Construction Insurance Law Update

BY

JULIE A. SHEHANE

COOPER & SCULLY, PC

JULIE.SHEHANE@COOPERSCULLY.COM

What Is An "Alternative Dispute Resolution Proceeding"

- Standard CGL policy provides the "right and duty to defend the insured against any 'suit'"
- "Suit" means:

  A civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which the insurance applies are alleged. "Suit" includes:

  a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

  b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent

BPX Production Co. v. Certain Underwriters At Lloyd's London (5th Cir. Oct. 20, 2025)

- BPX hired BJ Services to cement the production casing on a well. BJ services allegedly used the wrong components in cement mix, causing it to prematurely harden and a cement plug to form. Well had to be abandoned.
- BPX demanded payment from BJ Services for losses. It invoked the dispute resolution procedure in the master contract.

> "if a dispute arises, the Parties shall attempt to resolve such dispute through the following procedure:
>
> 1. a Party must give written notice of dispute to other party and request a meeting;
>
> 2. the Parties must participate in a Settlement Meeting within 30 days following Notice; and

BPX Production Co. v. Certain Underwriters At Lloyd's London (5th Cir. Oct. 20, 2025)

3. if the dispute remains after Settlement Meeting, the Parties may proceed to resolve the dispute with the contract's form selection and "Conduct of Arbitration" clauses.

- BPX sends BJ Services its notice of dispute letter.
- BJ Services then provides the notice to its CGL insurer, Underwriters.
- Underwriters denies for two reasons: (1) cited exclusion for certain types of property damage arising out of insured's operations; and (2) insured's failure to comply with certain requirements for obtaining protection under a supplement endorsement.
- NO OTHER REASONS GIVEN

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- BPX and BJ enter into settlement discussions, but BJ filed for Chapter 11 bankruptcy the following month.
- In bankruptcy judge's Order approving the settlement between BJ and BPX, BJ assigned its insurance claims to BPX, and BPX agreed released its claims against BJ.
- BPX then files suit against Underwriters, and Underwriters removes to federal court.
- Underwriters files Motion to Dismiss with sole argument that the duty to defend was never triggered because there was no "suit" within the meaning of the Policy.

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- Underwriters: the settlement discussions between BPX and BJ were not "alternative dispute resolution proceedings" and, even if they were, BJ never obtained Underwriters' consent.
- Court starts with Black's Law Dictionary for "alternative dispute resolution": "any procedure for settling a dispute by means other than litigation, as by arbitration or mediation."
- Court notes that the Contract sets forth a formal process for resolving disputes other than litigation (the three requirements).
- Several jurisdictions conclude that similarly mandated settlement negotiation procedures, albeit statutorily required instead of contractually, constitute "alternative dispute resolution proceedings."

BPX Production Co. v. Certain Underwriters At Lloyd's London (5th Cir. Oct. 20, 2025)

- Court notes competing case law in other jurisdictions: 10th Cir: must constitute a "civil proceeding" but FL Supreme Court held that statutory pre-suit process is not a "suit," but is an "alternative dispute resolution proceeding."
- Court finds language ambiguous (based on two jurisdictions' varied approach) and finds policy language broadens definition of "suit" beyond a civil proceeding, and encompasses other types of "alternative dispute resolution proceedings."

BPX Production Co. v. Certain Underwriters At Lloyd's London (5th Cir. Oct. 20, 2025)

- Underwriters relies on case holding that informal settlement negotiation that precedes commencement of civil action is not covered by terms of insurance contract.
- But Court distinguishes. Here, these were not informal negotiations. These were conducted pursuant to a contractually required process. So process constituted an "alternative dispute resolution proceeding."
- ISSUE 2: Did Underwriters waive the policy's "consent-to-suit" requirement?

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- Yes: "insurers who wrongfully refuse to defend their insureds lose the benefit of their policies' procedural requirements."
- Court specifically finds that waiver-by-wrongful-denial principle applies to consent-to-suit clause just as it applies to settlement-without-consent clause because both clauses "deal with the insured's duties after a loss that are conditions precedent to coverage."
- LESSON: Where there are specific ADR procedures specified in a construction contract, those ADR procedures can give rise to a duty to defend. Wrongfully denying a defense will waive condition precedents.

