

Hanna & Plaut Insurance Brief

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Everything You Wanted to Know About E-Discovery But Were Afraid to Ask

On December 1, 2006, several amendments to the Federal Rules of Civil Procedure will take effect. These new rules are aimed at addressing the fact that much information today is stored solely on electronic systems, which creates unique situations with regard to discovery of documents in litigation. Although the Rules have generally been understood to apply to electronically stored information (“ESI”), that understanding has now been made explicit. The parties are required to have a discussion about the existence and potential disclosure of ESI in the earliest stages of their cases. Rule 26(a)(1) requires that the parties include in their initial disclosures a copy of or a description, by category and location, of the ESI that supports their claims and defenses. Issues related to the disclosure or discovery of ESI, including the form or forms in which it should be produced, are to be included in the parties’ Joint Discovery Plan. The new rules do not require that parties automatically produce all relevant ESI. The amendments to the Rules distinguish between ESI that is readily accessible and ESI that is “not reasonably accessible because of undue burden or cost.” The rules do not define “reasonably accessible.” If a requesting party seeks to discover ESI that has been identified as not readily accessible, the burden is on the responding party to demonstrate the undue burden imposed by requiring such discovery. The burden then shifts back to the requesting party to show good cause for the request and that the costs and necessity of the discovery of the ESI balance in favor of production.

The new Rules recognize that the nature of ESI creates a problem regarding inadvertent destruction of information through automated processes. The Rules Committee recognized that “[t]he ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part.” Therefore, Rule 37(f) provides a “safe harbor,” that is, limited protection against sanctions for a party when ESI has been lost due to the routine operation of an electronic information system, so long as the operation is in good faith. The “routine operation” of a computer system “includes the alteration and overwriting of information, often without the operator’s specific direction or awareness, a feature with no direct counterpart in hard-copy documents.” Of course, parties

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Hanna & Plaut Gives Back

Hanna & Plaut attorneys recognize that we have been fortunate and have received many blessings that we don’t necessarily deserve—we get to live and work in Austin, Texas, we have a fantastic support staff, our work is interesting, and our clients are terrific. We try to show our gratitude by giving back to the community. Hanna & Plaut participates in Austin Bar Association projects like Legal Build, a partnership with Habitat for Humanity, and Adoption Day. In addition, we contribute our time and money to Volunteer Legal Services. Charlotte and Carrie have devoted

many hours to children who need advocates and families that need help with issues surrounding divorce and child custody. We are also firm believers in education. The firm participated this year in the Round Rock Independent School District’s Career Day. David spends his spare time teaching high school kids about the jury system through Austin Bar’s “Pick Me” program as well as coaching soccer through the West Austin Youth Association. Eric dedicates his time to teaching adults to read through Literacy Austin. Finally, Catherine pre-

sides over the PTA at her daughter’s middle school. Hanna & Plaut staff members are also involved in the community, many through their churches.

We know that our clients are always making efforts to give back to the community, and we strive to do so as well.

Happy Holidays!



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Extrinsic Evidence Redux

Extrinsic Evidence Allowed to Show Type of Work Done by Contractor Was Excluded

B. Hall Contracting, Inc. v. Evanston Ins. Co., 447 F.Supp.2d 634 (ND. Tex. Sept. 1, 2006)

In our last issue, we told you about the Texas Supreme Court's decision in *GuideOne Elite v. Fielder Road*. The Court refused to create an exception to the "eight-corners" or complaint-allegation rule that would permit an insurer to introduce extrinsic evidence in a declaratory judgment action on the duty to defend. While the court did not foreclose the possibility of a narrowly crafted exception for extrinsic evidence that goes solely to a fundamental issue of coverage and does not contradict allegations of the underlying petition, the court rejected a broader exception that would permit consideration of extrinsic evidence relevant to both coverage and the merits of the underlying litigation. In *B. Hall Contracting v. Evanston Ins. Co.*, the United States District Court for the Northern District of Texas hinted that it might take a more liberal view of extrinsic evidence, but then simply applied the exception implicitly accepted by the Texas Supreme Court in *Guide One*.

Hall, a roofing subcontractor on a construction project at UT-Arlington, contracted with a sub-subcontractor, Ramirez Roofing, for this work, which consisted of the installation of a membrane roof. While Ramirez was performing this work, a fire broke out and caused extensive property damage to structures

at UT-Arlington and personal injury to two workers who had to jump to the ground to avoid the fire. UT-Arlington and the injured workers brought separate suits against Hall, which sued its general liability insurer, Evanston, for a declaration of coverage. The trial court granted Evanston's motion for summary judgment, holding that the policy afforded no potential of coverage.

