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An Insurer's Christmas Present from the Fifth Circuit

On November 24, 2010, the Fifth Circuit Court of Appeals gave insurers an early Christmas present, finding that—notwithstanding a cornucopia of case law to the contrary—an insurer is entitled to use extrinsic evidence to contradict an allegation in a petition or complaint in order to defeat the duty to defend. The court's decision in *Atlantic Casualty Insurance Co. v. Gonzalez*, 2010 WL 4813666 (5th Cir. Nov. 24, 2010), is the newest wrinkle (and not a good wrinke) in Texas law regarding the state's allegedly strict (or not so strict) "eight corners" rule.

A. Background Facts

In an underlying state court lawsuit, Horatio Gonzalez alleged PV Roofing's negligence caused him significant injuries, including the loss of "both arms and legs as a result of an electrocution injury when a ladder came into contact with power lines and electrocuted him." *Id.* at *1. In his first amended petition, he alleged he was injured "while working in a home," but his second amended petition eliminated any reference to working. *Id.* His third and fourth amended petitions alleged he was injured "while at a home in Houston" and was:

> **(1) not an employee of PV Roofing;**
>
> **(2) not an independent contractor of PV Roofing;**
>
> **(3) not a subcontractor of PV Roofing; and**
>
> **(4) not an employee of an independent contractor or subcontractor of PV Roofing.**

Moreover, he claimed PV Roofing was performing residential roofing activities and maintained control over "the job." *Id.*

The "actual" evidence in the record established PV Roofing retained Bernardo Mejia as an independent contractor to complete a roofing job for the company. Gonzalez was friends with Mejia and, on the day of the accident, Mejia took Gonzalez with him to do his final inspection at the job site. Mejia needed to do a repair, and did so using an aluminum ladder. He walked around the house to make another repair and Gonzalez followed carrying the ladder. When Gonzalez handed the ladder to Mejia as asked, the ladder struck a high-voltage power line,

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electrocuting Gonzalez. PV Roofing was not aware Gonzalez would be at the job site the day of the accident and Gonzalez was not paid by anyone for his services.

PV Roofing's insurer, Atlantic Casualty, contended it had no duty to defend or indemnify PV Roofing because Gonzalez's injury fell under an exclusion providing:

> **This insurance does not apply to:**
>
> **(i) "bodily injury" to any "employee" of any insured arising out of or in the course of:**
>
> **(a) Employment by any insured; or**
>
> **(b) Performing duties related to the conduct of any insured's business**
>
> **(ii) "bodily injury" to any "contractor" arising out of or in the course of the rendering or performing services of any kind or nature whatsoever by such "contractor" for which any insured may become liable in any capacity . . .**
>
> **With respect to this endorsement only, the definition of "Employee" in the DEFINITIONS (Section V) of CG0001 is replaced by the following:**
>
> **"Employee" shall include, but is not limited to, any person or persons hired, loaned, leased, contracted or volunteering for the purpose of providing services to or on behalf of any insured, whether or not paid for such services and whether or not an independent contractor.**
>
> **As used in this endorsement, "contractor" shall include but is not limited to any independent contractor or subcontractor of any insured . . . and any and all persons working for or providing services and or materials of any kind for these persons or entities mentioned herein.**

Id. **at *1–*2. On cross-motions for summary judgment, the district court agreed with Atlantic Casualty, finding Gonzalez fell within the policy's broad definition of "employee," and, thus, his injury was excluded from coverage.**

B. The Fifth Circuit Didn't Even Wait for Christmas

At the outset, the Fifth Circuit acknowledged Gonzalez alleged he was not an employee or a contractor for PV Roofing. But, the Fifth Circuit said, "[T]hose allegations were conclusory because no facts are alleged supporting those conclusions." Rather, as the district court had

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recognized, "Gonzalez's complaint 'contains no facts describing what Gonzalez was actually doing when he was injured, or the nature of his relationship with PV Roofing or Bernard Mejia.'" *Id.* at *3. *"Because Gonzalez alleged insufficient facts to permit us to determine whether the exclusions are applicable, it is appropriate to consider extrinsic record evidence to determine whether Atlantic had a duty to defend PV Roofing." Id.* (emphasis added) (citing *W. Heritage Ins. Co. v. River Entm't*, 998 F.2d 311, 313 (5th Cir. 1993); *Liberty Mut. Ins. Co. v. Graham*, 473 F.3d 596, 603 (5th Cir. 2006)).

Although Gonzalez did not recall what happened after getting to the job site, Mejia testified that Gonzalez moved the ladder at Mejia's request. That request was in connection with Mejia's attempt to make a roof repair as part of his work for PV Roofing. Notably, Gonzalez did not contest the testimony or its use as extrinsic evidence.

Thus, although Gonzalez stated he was not an employee of PV Roofing because he was not paid by Mejia or PV Roofing, had no relationship with PV Roofing and did not volunteer to help PV Roofing on the job, the Fifth Circuit agreed with the district court that Gonzalez still fell within the broad "employee" definition in the exclusion. According to the court, "Gonzalez 'volunteered' to help Mejia, who was repairing a roof on PV Roofing's behalf." *Id.* As such, when Gonzalez moved the ladder for Mejia, his actions also were on PV Roofing's behalf. Because the policy does not require Gonzalez have a direct or formal relationship with PV Roofing in order for his actions to constitute a service "to or on behalf of" the insured, Gonzalez was an "employee" merely by volunteering to perform a service on behalf of PV Roofing. Therefore, the exclusion applied and Atlantic had neither a duty to defend nor indemnify its insured.

Commentary:

Is it bad form to quote from Saturday Night Live? Well, here I go anyway: Really? I mean: Really? While there has been an ongoing debate—mostly within the Fifth Circuit—as to whether Texas follows a strict "eight corners" rule, it always has been a bedrock principle that extrinsic evidence cannot be used to contradict allegations in a petition or complaint. That has been the rule even when the allegations were otherwise false, fraudulent, etc. etc. etc. And, the Supreme Court of Texas has gone so far as to state that that there is not a "truthfulness" exception to the "eight corners" rule. Simply put, this case breaks new ground. The new rule, I think, is that an allegation cannot be contested by extrinsic evidence EXCEPT if it's a "conclusory" allegation and then, and only then, it can be contested because a conclusory allegation is not really an allegation after all. Make sense? One has to wonder why it was an unpublished opinion. This case sets a bad and potentially dangerous precedent (to the extent unpublished opinions can set precedent). The Fifth Circuit would have been better off with a holding that extrinsic evidence can be used on Mondays, Wednesdays, and Fridays with an extra day during leap years. Really?

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

Lee H. 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 is Chair of the Insurance Law Section and a former council member of 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. Lee has been named a "Super Lawyer" by Texas Monthly Magazine each year since 2004, including a ranking as a Top 50 attorney in the Central and West Texas Region since 2007, and is ranked as a top insurance coverage lawyer by Chambers USA and Who's Who Legal. Lee also is a Fellow of the Texas Bar Foundation.

Douglas P. Skelley is an associate at Visser Shidlofsky LLP. He represents and counsels corporate policyholders in numerous insurance law matters. He is a member of both the Insurance Law Section and the Construction Law Section of the State Bar of Texas. Doug was named a Texas "Rising Star" by Texas Monthly Magazine in 2010 and 2011.

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