AN UPDATE ON RECENT INSURANCE COVERAGE DECISIONS AND THEIR IMPACT ON THE CONSTRUCTION INDUSTRY:

THE POLICYHOLDERS' PERSPECTIVE

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I. Additional Insured Coverage – Priority of Coverage

On April 14, 2023, the Supreme Court of Texas, in *ExxonMobil Corp. v. National Union Fire Insurance Co.*, addressed issues regarding additional insured status and priority of coverage for Exxon Mobile Corporation ("Exxon") with respect to personal injury claims.[1] In doing so, the court addressed basic concepts regarding the meaning of commercial general liability insurance. Though seemingly innocuous, the analysis by the court is important for contractors that have potential risks for large construction projects.

A. *ExxonMobil Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 672 S.W.3d 415 (Tex. 2023)

By way of background, the underlying Houston Court of Appeals opinion provides more extensive details regarding the underlying accident and contractual requirements.[2] In January 2013, Kevin Roberts and Arturo Munoz, two employees of Savage Refinery Services, LLC ("Savage"), were working at Exxon's Baytown, Texas Refinery under the terms of a Standard Procurement Agreement No. 2088773 (the "Exxon-Savage Contract"). Exxon drafted the Exxon-Savage Contract, which required, among other things, that Savage obtain certain insurance coverage for Exxon as an additional insured.[3] The "Insurance" provision of the Exxon-Savage Contract obligated Savage to "carry and maintain in force at least . . . its normal and customary Commercial General Liability insurance coverage and policy limits or at least $2,000,000, whichever is greater."[4]

According to the underlying lawsuit, Roberts and Munoz were '"bolting and unbolting flanges on piping to coker drums . . . when hot water and steam exited a flange on piping' on one of the drums, 'causing injury to Roberts and Munoz.'"[5] Exxon sought coverage as an additional insured under "all of Savage's liability insurance carriers," including the following policies:

- AIG Europe Limited, formerly known as Chartis Europe Limited ("AIG Europe Limited"), Liability Policy No. CU001150b (the "AIG Policy"),
- National Union Liability Policy No. 9725090 (the "National Union CGL Policy"),
- National Union Liability Policy No. 13273101 (the "National Union Umbrella Policy"), and

[1] No. 21-0936, 2023 WL 2939596, at *5 (Tex. Apr. 14, 2023).

[2] *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Exxon Mobil Corp.*, 658 S.W.3d 305 (Tex. App.—Houston [1st Dist.] 2021, pet. granted).

[3] *Id.* at 308.

[4] *Id.*

[5] *Id.*

- National Union Liability Policy No. 051769615 (the "other National Union Policy").[6]

AIG Europe Limited recognized Exxon's status as an additional insured and agreed to provide defense and indemnity coverage for Exxon up to the limit of the AIG Policy. That policy, however, had insufficient limits to satisfy the claims at issue and requirements under the Exxon-Savage Contract.[7] National Union denied coverage. This prompted Exxon to file a coverage lawsuit, alleging breach of contract and seeking a declaratory judgment against National Union. Specifically, Exxon sought declarations that:

> it was "an additional insured under the liability policies in question"; that "[b]odily injury claims asserted against [Exxon] by Roberts and Munoz . . . [were] covered under the provisions of the policies issued by . . . National Union"; that ". . . National Union owe[d] and ha[d] owed coverage including a duty to defend and duty to indemnify [Exxon] against the bodily injury claims asserted by Roberts and Munoz"; and that ". . . National Union ha[d] not timely acknowledged [Exxon]'s additional insured status, correct priority of coverage, or otherwise provided coverage for defense and indemnity against the bodily injury claims of Roberts and Munoz . . . and [were] consequently liable to [Exxon] for interest damages under Texas Insurance Code, Chapter 542, subchapter b." Exxon requested attorney's fees and costs under the Uniform Declaratory Judgments Act . . . .[8]

In response, National Union asserted, in part, that the National Union CGL Policy and the AIG Policy "'satisfied any and all obligations—to the extent there were any—to Exxon' and that 'th[o]se policies provide[d] no coverage, or further coverage, to Exxon.'"[9] National Union also denied that Exxon was an additional insured under the National Union Umbrella Policy or that the National Union Umbrella Policy provided coverage.[10] Alternatively, National Union maintained that the National Union CGL Policy and all the other "primary" policies must be exhausted before the National Union Umbrella Policy would be triggered.[11]

Eventually, the parties moved for summary judgment. Exxon claimed that it was covered by the National Union Umbrella Policy based on its interpretation of Savage's obligation to cover Exxon as an additional insured on its "normal and customary Commercial General Liability insurance coverage and policy limits" under the Exxon-Savage Contract.[12] That interpretation relied on Exxon's position that the term "Commercial General Liability insurance," as referenced in the Exxon-Savage Contract, covers both primary and umbrella or excess insurance. In granting

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[6] *Id.* at 309.

[7] *Id*.

[8] *Id.* at 310.

[9] *Id*.

[10] *Id*.

[11] See *id.*

[12] *Id*. at 312.

Exxon's summary-judgment motion against National Union on Exxon's breach of contract and declaratory judgment claims, the trial court implicitly adopted this interpretation.[13] The court of appeals disagreed, however, explaining that "there appears to be a near-consensus of understanding that 'commercial general liability insurance' refers to a form of primary policy or coverage and does not encompass umbrella or excess coverage."[14] The court of appeals recognized that Texas courts have routinely drawn a distinction between commercial general liability policies—*i.e.*, those providing primary coverage—from umbrella or excess policies.[15] The court further explained that Texas legal practitioners and other professionals understand "commercial general liability" in the same way, specifying that commercial general liability policies are primary policies distinct from umbrella or excess policies.[16] As such, the court found that the interpretation of "commercial general liability" proffered by Exxon deviated from the generally accepted understanding of the term, and, if adopted, would "disrupt the well-settled understanding of what constitutes commercial general liability insurance coverage reflected in these various authorities as well as in numerous other business agreements which, like the Exxon-Savage Contract, call for one party to provide insurance coverage for another."[17]