ALIENATED PREMISES EXCLUSION

2. Exclusions

This insurance does not apply to:

. . . .

j. Damage To Property

"Property damage" to:

. . . .

(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises.

Howard Hughes Corp. v. Liberty Mut. Fire Ins. Co. (S.D. Tex. Aug. 28, 2025)

- Liberty issued a CGL policy to Howard Hughes Corp ("HHC") where The Woodlands Land Development, LP was a named insured.
- Lawsuit brought by hundreds of homeowners against insureds for property damage caused by flooding during Hurricane Harvey.
- Plaintiffs alleged that a prior storm in October of 1994 exceeded the levels of the 500-year flood plain in parts of Harris and Montgomery counties.
- After this 1994 storm, the insureds designed and developed a subdivision named Timarron in the same area that experienced catastrophic flooding in 1994.

Howard Hughes Corp. v. Liberty Mut. Fire Ins. Co. (S.D. Tex. Aug. 28, 2025)

- Plaintiffs allege that insureds made errors by instructing home builders to set their slabs at an election that was unreasonably low.
- Insureds knew or should have known to have the houses built at an elevation adequate to prevent flooding.
- Plaintiffs' homes and property suffered damage in Hurricane Harvey because of these errors.
- Liberty denies coverage to insureds, citing the "alienated premises" exclusion.
- Insureds argue that exclusion does not apply because "there are no 'premises' at issue and the alleged property damage did not arise out of the premises.

Howard Hughes Corp. v. Liberty Mut. Fire Ins. Co. (S.D. Tex. Aug. 28, 2025)

- Court notes that exclusion precludes coverage where property damage "results from one or more hazards that were known to insured, or should have reasonably been known by insured, at the time the property was sold, given or abandoned."
- Liberty: entire premise of Lawsuit is that insureds knew or should have known of prior flooding events and risks.
- Insureds: exclusion does not apply because (1) land at issue does not qualify as "premises" because it did not have buildings upon it when alienated."

Howard Hughes Corp. v. Liberty Mut. Fire Ins. Co. (S.D. Tex. Aug. 28, 2025)

- Court notes that Policy does not define "premises," so we use the ordinary and commonly understood meaning.
- San Antonio Court of Appeals previously found that under dictionary definition of "premises," a tract of land may be intended, as when used in a conveyance.
- S.D. Tex already found in similar case that "premises" can apply to undeveloped lots sold for residential purposes.
- HELD: "premises" as used in policy's exclusion applies to lots at issue.

Howard Hughes Corp. v. Liberty Mut. Fire Ins. Co. (S.D. Tex. Aug. 28, 2025)

- Insureds argue that exclusion does not apply because "there is no allegation that there is anything wrong with the lots themselves."
- But the underlying Plaintiffs alleged that the insureds possessed actual knowledge of the general risk of flooding before having "portions of this residential development designed and built in the 500-year flood plan."
- HELD: These allegations place the claims against the insureds firmly within the Alienated Premises exclusion.

Roofing Designs by JR, LLC v. Kinsale Ins. Co., et. al. (N.D. Tex Bankruptcy Jan. 20, 2026)

- Roofing Designs served as roofing subcontractor. It subcontracted the labor installation to Tapia
- Subcontract required Tapia to name Roofing Designs as additional insured on its CGL Policy
- Tapia obtained coverage through Kinsale
- In May 2021, roofing system was substantially complete when GC reported roof leaks and defective installation
- Roofing Systems claimed these issues stemmed from building related issues, such as plumbing, HVAC, and exterior deficiencies – not the roofing system
- GC terminated Roofing Designs and filed suit against Roofing Designs

Roofing Designs by JR, LLC v. Kinsale Ins. Co., et. al. (N.D. Tex Bankruptcy Jan. 20, 2026)

- Roofing Designs alleges that the lawsuit centered on roofing work performed by Tapia, and tendered its defense and indemnity to Kinsale.
- Kinsale denied on the ground that Tapia was not named in the lawsuit and no allegations against Tapia.
- Because Kinsale denied, Roofing Designs alleges it suffered from cascading financial consequences, including having to file Chapter 11.
- Insured, in bankruptcy, files adversary proceedings alleging breach of contract, failure to defend, and other causes of action.
- Kinsale files a Motion to Dismiss under 12(b)(6) asserting insured failed to state a claim upon which relief can be granted.

