



# insurance law newsletter

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## IN THIS ISSUE:

### DECLARATORY JUDGMENTS:

Ft. Worth Court of Appeals holds that third-party claimant has standing to bring declaratory judgment action against defendant's liability insurer.

### CASES TO WATCH:

*Lamar Homes v. Mid-Continent Cas. Ins. Co.*, 428 F.3d 193 (5th Cir. 2005) (certified to the Supreme Court of Texas and argued on February 14, 2006) (whether allegations of faulty workmanship constitute "property damage" and "occurrence" under a CGL policy as well as whether the "prompt payment of claims" act of the Texas Insurance Code applies to liability insurers)

## Ft. Worth Court of Appeals Puts Twist on Declaratory Judgment Actions

Recently, the Ft. Worth Court of Appeals issued an opinion that may mark a change in declaratory judgment actions. *See Richardson v. State Farm Lloyds Ins.*, 2007 WL 1018651 (Tex. App.—Ft. Worth Apr. 5, 2007, no pet. h.). In *Richardson*, the court of appeals held that a third-party claimant can bring a declaratory judgment action against a liability insurer to determine whether the insurer has a duty to defend and/or indemnify its insured. The facts are as follows.

Eunice and Bobby Richardson (the "Richardsons") filed suit against Robert F. Kays ("Kays") and State Farm Lloyds Insurance ("State Farm"). The Richardsons alleged that Kays killed their son by rolling over him with Kays' vehicle. In the same lawsuit, the Richardsons sought a declaratory judgment action against Kays' insurer, State Farm. In particular, the Richardsons sought a ruling that State Farm had a duty to defend and indemnify Kays.

State Farm, in response, filed a plea to the jurisdiction. In the plea to the jurisdiction, State Farm alleged that the trial court did not have subject matter jurisdiction because the Richardsons have no standing to litigate whether State Farm has a duty to defend or indemnify Kays under the condominium policy because (i) the Richardsons have suffered no injury by State Farm's decision not to defend Kays; (ii) no relationship exists between State Farm and the Richardsons under the policy; and (iii) State Farm's duty to indemnify Kays is not ripe for adjudication because no judgment has been entered demonstrating Kays is legally liable to the Richardsons.

The trial court granted State Farm's plea to the jurisdiction. Surprisingly, the court of appeals disagreed. In doing so, the court of appeals looked to the Texas Supreme Court's opinion in *Farmers Texas County Mutual Insurance Company v. Griffin*, 955 S.W.2d 81 (Tex. 1997). In *Griffin*, the Texas Supreme Court approved of the use of declaratory judgment actions to resolve insurance coverage issues. Even so, the *Richardson* court took the *Griffin* holding one step further by concluding that "a declaratory judgment action is permissible when brought by a third party seeking to have the insurance company defend or indemnify for the conduct of its insured." *Richardson*, 2007 WL 1018651, at \*5.

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**CASES TO WATCH:**  
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*Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 2005 WL 1252321 (Tex. May 27, 2005) (pending on rehearing) (whether Texas recognizes a right of recoupment by an insurer against its insured)

*Fairfield Ins. Co. v. Stephens Martin Paving*, 381 F.3d 435 (5th Cir. 2004) (certified to the Supreme Court of Texas and argued on November 9, 2004) (whether an award of punitive damages is insurable under an employers liability policy)

*Ulico Cas. Co. v. Allied Pilots Ass'n*, 187 S.W.3d 91 (Tex. App.—Ft. Worth 2005, pet. granted) (argued on April 11, 2007) (whether Texas recognizes coverage by waiver and/or estoppel when an insurer undertakes the defense without adequately reserving rights)

**Commentary:**

It is common practice for insurers to include third-party claimants as parties to declaratory judgment actions. Oftentimes, insurers add third-party claimants as defendants in declaratory judgment actions against insureds so as to bind the third-party claimant to any ruling on coverage made in the declaratory judgment action. It appears the Ft. Worth Court of Appeals believed that it should be a two-way street.

Even so, it is questionable whether a third-party claimant ever is a proper party to a declaratory judgment action on coverage, regardless of whether the third-party claimant initiates the declaratory judgment, intervenes in an ongoing declaratory judgment between an insurer and its insured, or is made a defendant in the declaratory judgment action by the insurer. Simply put, Texas is not a direct action state and the third-party claimant is a stranger to the policy until such time as the third-party claimant becomes a judgment creditor.