As a result, the appellate court rejected Exxon's interpretation and concluded that the Exxon-Savage Contract provision requiring that Savage provide "'normal and customary Commercial General Liability Coverage'" to Exxon "had only one reasonable, certain, and definite meaning, creating an obligation for Savage to provide primary coverage to Exxon as an additional insured under a commercial general liability policy—but not any obligation to provide coverage under an umbrella or excess policy to Exxon as an additional insured."[18] As a result, the court held that Exxon was an additional insured under the National Union CGL Policy, through its incorporation of the Exxon-Savage Contract, but not under the National Union Umbrella Policy.[19]

Rejecting the Houston Court of Appeals holding, the Supreme Court of Texas noted that the National Union Umbrella Policy included as an insured any person or organization "included as an additional insured under the Scheduled Underlying Insurance, but not for broader coverage . . . ."[20] The Court held that, because the umbrella policy incorporated the primary policy for the purpose of identifying an insured, the umbrella policy also insured Exxon.[21] In response to National Union's argument that the limitation pertaining to "broader coverage" incorporated the payout limits of the underlying contract, the court held that the umbrella policy did not incorporate such limits and noted that the underlying contract "provides for a minimum amount of insurance,

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[13] *Id.* at 313–14.

[14] *Id.* at 316.

[15] *Id*.

[16] *Id*. at 317 (citing various authorities).

[17] *Id.* at 318.

[18] *Id.*

[19] *Id.*

[20] 672 S.W.3d at 419.

[21] *Id.*

not a maximum."[22] As such, "[w]hether Savage had to buy as much insurance as it did is beside the point. What matters is that it did obtain that insurance."[23] In addition, the court held that "[i]Interpreting 'broader coverage' to refer to payout limits, however, would give the umbrella policy a self-defeating meaning, as an umbrella policy springs into action only when the primary policy is exhausted."[24]

In response to National Union's argument that the underlying contract only required the named insured to provide primary insurance, the Court held that the umbrella policy "makes no mention of the 'type' of insurance provided or even what was minimally required by the service agreement."[25] As such, the court held that it "need not look to the primary policy or service agreement to determine matters outside the terms of the umbrella policy."[26] Ultimately, the court held that Exxon was an "insured" under National Union's Umbrella Policy.[27]

B. Commentary

This case is helpful to policyholders and shows that the Supreme Court of Texas will broadly construe insurance requirements in contracts to implicate policies up the chain of insurance available to additional insureds. Instead of narrowly construing the insurance requirements in the contract for "normal and customary commercial general liability insurance coverage" or "policy limits of at least $2,000,000," as additional insured coverage of $2,000,000 only under a primary commercial general liability policy, the Court interpreted such requirements as allowing the additional insured to seek coverage under excess policies that exceeded the minimum limits. Notably, newer additional insured endorsements include language attempting to limit the amount of coverage available to the limits required by the contract. This case provides a basis to contend that endorsements that do not include such language, or do not refer to the "minimum limits" as the cap on additional insured coverage, should not limit coverage available to an additional insured.

II. Evaluating the Duty to Indemnify in a Construction Defect Case

On Halloween 2023, the El Paso Court of Appeals addressed a less common issue—the duty to indemnify an insured following entry of a judgment against it. In the case, *United Fire Lloyds v. JD Kunz Concrete Contractor, Inc.*,[28] the focus was on three exclusions: (1) the "Contractual Liability" exclusion, (2) the "Damage to Your Product" exclusion, and (3) the "Damage to Your Work" exclusion. Because all those exclusions are frequently raised as coverage defenses, the court's analysis provides important insight on the duty to indemnify.

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[22] *Id.* at 419–20.

[23] *Id.* at 420.

[24] *Id.*

[25] *Id.* at 421.

[26] *Id.*

[27] *Id.*

[28] No. 08-23-00047-CV, 2023 WL 7171475 (Tex. App.—El Paso, Oct. 31, 2023, pet. filed).

A. *United Fire Lloyds v. JD Kunz Concrete Contractor, Inc.*, No. 08-23-00047-CV, 2023 WL 7171475 (Tex. App.—El Paso, Oct. 31, 2023, pet. filed)

1. Background Facts

Before addressing the exclusions at issue, a few background facts are important to the analysis. JD Kunz had been hired by ExploreUSA RV, Ltd. to construct a "concrete system" for a project. Following completion, ExploreUSA sued JD Kunz for breach of contract, contending that the system showed signs of failure, unusual cracking, deterioration, and damage. ExploreUSA claimed that the damage was the result of the concrete thickness being incorrect and the reinforcement steel being in the wrong location within the concrete. While JD Kunz had agreed to repair the damage as part of a warranty repair, ExploreUSA claimed that the work was inadequate. United Fire Lloyds agreed to defend JD Kunz in the lawsuit pursuant to a reservation of rights.[29]

Following trial, the jury answered three questions, finding that JD Kunz failed to comply with its contract, ExploreUSA's damages were not caused by JD Kunz's failure to comply with a warranty, and $1.7 million would adequately compensate ExploreUSA for the "reasonable and necessary cost to repair and replace the concrete."[30] After entry of the judgment, United Fire filed a lawsuit against JD Kunz and ExploreUSA (referred to as the "Kunz Defendants"), claiming that the three exclusions noted above negated coverage. The parties filed cross-motions for summary judgment, and the trial court ruled in favor of the Kunz Defendants, finding that a duty to indemnify existed. After some procedural machinations, a final, appealable order was entered and United Fire appealed the court's ruling.[31]

2. Appeals Court Analysis

On appeal, United Fire raised ten issues, which were grouped among the three exclusions and one issue involving when interest would begin to accrue on an award of appellate attorneys' fees.[32] After addressing the standard of review and general insurance policy interpretation principles, the court noted that the insurer agreed that the insuring agreement of the policy was satisfied and then turned to application of the exclusions:

(a) The "Contractual Liability" Exclusion

United Fire's first defense to coverage was that the "property damage" at issue was that for which the insured was obligated to pay damages "by reason of the assumption of liability in a contract or agreement."[33] The insurer argued that all of JD Kunz's liability was because of the obligations it assumed in its contract with ExploreUSA and neither exception to the "Contractual Liability" exclusion applied because (1) JD Kunz's liability was based on specific violations of the construction contract, not on liability it would have had in the absence of the contract, and (2)

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[29] *Id.* at *2.

[30] *Id.*

[31] *Id.* at *3.

[32] *Id.* at *3–*4.

[33] *Id.* at *7.

JD Kunz's liability was not based on an "insured contract."[34] The parties ultimately agreed that the second exception did not apply.