Roofing Designs by JR, LLC v. Kinsale Ins. Co., et. al. (N.D. Tex Bankruptcy Jan. 20, 2026)

- ISSUE: Whether Roofing Designs should be afforded coverage under the Tapia policy as an additional insured.
- Additional Insured Endorsement provided:

  This endorsement amends "Who Is An Insured" to include any person or organization that is required to be included by written contract, but only for *vicarious liability* imposed on the Additional Insured that is caused by the sole negligent conduct of the Named Insured and proximately caused by the Named Insured's work or product.
- Kinsale argued that lawsuit's pleadings against Roofing Designs do not give rise to a duty to defend or indemnify because they failed to allege liability arising from Tapia's conduct.

Roofing Designs by JR, LLC v. Kinsale Ins. Co., et. al. (N.D. Tex Bankruptcy Jan. 20, 2026)

- Court finds endorsement has two-part inquiry: (1) a written contract requirement; and (2) the underlying allegations impose vicarious liability on the additional insured for the named insured's sole negligence arising out of the named insured's work.
- Court reviewed underlying pleading, and finds asserted facts and claims only against Roofing Designs. The Complaint contains no allegations that Roofing Designs was vicariously liable for Tapia's sole negligence.
- HELD: Based on examination of pleadings and AI endorsement, Roofing Designs did not qualify as an additional insured and Kinsale owed no duty to defend.
- **Court notes that it "does not consider citations to non-existent opinions or authorities that cannot be substantiated," and in a footnote, indicates that the deficient citations may be sanctionable!

Crum & Forster Spec. Ins. Co. v. Smallwood (N.D. Tex Jun. 9, 2025)

- Underlying Plaintiff (Peguero) working at a construction site where GC provided a forklift with a wood box to provide supplies.
- As Peguero worked on 4th floor, he attempted to retrieve materials from wood box when box tipped and he fell. He suffered fatal injuries.
- Peguero's family filed suit against the GC, who contracted for the electrical work to be completed by Larry Smallwood. The GC sought additional insured coverage.
- Smallwood and Peguero family settled, but insurer still sought DJ that GC was not entitled to a defense or indemnity as additional insured.

Crum & Forster Spec. Ins. Co. v. Smallwood (N.D. Tex Jun. 9, 2025)

- Insurer argued that Peguero's injuries were excluded from coverage based on Worker Injury exclusion:

  This insurance does not apply to:

  a. "Bodily injury" to any "employee" or "temporary worker" of any insured arising out of or in the course of:

     1. Employment by any insured; or

     2. Performing duties related to the conduct of any insured's business; or

  c. "Bodily injury" to:

     1. Any contractor, subcontractor, independent contractor, or any other person; or

Crum & Forster Spec. Ins. Co. v. Smallwood (N.D. Tex Jun. 9, 2025)

2. Any "employee," "temporary worker," or any day laborer or other person hired, engaged or retained in return for compensation or renumeration of any kind, working for, such contractor, subcontractor, independent contractor or any other person, arising out of or in the course of performing work or rendering services of any kind or nature whatsoever:
    a) For or on behalf of any insured; or
    b) For which the insured may become liable in any capacity; or

d. Any obligation to contribute to, share damages with, repay or indemnify someone else who must pay damages because of such "bodily injury."

Crum & Forster Spec. Ins. Co. v. Smallwood (N.D. Tex Jun. 9, 2025)

- The Court summarized the exclusion as precluding coverage for (1) injuries to employees of the insured, injuries to contractors, subcontractors, or independent contractors, and injuries to employees or workers hired by those contractors to perform work on behalf of the insured.
- Turning to the pleadings - alleged that the GC contracted for electrical work to be completed by Smallwood.
- Alleged that Peguero's accident occurred while working in the course and scope of his employment as an electrician.
- His status was either an employee of Smallwood or someone hired by Smallwood to complete the electrical work as an independent contractor

Crum & Forster Spec. Ins. Co. v. Smallwood (N.D. Tex Jun. 9, 2025)

- Under any scenario, Mr. Peguero's accident would be excluded because the exclusion applies to employees and independent contractors.
- Insurer had no duty to defend the GC
- But, Court goes further and finds:

  "The same reasons that negate the duty to defend likewise negate any possibility that the insurer will ever have a duty to indemnify."

QUESTIONS?

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