees was prohibited. Al Boenker sought a declaratory judgment that the bulletin was void and requested an injunction against FAIR Plan enforcing the bulletin. Both parties moved for summary judgment; the trial court granted judgment in favor of FAIR Plan.

On appeal, Al Boenker argued that FAIR Plan violated the separation-of-powers doctrine by attempting to exercise legislative power by issuing the bulletin. The Austin Court of Appeals

disagreed. The court noted that the Texas Legislature may delegate powers to agencies to carry out legislative purposes, including powers reasonably necessary to fulfill express functions or duties. Further, the court explained that Al Boenker's argument would require it to find the FAIR Plan acted as a state agency promulgating a rule under the Texas Administrative Procedure Act. The court declined.

Al Boenker also argued that FAIR Plan exceeded its authority by issuing the bulletin, relying on the ability of an insurer, through its agent, to collect permissive fees under the Texas Insurance Code. Again, the court disagreed. Importantly the permissive fee authority under the Insurance Code applied only to "an insurer, its agent, or sponsoring organization." In contrast, under the terms of the contractual agreement, Al Boenker is solely the agent of the applicant and not of FAIR Plan. Therefore, the permissive fee provision of the Insurance Code was inapplicable. 

- Rebecca A. Copeland

### **Court Defines "Per Loss Event" in the Context of a Medical Malpractice Insurance Policy**

*Columbia Casualty Company v. CP National, Inc., No. 01-00-01406-CV, 2004 WL 2066247 (Tex.App.[1st Dist.] Sept. 16, 2004, n.p.h.).*

Jill Flax, on behalf of the deceased, Howard Flax, filed suit against Sibley Memorial Hospital and Drs. Richard Doyan and Cooper Pearce. The lawsuit alleged medical negligence, loss of consortium, and wrongful death based upon emergency room care given to Mr. Flax. Drs. Doyan and Pearce were employed by CP National, an affiliate of National Emergency Services, Inc., which provided emergency room care physicians to Sibley. Pursuant to a professional liability insurance policy, Columbia provided a defense.


While the defense was on-going, however, a dispute arose regarding the applicable limits of the

insurance policy. According to Columbia, the policy provided a single “per loss event” liability limit of \$1,000,000. In contrast, CP National and National Emergency Services claimed that the \$1,000,000 applied separately to Drs. Doyan and Pearce, for a total of \$2,000,000. The companies brought suit in Harris County, Texas, against Columbia seeking a declaratory judgment on the liability limits of the policy.

According to the terms of the insurance policy, “[t]he limit of liability stated for ‘each claim’ is the limit of our liability for all injury or damage arising out of, or in connection with, the same or related medical incident [and applies separately to] each individual specifically named in this policy who qualify [sic] for coverage....” Furthermore, the policy provided that “[t]his limit applied regardless of the number of persons or organizations who are covered under this policy.”

In interpreting the terms of the policy, the Houston First Court of Appeals explained that no Texas court had defined “per loss event” within the context of a medical malpractice insurance policy. The court recognized that generally a “loss event” is defined as the occurrence giving rise to the liability under an insurance contract. However, the court explained that because Columbia’s contract was a claims-based contract – one in which notification of a claim triggers coverage versus the mere occurrence of a loss-causing event – the limit of liability in the policy applied to each claim.

However, the court further explained that the plain and unambiguous language of the contract provided that the per loss event limit applied to “*all insureds* (NES, CPN, Dr. Doyan, and Dr. Pearce) for *all* damages (any damages sought in the *Flax* lawsuit) to *all persons* (Mrs. Flax and the Flax estate) for injuries to *one patient* (Flax).” Importantly, the court concluded that all the events giving rise to the underlying claims for relief were related; therefore, for purposes of providing coverage there was only one claim. Thus, the court refused to liberally construe the policy to provide for a \$2,000,000 rather than a \$1,000,000 limit on liability.

Furthermore, interpreting the term “related medical incidents” – also for the first time in Texas in the context of medical malpractice insurance – the court utilized the ordinary meaning of the word “related.” Thus, the court concluded that “related” means having a logical or causal connection. The court considered the incidents giving rise to the underlying *Flax* suit related because they all involved the same patient, the same facility, the same time period, the same x-ray and the same ultimate result. 

- Rebecca A. Copeland

### **Inclusion of Pollution and Saline Endorsements Expand Insurance Company’s Duty to Defend Despite Pollution Exclusion Clause**

*Primrose Operating Co.; CADA Operating, Inc. v. National American Ins. Co.*, 382 F.3d 546 (5<sup>th</sup> Cir. 2004).

Primrose Operating Company and CADA Operating were sued by the Senn family for polluting their West Texas ranch, including pollution and saltwater contamination. Primrose operated an oil and gas lease on the ranch from 1992 to 1999; CADA succeeded Primrose as operator in 1999. Both Primrose and CADA requested their insurer, National American Insurance Company (“NAICO”) to provide a defense against the claims; NAICO refused. CADA eventually settled with the plaintiffs. A jury awarded damages against Primrose for negligently damaging the ranch. Primrose and CADA then filed suit against NAICO seeking damages for breach of the duty to defend. The jury awarded Primrose and CADA damages for breach of contract and Primrose damages for *Texas Insurance Code* violations.

On appeal, NAICO argued that it did not have a duty to defend because the pollution exclusion clause in the contract excluded coverage. However, Primrose and CADA countered that they had purchased a Pollution Endorsement and a Saline


Endorsement which brought the underlying Senn claims back within policy coverage. Thus, if the conditions in the endorsements were met, the pollution exclusion would no longer apply. The Pollution Exclusion provision of the contract excluded coverage for any premises “occupied” by any insured. The Pollution Endorsement applied to pollution that was sudden, accidental, and unexpected; incidents that did not occur prior to the policy period; and, pollution that was not a violation of law.

In interpreting the endorsement provisions, the Fifth Circuit explained that the “sudden and accidental” clause required the pollutant to be released quickly. Despite the failure of the Senn petition to allege sufficient facts in this regard, NAICO argued that the pollution was not sudden because it resulted from “day to day operations.” The court disagreed explaining that the policy did not contain a routine business exclusion and the Senns did not allege that the pollution occurred in the routine course of business. Moreover, the testimony at trial supported the jury’s conclusion that at least one of the alleged spills occurred suddenly.

NAICO also argued that because the Senn petition failed to distinguish between acts of negligence caused by Primrose versus CADA, the damage was “indivisible” and therefore the acts were caused by

pollution incidents prior to the effective date of the policy. However, the court explained that the petition did not support “indivisible incidents” but rather “indivisible injury.” Further, the parties stipulated that some incidents occurred after the policy’s effective date.

Finally, the court rejected NAICO’s contention that the failure to clean up the spills resulted in continued migration of the pollutants and necessarily contributed to the failure to comply with Texas law. According to the court, the Senn allegations were completely independent of any allegation of statutory or regulatory noncompliance.

The court also concluded that the Pollution Endorsement did not limit the effect of the Saline Endorsement, as NAICO argued. Viewing the insurance contract as a whole, the court concluded that the parties clearly intended the Saline Endorsement to increase the amount of coverage caused by saline substances. Further, there was no language in the contract conditioning the application of the Saline Endorsement to the Pollution Endorsement. And, had NAICO intended such conditioning, it could have written the contracts to reflect such condition precedent. 

- Rebecca A. Copeland

***The contents of this newsletter are presented as general information only and are not intended as legal advice. The reader is invited and advised to consult with an attorney for more specific information regarding the matters and materials addressed herein, or for advice based on the individual circumstances of his or her specific situation.***

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