In addressing the application of the exclusion, the court discussed prior decisions from the Supreme Court of Texas that had addressed the exclusion squarely, noting that the Court in *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London* rejected the view that the exclusion *only* applied to an insured's assumption of liability of a third party.[35] Instead, the *Gilbert* court had held that the exclusion could apply when the insured was sued for breach of contract and no third party was involved.[36] Later, though, the Supreme Court clarified that the exclusion does not apply to every breach of contract case in *Ewing Construction Co., Inc. v. Amerisure Insurance Co.*[37] In other words, an insured does not "contractually assume liability for damages within the meaning of the policy exclusion unless the liability for damages it contractually assumed was greater than the liability it would have had under general law."[38] "Accordingly, the [Supreme Court] expressly held that a 'general contractor who agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract [and] thus it does not assume liability for damages arising out of its defective work so as to trigger the Contractual Liability Exclusion.'"[39] Rejecting United Fire's contention that the analysis in *Ewing* did not apply to the duty to indemnify,[40] the court then turned to application of the foregoing case law.

In doing so, the court first rejected United Fire's claim that the analysis in *Ewing* was on the exception for liability in the absence of a contract instead of on the exclusion itself. In fact, the Court in *Ewing* specifically said it was analyzing whether the "exclusion" was triggered, finding it was not and, therefore, the Court did not need to address any exceptions. United Fire then tried +to distinguish *Ewing* on specificity grounds—*i.e.*, the contractor in *Ewing* was sued generally for not performing its work in a "good and workmanlike manner," but JD Kunz had been sued for specific contractual violations including failing to correctly place the reinforcement steel and pouring the concrete to the wrong thickness.[41] Again, though, the El Paso Court of Appeals disagreed, recognizing that the contractor in *Ewing* had been sued for contractual violations but had done nothing more than "agree to perform the 'contract's terms' in a good and workmanlike manner"; therefore, it had not agreed to assume any liability beyond that owed under the common law, which rendered the exclusion inapplicable. Accordingly, the fact that ExploreUSA listed specific contractual violations in its lawsuit against JD Kunz was irrelevant unless JD Kunz agreed

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[34] *Id.*

[35] *Id.* at *8 (citing *Gilbert*, 327 S.W.3d 118, 127 (Tex. 2010)).

[36] *Id.* (citing *Gilbert*, 327 S.W.3d at 133).

[37] *Id.* (citing *Ewing Constr. Co., Inc. v. Amerisure Ins. Co.*, 420 S.W.3d 30 (Tex. 2014)).

[38] *Id.* (quoting *Ewing Constr.*, 420 S.W.3d at 36).

[39] *Id.* (quoting *Ewing Constr.*, 420 S.W.3d at 38).

[40] *Id.* at *8, n.8 (explaining that, while *Ewing Constr.* was a duty to defend case, it relied extensively on *Gilbert*, which was a duty to indemnify case and, in any event, United Fire never explained why *Ewing Constr.* did not apply to the duty to indemnify).

[41] *Id.* at *9.

to assume obligations beyond agreeing to comply with the contract terms.[42] Nonplussed, United Fire said that JD Kunz "agreed to adhere to a particular project schedule; to refrain from assigning the contract; to properly request approval to hire subcontractors to perform its work; and to require its subcontractors to maintain insurance."[43] But, the appellate court noted, United Fire did not explain how any of those issues caused property damage. Instead, the jury's verdict and the trial court judgment were based solely on the cost to repair the concrete system that the contractor had agreed to install. No other reason existed for JD Kunz's obligation to pay the judgment.[44] As such, the exclusion did not apply, and no need existed to address the exception to that exclusion.

(b) The "Damage to Your Product" Exclusion

Next, the court of appeals analyzed United Fire's claims that the "Damage to Your Product" exclusion applied, which applies to "property damage" to the insured's product arising out of it or any part of it." "Your product" is defined as: "[a]ny goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by [the insured]," as well as "[c]ontainers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products." "Your product" also includes any "[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of your product."[45] In particular, United Fire argued that the failed concrete system and its component parts were JD Kunz's product and JD Kunz supplied and installed the materials for the system which were defective.

With regard to United Fire's argument that the "concrete system"—*i.e.*, a parking lot—was a "product," the court noted that the Austin Court of Appeals had rejected a similar argument years ago with respect to construction of a building.[46] In reaching that conclusion, the Austin court recognized that in "ordinary language buildings are constructed or erected, not manufactured."[47] United Fire's attempt to distinguish that case (and those on which the court relied) because a parking lot could be considered a "product" fell flat, however, because United Fire did not cite any cases for that proposition. Instead, the court agreed with the Kunz Defendants that the parking lot was more akin to a building. And, importantly, the "Damage to Your Product" exclusion does not apply to real property based on the definition of "your product," which specifically excludes real property, and a parking lot is real property.[48] The court also rejected claims by United Fire that the situation was analogous to installing a product into a building, which is akin to selling or distributing a product than constructing a building, because JD Kunz was not responsible for installing a product in the concrete system but was responsible for the entire project.[49] In fact,

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[42] *Id.*

[43] *Id.*

[44] *Id.* at *10.

[45] *Id.* (quoting the policy terms).

[46] *Id.* (citing *CU Lloyd's of Tex. v. Main Street Homes, Inc.*, 79 S.W.3d 687, 690 (Tex. App.—Austin 2002, no pet.)).

[47] *Id.* (citing *Main Street Homes*, 79 S.W.3d at 690 (citations omitted)).

[48] *Id.* at *11 (citations omitted).

[49] *Id.* at *12.

nothing in the record indicated that either the rebar or the concrete was a JD Kunz product; rather, they were both separately supplied and installed by JD Kunz's subcontractors.[50]

The court also rejected United Fire's claim that the exclusion should apply because the materials used by JD Kunz were defective. In particular, the court explained that the materials were *not* defective and not alleged to be. Instead, ExploreUSA contended that the concrete was not the correct thickness and the rebar was misplaced. And, in fact, summary judgment evidence of two experts was submitted by the Kunz Defendants, who "expressly testified at the underlying trial that, based on their testing, there was nothing wrong with the concrete or the rebar used in the project, and in their opinions, the system damage resulted solely from the improper installation of the rebar and the fact that the concrete was poured too thin."[51]

(c) The "Damage to Your Work" Exclusion

With regard to exclusions, the court ended its analysis discussing the "Damage to Your Work" exclusion, which bars coverage for damage "to 'your work' arising out of it or any part of it." But the exclusion is subject to an exception whereby the exclusion does not apply "if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor."[52] Because the damage was to JD Kunz's work, as had been readily admitted, the court's focus was on the so-called "subcontractor exception."