Accordingly, at least historically, most Texas courts have concluded that a third-party claimant is neither a necessary party nor an indispensable party to a declaratory judgment action—at least prior to the point at which the third-party claimant becomes a judgment creditor. *See Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331 (Tex. 1968); *Safeway Managing Gen. Agency v. Cooper*, 952 S.W.2d 861, 868–69 (Tex. App.—Amarillo 1997, no pet.); *Providence Lloyds v. Blevins*, 741 S.W.2d 604, 606 (Tex. App.—Austin 1987, no writ). Even the Ft. Worth Court of Appeals had previously ruled that a third-party claimant was not a proper party to a declaratory judgment action. *See Nat'l Sav. Ins. Co. v. Gaskins*, 572 S.W.2d 575, 575 (Tex. Civ. App.—Ft. Worth 1978, no writ). And, other courts of appeal had ruled that a third-party claimant cannot intervene into an ongoing declaratory judgment action between an insurer and its insured. *See Feria v. CU Lloyds of Texas*, 2001 WL 1263666 (Tex. App.—Dallas Oct. 23, 1001, no pet.). The federal courts, which traditionally have take a more liberal view in allowing the inclusion of third-party claimants, have reached contradictory results as well. *Compare Standard Fire Ins. Co. v. Sassin*, 894 F. Supp. 1023, 1026 (N.D. Tex. 1995) (holding that a third-party claimant was not a proper party to a declaratory judgment) *with Bituminous Cas. Co. v Garcia*, 223 FRD 308 (N.D. Tex. 2004) (allowing a third-party claimant to intervene in a declaratory judgment action).

The Ft. Worth Court of Appeals believed that the *Griffin* case changed the law in Texas. It is questionable whether the Texas Supreme Court will see it that way. Notably, in *Griffin*, the Texas Supreme Court did not address whether a third-party claimant should be made a party to a declaratory judgment action. Rather, the Texas Supreme Court simply noted that a declaratory judgment action is an appropriate mechanism for the insurance

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**CASES TO WATCH:**  
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*American Home Assur. Co., Inc. v. Unauthorized Practice of Law Comm.*, 121 S.W.3d 831 (Tex. App.—Eastland 2003, pet granted) (argued on September 28, 2005) (scope of the tripartite relationship between insurer, insured, and defense counsel retained by insurer)

company to utilize in seeking a declaration that it is not obligated to defend or indemnify its insured in a suit brought by a third party. While it is true that the *Griffin* court suggested that the third-party claimant “may wish to participate in [the declaratory judgment],” the court’s comment in this regard arguably was dicta. *Griffin*, 955 S.W.2d at 84. When directly presented with the issue, it is more likely that the Texas Supreme Court will adhere to the long-standing principle that a third-party claimant has no standing to bring a declaratory judgment action against a liability insurer until such time as the third-party claimant becomes a judgment creditor. Additionally, if presented with the issue, the court also may conclude that an insurer likewise cannot join a third-party claimant as a party to a declaratory judgment action while the underlying litigation remains pending.

**GETTING TO KNOW LEE H. SHIDLOFSKY AND THE INSURANCE LAW PRACTICE GROUP ...**

Lee Shidlofsky is a founding partner of Visser Shidlofsky LLP. His practice is devoted to representing and counseling corporate policyholders in the area of insurance law, risk management, contractual risk transfer, and extra-contractual issues. He holds council positions with the Insurance Law Section and the Construction Law Section of the State Bar of Texas. He is the author of numerous articles and seminar papers and is a frequent speaker at continuing legal education seminars in Texas and across the country. Mr. Shidlofsky has been named a “Super Lawyer” by Texas Monthly Magazine each year since 2004 and is ranked as a top insurance coverage lawyer by Chambers USA.

The Insurance Law Practice Group represents corporate policyholders that are in disputes with their insurance companies, provides advice to plaintiffs in complex litigation on how to best maximize an insurance recovery, and provides risk-management consultation in connection with a wide-variety of contractual risk transfer issues. The Insurance Law Practice Group handles a wide-variety of first-party and third-party insurance claims in state and federal courts at both the trial and appellate court levels. The Insurance Law Practice Group is committed to practical and pragmatic solutions to insurance issues.

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