Construction Insurance Law Update

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EXXONMOBIL CORP. v. NATIONAL UNION FIRE INS. CO., 672 S.W.3D 415 (Tex. 2023)

- Exxon hired Savage Refinery Services as independent contractor to work in Baytown, TX
- The parties executed a services agreement:
  - Savage was to procure at least a minimum stated amount of liability insurance for its employees; and
  - Name Exxon as an additional insured ("AI")

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- Savage procured five different policies.
  - Two were issued by National Union (primary and umbrella)
  - One was issued by Starr Indemnity & Liability Insurance Company
  - Exxon recognized as an AI under National Union primary policy

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- Two Savage employees were severely burned at Baytown refinery
- Settled with Exxon for a collective amount exceeding $24M
  - $5M of that $24M came from some of Savage's primary policies, including the National Union primary policy
  - That primary policy recognized Exxon as AI
  - National Union's primary policy exhausted

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- Exxon was forced to fund the other $19M out of its own pocket
- National Union and Starr denied under their umbrella policies
  - Denials based on:
    1. Exxon not an Insured under Umbrella policy; and
    2. Exxon's service agreement with Savage limited Exxon's entitlement to further policy proceeds

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- Trial court sided with Exxon:
- Court found that Exxon was an insured under National Union umbrella policy
- National Union (but not Starr) was required to reimburse Exxon for the funds it had to pay out of pocket.
- National Union appealed, maintaining that Exxon was not an Insured under its umbrella policy.
- Court of Appeals sided with National Union and reversed

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Court of Appeals Holding:

- The umbrella policy incorporated the primary policy's limits; and
- The primary policy incorporated the limits of the services agreement
- That agreement required only CGL insurance of a specified amount

"[b]ecause coverage available to Exxon as an additional insured under the [primary policy], through its incorporation of the Exxon-Savage contract, makes clear that Exxon's status as an additional insured is limited to primary coverage, Exxon is not entitled to coverage under the [umbrella policy] as an additional insured."

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- The Court of Appeals additionally affirmed the trial court's ruling in favor of Starr.
- Exxon Appealed to the Texas Supreme Court
- GENERAL PRINCIPLES OF LAW:
  - As early as 1886, Texas Supreme Court has recognized as "a cardinal principle of . . .insurance law" that "[t]he policy is the contract; and if outside papers are to be imported into it, this must be done in so clear a manner as to leave no doubt of the intention of the parties."

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- Court referred to its prior decision from *In Re Deepwater Horizon:*
- In that case, the Court reiterated that "we rely on the policy's language in determining the extent to which, if any, we must look to an underlying service contract to ascertain the existence and scope of additional-insured coverage."
- Court had already rejected an insurer's attempt to nullify a subrogation waiver in a workers' compensation policy by invoking unincorporated terms in the underlying service agreement.

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Three basic principles for interpreting meaning of insurance policy:

1. begin with the text of the policy;
2. refer to extrinsic evidence documents only if that policy clearly requires doing so; and
3. refer to extrinsic documents only to the extent of the incorporation and no further.

"**Any venture beyond the four corners of an insurance policy must be carefully limited to the scope of that policy's clearly authorized reference.**"

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- Court begins by examining the text of National Union umbrella policy, specifically the definition of "INSURED":

  > Insured means . . . Any person or organization, other than the Named Insured, included as an additional insured under Scheduled Underlying Insurance, but not for broader coverage than would be afforded by such Scheduled Underlying Insurance.

- Text invites two limited and targeted inquiries:
  1. Who is insured; and
  2. For what coverage?

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- As to first question:
- Umbrella policy covers "any person or organization" that is "included as an additional insured under Scheduled Underlying Insurance"
- Definition of "Scheduled Underlying Insurance" included National Union primary policy
- Therefore, Umbrella policy refers to primary policy to determine additional insureds
- Primary policy covers "any person or organization" to which Savage is obligated by "any contract or agreement"
- This language makes Savage/Exxon services agreement relevant
- Exxon is AI under umbrella policy. "None of this should be a surprise."

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- Turning to second inquiry (for what coverage?)
- Umbrella policy disclaims broader coverage than primary policy
- Prevents Exxon from demanding coverage for losses that primary policy would not cover.
- BUT: Exxon does not seek broader coverage. It seeks the *same* coverage, but at the umbrella policy's higher limit.
- National Union and Court of Appeals place far too much emphasis on policy's "broader coverage" language

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Texas Supreme Court disagrees with "broader coverage" argument for three reasons:

1. Umbrella policy says nothing about service agreements payout limits;
2. Even if Court could read umbrella policy to reference the service agreement's payout limits, there are not limits in the service agreement to even adopt!

   - Provides for *minimum amount*, not maximum amount.

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3. Primary policy has its own payout limits. To interpret "broader coverage" to refer to payout limits would give the umbrella policy a "self-defeating meaning"

   -This is because an umbrella policy triggers only when primary policy limits are exhausted.

   "In short, the contractual text before us does not require departure from the settled understanding that umbrella policies provide greater limits for *the risks already covered* by primary policies."