After finding that the insurer had not waived the right to assert that the Kunz Defendants failed to meet its burden on the exception in challenging coverage, the court addressed United Fire's claim that the exception could not apply because the issue of the subcontractors' performance was not litigated in the underlying liability lawsuit.[53] The El Paso court, however, noted that United Fire's characterization of the issues in the underlying lawsuit were not accurate, as ExploreUSA "alleged that the physical damage and deterioration of the system was the 'result of the incorrect or inadequate performance of work by JD Kunz and/or its *subcontractors*.'"[54] The claims also involved JD Kunz's failure to exercise quality control, which United Fire recognized directly implicated the issue of whether JD Kunz breached the contract by failing to supervise its subcontractors. Simply put, nothing in that lawsuit precluded the Kunz Defendants from relying on the "subcontractor exception" to reinstate coverage otherwise barred by the "Damage to Your Work" exclusion.[55] The El Paso Court of Appeals also held that the failure to hold the subcontractors liable in the underlying lawsuit through a third-party complaint or a jury question on who performed the work would not bar the Kunz Defendants from relying on the exception. United Fire's reliance on courts noting that the duty to indemnify is based on facts established in the underlying lawsuit was an incomplete story.[56] In that regard, "the Texas Supreme Court has

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[50] *Id.*

[51] *Id.* at *13.

[52] *Id.*

[53] *Id.* at *15.

[54] *Id.* (emphasis added by court).

[55] *Id.*

[56] *Id.* at *15–*16 (citations omitted).

expressly recognized that the facts necessary to establish coverage 'are not required to be proven in an underlying trial against the insured and are often proven in coverage litigation.'"[57] And United Fire did not cite any authority for the proposition that the issue of insurance coverage had to be resolved with any finality in the underlying liability lawsuit; rather, the United States Court of Appeals for the Fifth Circuit has recognized that "[t]he underlying case often does not resolve all the factual issues necessary to determine coverage because issues relevant to the question of coverage can be irrelevant to the question of the insured's liability."[58]

Finally, turning to the evidence presented to support application of the "subcontractor exception," United Fire argued that the Kunz Defendants did not show that the subcontractors were "solely" responsible for the damages, claiming that the evidence conflicted as to who did what and who was ultimately responsible for the defective work. The court, however, saw no such conflict because the Kunz Defendants presented uncontradicted evidence that the subcontractors performed *all* the work leading to the system failure.[59] United Fire attempted to pick apart the testimony that was submitted but relied on generic statements about general practices rather than facts about what occurred on the project at issue[60]; cited to the use of the word "responsible" with respect to JD Kunz's liability for the work despite clear testimony from the same witness that the subcontractors performed all the work[61]; noted that Mr. Kunz did not know who was responsible for placement of the bricks necessary to raise the rebar off the ground, but he deferred to his employee, who testified that a subcontractor was responsible for the bricking[62]; and the supervision of the subcontractors' performance of the work was a separate and distinct violation of contract from the allegedly defective performance itself, but that was irrelevant to the question of who performed the work itself, which is the requirement for triggering the "subcontractor exception." Accordingly, the court found that the Kunz Defendants met their burden to establish the applicability of the exception and, as such, the exclusion did not negate coverage for the judgment.

B. Commentary

The El Paso Court of Appeals' decision in *JD Kunz* is not necessarily monumental, but it is unique in that it addresses coverage for the duty to indemnify and considers actual facts and evidence. The court applied well-established case law in Texas on the various exclusions raised. While United Fire attempted creative arguments to skirt those holdings with respect to the "Contractual Liability" and "Damage to Your Product" exclusions, the appellate court provided well-reasoned explanations for why the arguments fell short. Perhaps most importantly, the court's analysis on the obligations of the insured to effectively "try the coverage case" in the liability lawsuit is a good reminder for construction attorneys as to what is necessary in trying a liability

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[57] *Id.* at *16 (quoting *In re Farmers Tex. Cnty. Mut. Ins. Co.*, 621 S.W.3d 261, 276 (Tex. 2021) (citing *D.R. Horton-Tex., Ltd. v. Markel Int'l Ins. Co., Ltd.*, 300 S.W.3d 740, 743 (Tex. 2009))

(Tex. 2009)

[58] *Id.* (quoting *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Puget Plastics Corp.*, 532 F.3d 398, 404 (5th Cir. 2008)).

[59] *Id.* at *17.

[60] *Id.* at *18.

[61] *Id.*

[62] *Id.*

case that inevitably will end in a coverage lawsuit. Simply put, not all the facts necessary to establish liability will be the facts necessary to establish coverage. Thus, while developing evidence in the course of the underlying litigation is important for positioning the case for settlement with insurance dollars, what is actually determined in the jury verdict is not necessarily the "end game." Instead, per this opinion, that evidence can later be used as necessary to resolve coverage issues in the event a construction defect is tried to verdict and cannot be otherwise settled.

III. Equitable Contribution and Subrogation between Insurers – Another *Colony Insurance v. First Mercury Insurance* Dispute[63]

In the 2023 version of *Colony Insurance Co. v. First Mercury Insurance Co.*,[64] the issue before the United States Court of Appeals for the Fifth Circuit was one insurer's (Colony's) right to contribution or subrogation from another (First Mercury) for a settlement payment made by Colony that it contended should have been fully paid by First Mercury. Ultimately affirming the district court's ruling, the court addressed those issues as well as allocation of damages for a covered loss.

A. *Colony Insurance Co. v. First Mercury Insurance Co.*, 88 F.4th 1100 (5th Cir. 2023)

1. Background Facts

The underlying lawsuit that gave rise to this coverage action involved a roof replacement by the insured, DL Phillips, on behalf of Palmer Cravens. The roof replacement project began in November 2012 and was completed on February 1, 2013, but it began leaking by March 2013. The leaks persisted in March, April, May, June, and September 2013. Palmer Cravens retained an expert to investigate the roof leaks, and the expert determined that there were pervasive defects causing the leaks. The expert obtained several estimates for re-roofing the building as well as performing other repairs.[65]

Palmer Cravens then filed suit against DL Phillips in June 2014. During the pendency of the lawsuit, a strong storm occurred in September 2014, causing substantial damage. Another storm in June 2018 caused more damage. First Mercury insured DL Phillips between 2012 and 2014, and Colony insured the company from 2014 to 2016. Each of the four policies had a $1 million per occurrence limit of insurance.[66]

At trial, the jury awarded a $600,000 verdict to Palmer Cravens, but the court entered a judgment against the insured for more than $3.7 million after granting a judgment notwithstanding

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[63] In last year's paper, we addressed another case between the same parties addressing a similar but distinct issue involving the removal of the "continuation, change, or resumption" language from a standard general liability policy. *See Colony Ins. Co. v. First Mercury Ins. Co.*, No. CV H-18-3429, 2020 WL 5658662, at *7 (S.D. Tex. Sept. 22, 2020); *see also* No. CV H-18-3429, (S.D. Tex. Sept. 26, 2022) (Doc. 137 – Findings of Fact and Conclusions of Law).

[64] 88 F.4th 1100 (5th Cir. 2023).

[65] *Id.* at 1104.

[66] *Id.*

the verdict. The award included $2.4 million to replace the roof and cover lost rental income, plus $590,000 in prejudgment interest.[67]

The two insurers defended their mutual insured during the course of the litigation, but Colony ultimately later sued DL Phillips for a declaration that no coverage existed under its policies. In Spring 2019, though, Pamer Cravens, DL Phillips and the insurers reached a confidential settlement agreement that resolved both Pamer Cravens' and Colony's lawsuits. Both insurers contributed with First Mercury paying slightly more than Colony. The payments were described as both "indemnity" and "supplementary" payments under the policies. While the insurers agreed to release each other, they included an exclusion that allowed for either to pursue the other for reallocation or reimbursement of the settlement payments.[68]

Colony took the lead under that provision and filed a lawsuit against First Mercury. Colony sought: "(1) damages for First Mercury's alleged breach of the First Mercury policies; (2) a judicial declaration that First Mercury had a duty to indemnify DL Phillips for the full amount of the settlement and that First Mercury breached its policies by not doing so; and (3) Colony's attorneys' fees, pursuant to Section 38.001 of the Texas Civil Practice and Remedies Code, as a contractual subrogee of DL Phillips."[69] On cross-motions for summary judgment, the district court adopted the magistrate judge's report and recommendation, granting summary judgment in favor of First Mercury and against Colony. In doing so, and although both insurers agreed that the damage was caused by a single "occurrence" (*i.e.*, the defective roof installation), Colony did not show that First Mercury was responsible for any property damage that occurred after its policies ended. Moreover, Colony did not "make any effort to valuate the property damage that occurred before the First Mercury policy expired," so Colony could not show that the monies it contributed toward settlement were payments covered by the First Mercury policies; rather, Colony solely argued that allocation was unnecessary because all the damage was First Mercury's to cover.[70]

2. Appeal to the Fifth Circuit

On appeal, Colony contended that the district court erred by "(1) holding that First Mercury was responsible only for those property damages that occurred during the policy period, and in doing so, rejecting the 'all-sums' approach to damages allocation; and, alternatively, by (2) finding no genuine dispute of material fact regarding the allocation of covered and non-covered damages."[71] The court disagreed and affirmed.

(a) Damages Owed by First Mercury

First, the appellate court addressed Colony's contention that, under the "all sums" approach, First Mercury was responsible for all damages resulting from the roof defect (*i.e.*, those damages reported in 2013, 2014, and 2018). The basis for Colony's claim was that, once an

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[67] *Id.*

[68] *Id.* at 1104–05.

[69] *Id.* at 1105.

[70] *Id.*

[71] *Id.*

insurer's coverage is triggered by an "occurrence," that insurer is liable for any resulting damage no matter when it occurs. Turning to Supreme Court of Texas precedent, the appellate court first noted that, in *Don's Building Supply, Inc. v. OneBeacon Insurance Co.*, the Court found that "'property damage occurred when a home that is the subject of the underlying suit suffered wood rot or other physical damage,' not when the damage was discovered (nor, by implication, when the initial installation of defective products occurred)."[72] Subsequently, the Fifth Circuit relied on *Don's Building Supply* in *Wilshire Insurance Co. v. RJT Construction, LLC*, noting that *when* damage occurs is what matters, not when the "but-for cause of the damage occurred."[73] Accordingly, that court held that, for purposes of the duty to defend, foundation cracks were the damage caused by the faulty construction and it was irrelevant that the faulty foundation work occurred in 1999 and the damage discovered in 2005; what mattered was that the damage allegedly occurred in 2005.[74] That decision was reaffirmed by the same court in *VRV Development, L.P. v. Mid-Continent Casualty Co.*, holding that when retaining walls collapsed, "property damage" occurred after the insurance policies at issue expired, not when the walls were first installed or when cracks first appeared, which happened during the first policy at issue.[75] The court reached that conclusion notwithstanding the "continuation, change, or resumption" language that was in the policies at issue, as the court found that the homeowners' backyards and the city's easement in that case were not actually, physically injured until the collapse and failure of the retaining wall.[76] And, finally, the Supreme Court of Texas determined, in *Lennar Corp. v. Markel American Insurance Co.*, that an insurer was liable for all water-related damage and related costs of repair despite the fact that damage occurred before and after the policy period, noting that the insurer's policy terms "'expressly includes damage from a continuous exposure to the same harmful conditions' such that, '[f]or damage that occurs during the policy period, coverage extends to the 'total amount' of loss suffered as a result, not just the loss incurred during the policy period.'"[77]

Applying that case law to the case before it, the Fifth Circuit found that the district court had correctly concluded that First Mercury only was obligated to pay for damage that occurred during the policy periods and not all damage resulting from the defect. First Mercury limited its exposure to damage that occurred during the policy periods and declined to extend such coverage to damage resulting from continuous exposure to that defect, as First Mercury specifically deleted the "continuation, change, or resumption" language from its policies.[78] Further, the court refused to condone "bootstrapping" arguments that would allow an insured to hold an insurer responsible

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[72] *Id.* at 1108 (quoting *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 22, 24 (Tex. 2008)).