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- National Union also argued service agreement obligates Savage to provide Exxon only with *primary* insurance, so Exxon is entitled to nothing more.
- Court: National Union's position violates the settled principle that the Court start with the text of the umbrella policy and refer to other documents only where the policy authorizes.
  - would require Court to look to terms in extrinsic documents that the umbrella policy did not incorporate.
  - As umbrella policy requires only knowing whether insured was covered by primary policy, no further extrinsic evidence is considered.
- Court of Appeals' holding with respect to Starr was based on same error, so reversed judgment in favor of Starr.

CHUBB LLOYDS INS. CO. v. BUSTER & COGDELL BUILDERS, 668 S.W.3d145 (Tex. App.—Houston [1st Dist.] 2023)

- Homeowners hired Buster & Cogdell to expand their home
- Buster & Cogdell hired Newco to perform welding
- Newco started fire that damaged the home, which was mostly built
- Chubb was the homeowner's carrier, and paid almost $4M on the homeowners' claim.
- Chubb then sued Buster & Cogdell and Newco to recover the sums it paid

CHUBB LLOYDS INS. CO. v. BUSTER & COGDELL BUILDERS

- Buster & Cogdell and Newco ("Contractors") moved for summary judgment.
- They argued that Chubb had waived its right to recover from them
- Contractors relied on two contractual provisions:
  1. "Subrogation" provision stated that "[a]n insured may waive in writing before a loss all rights of recovery against any person."
  2. The construction contract provided that "absent a contrary provision in a property-insurance policy, the owner "waives all rights against" the contractors "for damages caused by fire or other causes of loss to the extent covered by property insurance or other insurance."

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- Chubb countered that the construction contract was never executed, and the waiver provision is not valid and binding.
- **Question on appeal: Is construction contract valid and binding?**
- Husband homeowner provided Affidavit that he signed first contract and emailed it back. Second contract sent, but not signed. Only difference was signature line for wife.
  - In subject line of email back, homeowner asked "would you please countersign it and send back to me?"
  - The contractor did not sign and return a copy to homeowner.
- Wife homeowner also provided an Affidavit. She never signed the first or second contract.

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- Wife also attested that she neither meant to waive any subrogation rights, or give her husband the authority to do so on her behalf.
- Construction agreement required homeowners to pay 10% of contract sum as nonrefundable deposit "upon execution" of the contract.
- Wife issued three payment checks after husband signed contract, one of which was for 10% of contract sum and memo line stated "10% deposit."
- Many emails in summary judgment record involving wife, such as one sent later in same day that husband signed contract where she advised contractor that no HOA approval was necessary to proceed.
- In another email, wife approved of a change order. The construction agreement required change orders when revisions to the original scope of work were made.

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- Trial court found that defense of waiver was meritorious and granted contractors' summary judgment motions.
- Chubb argued that clearly the evidence shows that wife did not sign, and contractors never signed.
- Contractors argued that the agreement need not be signed to be binding. Parties demonstrated mutual assent to terms by performing under the contract.
- Court of Appeals notes that in subrogation, insurer steps into the shoes of its insured. As such, subrogation rights are subject to any defense that may bar the insured from recovering.

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- Court of Appeals starts by noting:
  - Subrogation rights may be waived.
  - Contracts require mutual assent to be enforceable.
  - Signatures are often evidence of mutual assent
  - Contracts need not be signed unless parties explicitly require signatures as a condition of their mutual assent.
  - Determining whether mutual assent exists turns on what the parties said and did, not on their subjective states of mind.
  - A party can manifest its assent by conduct, provided it intends to engage in the conduct and knows or has reason to know that the other party may infer from its conducts that it assents.

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- Court finds that husband and contractor executed the first contract, and husband manifested his assent by signing it.
- Contractor manifested its assent by performing as required under the first contract.
- Chubb argued that first contract was withdrawn when contractor sent second contract.
- Court disagrees. Husband signing first contract was rejection of second contract, and constituted a counter offer, which contractor accepted by performing.
- Chubb argues that it can still subrogate through wife, who did not sign either contract.

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- Court disagrees with Chubb again because contract did not explicitly require signatures as a condition of mutual assent.
- Wife was copied on email from husband to contractor with signed agreement, she signed the check making the 10% payment that was due upon execution, and otherwise performed as required under the contract.
- Wife manifested her assent to the contract's terms.
- "What matters is what [the wife] said or did, not what she intended but did not express."
- Court ultimately finds in favor of contractor and their affirmative defense of waiver.

UNITED FIRE LLOYDS v. JD KUNTZ CONCRETE CONTRACTOR, INC., 2023 WL 7171475 (TEX. APP.—EL PASO, OCT. 31, 2023)

- ExploreUSA ("Explore") sold recreational vehicles
- It entered into a contract with JD Kuntz ("Kuntz") whereby Kuntz was to provide all materials and labor to install a complete concrete system for "supercenter."
- Construction contract provided that Kuntz was

  "solely responsible for, has control over, and is fully responsible for all construction means, methods, techniques, procedures, coordination, safety, and sequences [and] shall coordinate all activities related to [its] work as defined herein."