[73] *Id.* (citing *Wilshire Ins. Co. v. RJT Constr., LLC*, 581 F.3d 222, 225 (5th Cir. 2009)).

[74] *Id.* (citing *Wilshire Ins.*, 581 F.3d at 225).

[75] *Id.* at 1109 (citing *VRV Development, L.P. v. Mid-Continent Cas. Co.*, 630 F.3d 451, 457–58 (5th Cir. 2011)).

[76] *Id.* (citing *VRV Dev.*, 630 F.3d at 458). Had the underlying claimants been suing for damage to the wall itself rather than their own property, then the policy in place when the cracks in the walls first occurred likely would have triggered coverage under prevailing Texas law.

[77] *Id.* at 1109–10 (citing *Lennar Corp. v. Markel Am. Ins. Co.*, 413 S.W.3d 750, 758 (Tex. 2013)).

[78] *Id.* at 1110 & n.36 (comparing policy language at issue in *Lennar* with that in the First Mercury policies).

for damage outside a policy period based on when the "occurrence" took place unless specific policy language allowed for it.[79]

(b) Allocation Between Covered and Uncovered Damages

Having found that First Mercury's responsibility for damages was limited, the court of appeals turned to Colony's argument that a genuine issue of material fact existed with respect to allocation such that Colony could show that it paid for damages that occurred in First Mercury's policies for which Colony was entitled to reimbursement. Colony advanced theories of recovery under contractual and equitable contribution and contractual and equitable subrogation.[80] To prevail on either theory (contribution or subrogation), Colony had to show that it paid a debt owed by First Mercury.[81]

In addressing the issue, the court of appeals used the following framework from *Great American Insurance Co. v. Employers Mutual Casualty Co.*: sufficient evidence exists to create a reasonable basis for a jury to believe there was an unfair allocation when: "(1) one insurer paid nothing; (2) the other paid the entirety of the settlement; and (3) there was evidence that the total value of the claims against the first insurer would have *exceeded* the total value of the settlement."[82] Colony sought to meet that burden by presenting three estimates of the roof damage that occurred during First Mercury's policies. But the appellate court held that the evidence was insufficient because it did not show that the claims exceeded the value of the settlement (or that portion of the settlement paid by First Mercury). In particular, the estimates showed "X" amount of damage during the First Mercury policies, but First Mercury paid more than that amount in the settlement.[83] Thus, "[g]iven that math, Colony's evidence does not give rise to a reasonable belief of wrongful allocation."[84] And, as such, Colony's arguments for contribution or subrogation failed.

B. Commentary

Many insurers seem to overlook or simply ignore the "continuation, change or resumption" language found in the insuring agreement of a standard general liability policy; rather, insurers sometimes will entrench themselves in a position that they are only going to provide indemnity coverage for damage that occurred during their policy periods. That seemingly would fly in the face of the "all sums" approach previously approved by the Supreme Court of Texas. However, when, as here, the insurer has removed that language from its policy, the result is completely different. And, regardless of which language is present—such that the policy only covers damage during the policy period or also covers continuous or resumed damage in later policies—the party with the burden still will have to offer proof of damage during the relevant time frame. In this particular case, which required proof of damage to show that the monies paid by First Mercury

[79] *Id.* at 1110.

[80] *Id.* at 1112.

[81] *Id.*

[82] *Id.* at 1113 (citing *Great Am. Ins. Co. v. Employers Mut. Cas. Co.*, 18 F.4th 486, 492–94 (5th Cir. 2021)).

[83] Because the settlement amount was confidential, the court did not reveal the actual amount, using "X" instead. *Id.* at 1114.

[84] *Id.*

were less than the damages attributable to its policies, was not provided. While the court's decision appears to be limited to post-settlement, "insurer v. insurer" disputes, the analysis remains important for insureds to consider when approaching settlement discussions with multiple insurers, as understanding the terms of the policies and the insurers' resulting obligations may be crucial in avoiding insurer v. insurer disputes that could derail settlement, as an insurer may well be reluctant to "pay and chase" a co-insurer.

IV. Honorable Mention

A few more cases from the last year in the world of construction-related insurance deserve some recognition:

A. ***Evanston Insurance Co. v. Rodriguez Engineering Laboratories*, No. 1:21-CV-01129-RP, 2023 WL 1788541 (W.D. Tex. Feb. 6, 2023), *report and recommendation adopted,* 2023 WL 4539850 (W.D. Tex. Feb. 21, 2023)**

On February 6, 2023, a magistrate judge of the Western District of Texas addressed a summary judgment involving an excess professional liability insurance policy. In that case, an insured (Rodriguez Engineering Laboratories) sought a defense and indemnity from an insurer (Evanston) for claims asserted against it in relation to its provision of professional services on a highway construction project. The insurer disclaimed coverage because the insured failed to provide it with timely notice because it did not adhere to the specific requirements of the policies at issue, which the insured disputed because it believed that Evanston had sufficient notice through the broker to which it had provided notice, arguing that the broker was Evanston's agent. The excess policies issued by Evanston followed-form to underlying professional liability policies that included 12-month extended reporting period provisions that applied to claims first made against Rodriguez "during the Extended Reporting Period for or based upon Wrongful Acts committed or allegedly committed prior to such effective date of cancellation or nonrenewal and otherwise covered" by the policies."[85] While the insurance agent provided notice of the claim to the insured's primary insurer, notice was not directly provided to Evanston under the excess policy. Instead, Evanston did not receive notice until almost two years after the end of the extended reporting period of its first policy. The magistrate judge agreed that the insured failed to adhere to the policy notice requirements, confirming that coverage did not exist under either policy issued by Evanston. Proper notice was not provided under the first policy, and the insured could not establish that the broker was the insurer's agent for the purpose of receiving claims under the second policy. Thus, the magistrate judge recommended that the insurer's motion for summary judgment be granted. On February 21, 2023, the district court judge adopted the report and recommendation in full after no objections were filed to the report and recommendation. This case shows the importance of providing timely notice under a claims-made policy.

B. ***Allied World National Assurance Co. v. Old Republic General Insurance Co.*, No. 22-10107, 2023 WL 3579437 (5th Cir. May 22, 2023)**

On May 22, 2023, the United States Court of Appeals for the Fifth Circuit addressed an employer liability exclusion in a general liability insurance policy in conjunction with an

[85] 2023 WL 1788541, *2.

endorsement that purported to modify the exclusion. The deceased worker was an employee of a subcontractor to the general contractor retained by Tarrant Regional Water District to work on a pipeline. Under its contract, the Water District procured the insurance, including a CGL policy and an Employer's Liability policy insured by Old Republic, and an excess policy issued by Allied World. The insurers wound up in a declaratory judgment action pertaining to Old Republic's obligation to defend a lawsuit against the Water District under the CGL policy. The endorsement modifying the exclusion added language that provided as follows: "This paragraph e does not apply to 'bodily injury' to an 'employee' when such 'bodily injury' is caused by another 'employee.'" Because the allegations in the lawsuit were that an employee caused the death of the decedent employee, the exclusion would not apply. The parties, however, both contended that prefatory language in the endorsement—"[w]ith respect to supervisory personnel"—affected the application of the exclusion. The court, however, disagreed, noting that that that prefatory language was not added to the exclusion, as only the *indented part* of the endorsement was added to the exclusion based on the plain language of the endorsement. Accordingly, even if Old Republic's interpretation of the endorsement was reasonable, Allied World's also was reasonable, such that, at best, the endorsement was ambiguous and construed in favor of the duty to defend. This case highlights the fact that insurers are including an increasing number of exclusions and endorsements affecting the scope of coverage for "employee injury" claims.

C. ***Palmer Cravens, LLC v. Preferred Contractors Insurance Co.*****, CA 1:22-CV-327-JRN, 2023 WL 5652524 (W.D. Tex. July 14, 2023), *report and recommendation adopted,* 2023 WL 566049 (W.D. Tex. Aug. 30, 2023)**

In Summer 2023, the Western District of Texas tackled the issue of a judgment creditor's standing to sue a liability insurer on a judgment and the "fully adversarial trial" requirement for enforcing such a judgment. In the case, Palmer Cravens secured a judgment against Dripping Springs Roofing and its owner's estate for "property damage" claims caused by roofing defects. Because the company's owner passed away during the litigation, a representative of his estate appeared at the bench trial via Zoom. After securing the judgment, Palmer Cravens and the Estate sued the insurer for breach of contract, violations of the Texas Insurance Code, and estoppel. PCIC moved for summary judgment, contending that it should not be bound by a state court judgment against its insured because there was not a "fully adversarial trial." Palmer Cravens countered that the policy did not include any such requirement, noting that the policy provided that a third party could sue on a final judgment. The insurer claimed that that conflated the issues of standing and enforceability. While neither party reasonably believed that standing did not exist, whether there was a "fully adversarial trial" that established the insured's liability was a topic of dispute. The court addressed Fifth Circuit precedent that established that "an insurer is only bound by a fully adversarial trial against its insured." The court agreed and turned to whether an argument could be made that there was a "fully adversarial trial." While the presumptive heirs of the estate appeared at the trial, they expressly disclaimed any interest in the estate and trial. They failed to make any objections or put on any witnesses at the trial. The court said it did not even have to guess whether those decisions were a strategic decision because their attorneys expressly said they had no interest in the estate. "Accordingly, there is no reason to believe the state-court court judgment 'accurately reflects the plaintiff's damages and thus the defendant–insured's covered liability loss.'" Thus, the magistrate judge recommended that the insurer's motion be granted. That decision was adopted in full by the district court judge on August 30, 2023. Shortly thereafter, PCIC filed an unopposed motion to transfer the case to the Southern District of Texas, which was granted, and the case

remains pending there. This case indicates that policyholders and claimants must always be cognizant that if they appear to be working in concert in any way, coverage may be affected.

D. *Phoenix Insurance Co. v. Knife River Corporation South*, Civ. A. No. 4:22-CV-02859, 2023 WL 5846803 (S.D. Tex. Sept. 11, 2023)

On September 11, 2023, a district court judge for the Southern District of Texas considered a magistrate judge's report and recommendation on the application of the Texas Anti-Indemnity Act (the "TAIA") to a defendant's tender for a defense and indemnity from Phoenix Insurance Company as an additional insured. The magistrate judge found that the TAIA does not apply to the duty to defend, but the district court judge disagreed; however, the district court judge then agreed with the magistrate that the contract before it did not violate the TAIA. In that regard, Pavement Marking, LLC (referred to as "PMI" in the decision) entered into a subcontract with Knife River and agreed to perform roadway striping on a project. In the contract, PMI agreed to secure CGL coverage and name Knife River as an additional insured. Additionally, PMI agreed to release, indemnify, and hold harmless Knife River for any property damage and bodily injury claims arising from PMI's work, "but only to the extent caused by the negligent acts or omissions of" PMI and those working on its behalf (employee or otherwise). The expressed intent included that PMI's obligations would include claims based on negligence, whether caused or alleged to be caused by PMI. Further, if a determination was made that the injury or death was caused by the proportionate responsibility of Knife River, then Knife River would assume responsibility for its own proportionate share of the damages for which it was comparatively responsible, except those amounts covered by insurance required pursuant to the subcontract.

Following the death of an individual on the roadway, his heirs filed suit against Knife River claiming that his injuries were caused in part by a lack of proper road striping. (Other claims were of a dangerous highway edge drop-off and various other claims of negligence related to the pavement edge. PMI was not a defendant.) Knife River tendered the lawsuit to Phoenix, which denied coverage and filed the instant lawsuit. After determining that the TAIA did apply to the duty to defend, the district court judge noted that the TAIA prohibits, among other things, additional insured coverage to the extent the insurer is required to "provide coverage of a claim caused by the Additional Insured's negligence or fault"; thus, in the facts before it, the TAIA prohibits such coverage "to the extent that Phoenix may be required to defend Knife River in claims caused by Knife River's—as opposed to PMI's—alleged wrongdoing." Succinctly, the court found that the subcontract did not violate the TAIA because the plain language of the contract required Phoenix to defend Knife River as an additional insured only where PMI was alleged to be at fault, not where Knife River is at fault. Moreover, the district judge ruled that the lawsuit triggered the duty to defend even though it contained allegations against Knife River. While the district judge did not elaborate on the issue and cited only to the magistrate judge's report and recommendation, that report and recommendation made clear that the decedent's injury was alleged to have been "caused in part by PMI's" own wrongdoing. And, because those facts, applying the "eight corners" rule to the duty to defend, "'may fall within the scope of' the policy's coverage," a duty to defend was owed. In other words, despite the allegations of Knife River's own direct liability, which arguably triggers the prohibitions of the TAIA, the court still found a duty to defend applied. Because that duty existed, the court found that a ruling on the duty to indemnify was premature.