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- Contract also required Kuntz to obtain CGL insurance, and name Explore as an additional insured ("AI").
- United Fire issued Kuntz's policy with a $1M limit per occurrence, and $2M aggregate limit.
- Policy contained exclusions for:
  - Contractual liability;
  - "Your product"; and
  - "Your work"

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- Explore sued Kuntz for breach of contract alleging that concrete system shown signs of failure, unusual cracking, deterioration, and damage.
- Explore alleged failure was from:
  - Thickness of concrete was not in compliance with contract or industry standards;
  - Rebar was not placed in midsection and "was in most cases placed directly upon the stabilized subgrade surface."
  - Explore also alleged that Kuntz failed to perform warranty work.

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- Kuntz tendered to United Fire.
- United Fire defended under ROR based on exclusions.
- Jury found that:
  - Kuntz failed to comply with contract;
  - Kuntz's failure to comply with warranty was not a producing cause of damages to Explore;
  - Awarded $1.7M after instructed to only consider "the reasonable and necessary cost to repair and replace the concrete."
  - After attorneys' fees and costs, total judgment for $2,291,747.73.

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- United Fire filed DJ action based on the three exclusions.
- Trial court awarded summary judgment in favor of Kuntz, finding that United Fire had a duty to indemnify.
- United Fire appealed
- First Argument:
  - Contractual liability exclusion bars coverage because Kuntz's liability was based on specific contract violations, not liability that Kuntz would have in the absence of the contract.
  - Court must answer: (1) whether Kuntz was liable to Explore due to contractual assumption of liability; and (2) if so, whether Kuntz would have been liable in the absence of the contract.

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Contractual Liability Exclusion

This insurance coverage does not apply to:

Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement;

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- Court relies on *Ewing Construction Co. v. Amerisure Ins. Co.*, which held:

  > The 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.

- United Fire tries to distinguish *Ewing* because in *Ewing*, the insured was only sued for failing to perform its work in a good and workmanlike manner.
- United Fire points out that Explore alleged that Kuntz failed to comply with the diagram of the Contract, failed to properly install rebar, failed to pour the right thickness, and failed to exercise quality control.

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- Court disagreed and found that in *Ewing*, the court held that a contractor does not assume any obligations beyond the general law by agreeing to adhere to the contract's express terms.
- Did Kuntz agree to assume any obligations beyond agreeing to comply with the terms of the contract?
- United Fire argued yes, as it agreed to abide by a particular schedule, refrain from assigning contract, to properly request and hire subcontractors, and require its subcontractors to maintain insurance.
- BUT: United Fire could not explain how the damages Explore was awarded were caused by Kuntz's assumption of those obligations.

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- Analysis tied to language of exclusion: "liability for damages arose by reason of the assumption of liability in a contract or agreement."

- Only liability found was based on Kuntz's failure to ensure the concrete system was properly installed.

- So Contractual Liability Exclusion did not bar coverage.

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The Court then turned to the **"Your Product"** exclusion:

This insurance does not apply to:

Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

- United Fire argued that the concrete system and its "component parts" can be considered Kuntz's "product."

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- Second, United Fire argued that Kuntz supplied and installed the materials in the system, and Explore's suit was based, in part, on the defective nature of those materials.
- Court is not persuaded by either argument
- Products are manufactured, not constructed or erected.
- Concrete system "parking lot" was real property.
- Kuntz's work not limited to installing a product. It was responsible for entire construction project.
- Explore did not allege that system failed because component parts were defective. It was that the parts were not installed correctly.

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- Last, Court examines the **"Your Work"** exclusion:

  This insurance does not apply to"

  Damage to Your Work

  "Property damage" to "your work" arising out of it or any part of it and included in the "products- completed operations hazard".

  This 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.

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- United Fire argues that "your work" exclusion bars coverage because Explore alleged deficient performance in construction the concrete system.
- But the exclusion contains an exception for work performed on the insured's behalf by a subcontractor.
- Focus turned to whether Kuntz met its burden of establishing that subcontractor exception applies.
- United Fire argued that Kuntz cannot raise subcontractor exception because it did not seek to hold the subcontractors liable and failed to obtain a jury question of who performed the deficient work.

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- Court: United Fire is right that indemnity arises only after an insured's legal responsibility for covered damages has been established by judgment or settlement.
- It is also right that the facts actually established in underlying suit control the duty to indemnify.
- BUT: Texas Supreme Court has already held that 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."

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- United Fire posits that evidence was contradictory as to who performed what work and who was responsible for performing the defective work.
- Court disagreed. Kuntz attached Affidavits and deposition excepts where witnesses testified that all of the construction work was subcontracted out and multiple subcontractors were hired.
- Conversely, United Fire produced no evidence that Kuntz performed the defective work and did not subcontract it out.
- The Court held that the "Your Work" exclusion did not bar coverage.

QUESTIONS?

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