E. *Hanover Lloyds Insurance Co. v. Donegal Mutual Insurance Co.*, No. EP-22-CV-00162-FM, 2023 WL 6542323 (W.D. Tex. Oct. 5, 2023)

In October 2023, a magistrate judge of the Western District of Texas tackled an insurer v. insured dispute on the duty to defend and ultimately the duty to indemnify brought by two insurers that had defended an insured and settled the underlying dispute. Together, the insurers sought a ruling that a third insurer had an obligation to defend and to contribute to the settlement amount. The court first found that only the general contractor's live pleading against the insured subcontractor, along with its exhibits (including the live pleading filed by the owner) would be considered in the "eight corners" analysis because the owner's earlier amended petition was superseded and not referenced in any way in the general contractor's pleading. The court then turned to the coverage issues: (1) allegations of "property damage"; (2) existence of an "occurrence"; and (3) application of the "Damage to Impaired Property" exclusion.

On the existence of "property damage," the magistrate judge liberally construed the allegations, finding that various allegations about the electrical work performed by the subcontractor demonstrated that that work caused "property damage," interpreting, among other things, "operational issues with electrical devices," as the subcontractor's work having "caused physical injury to those electrical devices"; premature failures of fans and lights as having "require[d] that the alleged faulty electrical work damaged the lights and fans"; and, "falling lights would have caused damage to other tangible property at the Facility." Having reached those conclusions, which were alleged to be the result of TEC's negligent behavior, the magistrate judge easily found that an "occurrence" existed. The judge, however, rejected any reliance on extrinsic evidence as to *when* the "property damage" occurred, noting that, although the general contractor's petition "does not explicitly state when the subcontractors carried out their work on the Facility, [] this does not mean that there is a gap in the pleading." And, in any event, the referenced extrinsic evidence did not "conclusively establish the coverage fact to be proved." Thus, the court concluded that an occurrence of property damage existed during the relevant time period. On the "Damage to Impaired Property" exclusion, the magistrate judge noted that the burden was on the third insurer to show that the exclusion applied to the alleged faulty workmanship and damage. While the insurer contended that the allegations in the lawsuit "stem from defects, deficiencies, and inadequacies of [the subcontractor's] work," the insurer did not assert "that the property in question [was] impaired property because it [did] not assert[] that repairing or replacing [the subcontractor's] work [would] restore the rest of the property to use." Moreover, the court already had found that the Facility was damaged, so it was not "property that has not been physically injured." Accordingly, a duty to defend was owed and the defendant insurer was obligated to pay one-third of the defense costs. However, the duty to indemnify could not be determined because genuine issues of material fact existed as to the work for which the subcontractor was responsible, the property damage it caused, and when that damage actually occurred.

Following the filing of objections to the magistrate judge's report and recommendation, the parties reached an undisclosed settlement and dismissed the lawsuit.

F. *Continental Insurance Co. v. Cincinnati Insurance Co.*, No. 5:23-cv-5037, 2023 WL 7199268 (W.D. Ark. Nov. 1, 2023)

The Western District of *Arkansas* joined the distinguished rank of being one of only a handful of courts in the country to address the applicability of the Texas Anti-Indemnity Act in *Continental Insurance Co. v. Cincinnati Insurance Co.*, which was decided on November 1, 2023. The dispute was among insurers in disagreement over which of them owed a defense to a construction company. Continental provided the full defense and brought suit against seven other insurers for a declaration that they each owed a defense and each were obligated to reimburse that portion of the defense that Continental paid beyond its fair share. While those insurers defended their own subcontractor insureds for claims brought against them by the general contractor, they refused to defend the general contractor as an additional insured in an arbitration proceeding brought by the project owner against the general contractor. One insurer (HDI) moved to dismiss Continental's claims based on the Texas Anti-Indemnity Act, contending that the claims under the HDI policy were governed by *Texas* law, which prohibits enforcement of the provisions Continental invoked.

The subcontract at issue included an indemnity provision that required the subcontractor to defend and indemnify the general contractor against various claims arising out of the subcontractor's work, including claims of concurrent negligence but not claims "found to be due to the *sole* negligence of" the general contractor. The contract also included an additional insured requirement by which the general contractor was to be named under the subcontractor's policy. Continental contended that HDI's policy provided primary insurance to the general contractor as an additional insured as required by the subcontract.

Importantly, HDI argued, and the court agreed, that Texas law governed the policy and Texas law invalidated the additional insured provision to the extent it provided additional insured coverage for the general contractor's own negligence or fault. In reaching that conclusion, the court emphasized that the Act applies to "a provision . . . in an agreement collateral to or affecting a construction contract" and "[a] . . . provision within an insurance policy providing additional insured coverage, is void and unenforceable to the extent that it requires or provides coverage the scope of which is prohibited under this subchapter." Continental's only argument in response was that the Act only applied to construction contracts (like the similar Arkansas statute), but the foregoing provisions expressly invalidated the additional insured requirement. The provision in the Act is even named "Unenforceable Additional Insured Provision." And a legislative note within the Act stated that "[t]he changes in law made by this Act apply to a related . . . insurance policy." Thus, it "could not be more clear" that the Act applied to construction contracts and insurance policies.

Continental also argued that *the construction contract* had an Arkansas "choice of law" provision, which the court deemed "substantively wrong and beside the point." Because Continental's claims were based on the provisions of the HDI policy and not the subcontract to which HDI was not a party, the applicable law was that which governed the policy and not the subcontract. After addressing the "somewhat muddled caselaw" on "choice of law" in Arkansas, the court found that the factors to be considered overwhelmingly weighed in favor of applying Texas law to the HDI policy, which had already been determined to bar the additional insured claim.

This case is interesting in that it applied the TAIA to an insurance policy where the underlying construction contract contained an Arkansas "choice of law" provision. While the law of the state in which a policy was issued often governs the policy interpretation under the "most significant contacts" test, application of the TAIA where the underlying contract is entered into in another state for a project in that state is unique. And, as an important aside, the court's decision appears to be inconsistent with the *Knife River* decision discussed above in which the duty to defend *did* exist despite allegations of wrongdoing by both the named insured and the purported additional insured.