With regard to both underlying suits, the court held that the policy's "Roofing Endorsement," which excluded all damages or injury arising from "[a]ny operations involving any . . . membrane roofing," was not ambiguous and precluded coverage.

UT-Arlington's suit for property damage alleged that the accident arose from operations involving a "membrane roof," so the eight corners of the petition and policy excluded the duty to defend or indemnify Hall in that suit. However, the personal injury suit contained no allegations regarding the type of roof. Thus, the court had to determine whether this fact could be established through extrinsic evidence. The court construed the Texas Supreme Court's recent decision in *GuideOne Elite v. Fielder Road* as permitting the use of extrinsic evidence "relevant to an independent and discrete coverage issue" that does not affect the merits of

the underlying claim and held that the extrinsic evidence establishing applicability of the Roofing Endorsement did not contradict any allegation in the personal injury suit pleadings and was, in fact, consistent with those pleadings.

In addition to its consideration of the specific coverage issues in the case, the court also opined generally about the role and applicability of the eight-corners rule and seemed to suggest that it would take a more liberal view of extrinsic evidence depending on the policy language imposing the duty to defend. Noting that the supreme court tied the duty to defend and use of the eight-corners rule in *Fielder Road* to the policy language covering defense "even if the allegations of the suit are groundless, false or fraudulent," the *Hall* court stated that the absence of that phrase in the Evanston policy meant that the eight-corners rule "is not applicable to this case." The Evanston policy (like many policies) merely obligated Evanston to defend "against any 'suit' seeking those damages" for bodily injury or property damage and excluded any duty to defend against a suit seeking damages "to which this insurance does not apply." Unlike the duty to defend in *Fielder Road*, which was broader than the duty to indemnify, "[t]he language

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Extrinsic Evidence Not Allowed to Show Who Did the Work For Purposes of Additional Insured Coverage

D.R. Horton-Texas, Ltd. v. Markel Intern'l Ins. Co., Ltd., 2006 WL 3040756 (Tex.App.-Hous. (14 Dist.) Oct 26, 2006, n.p.h.)

In a previous issue, we discussed the Houston Court of Appeals' refusal to entertain extrinsic evidence on the duty to defend in *D.R. Horton-Texas, Ltd. v. Markel Intern'l Ins. Co., Ltd.*, 2006 WL 1766120 (Tex. App.-Hous. [14th Dist.] June 28, 2006). The court recently issued a superseding opinion on rehearing in that case, leaving its extrinsic evidence holding intact. *D.R. Horton-Texas, Ltd. v. Markel Intern'l Ins. Co., Ltd.*, 2006 WL 3040756 (Tex.App.-Hous. (14 Dist.) Oct 26, 2006). The court updated its discussion of this issue based on the Supreme Court's decision in *GuideOne v. Fielder Road*, which

was issued the day after the original *DR Horton* opinion appeared. The court also referred to an intervening decision of its own, *Pine Oak Builders, Inc. v. Great American Lloyd's Ins. Co.*, 2006 WL 1892669 (Tex. App. - Houston [14th Dist.] July 6, 2006, n.p.h.).

In light of *GuideOne*, the *DR Horton* court reaffirmed its holding that the underlying petition's failure to list the subcontractor, Ramirez, as a defendant or to make any reference to Ramirez or to his work precluded coverage for DR Horton as an additional insured because the additional insured endorsement was limited to claims arising out of the subcontractor's

work. In reaching this holding, the court declined to consider the summary judgment evidence provided by DR Horton that linked Ramirez to the injuries claimed by the homeowners. Referring to the *GuideOne* and *Pine Oak Builders* decisions, the court specifically observed that the extrinsic evidence provided by DR Horton was of the same type at issue in those cases, *i.e.*, evidence that was material to both coverage and to the underlying liability of the insured. The court therefore held that the case fell under the "eight corners" rule and refused to consider the extrinsic evidence.

CGL Notes: Injury at Cellular Level Constitutes “Bodily Injury”

Samsung Electronics America, Inc. v. Federal Ins. Co., 202 S.W.3d 372 (Tex. App.—Dallas Aug. 21, 2006, n.p.h.)

Samsung was sued in several jurisdictions by users of its cell phones for injury that allegedly was caused by the harmful radio frequency radiation emitted by Samsung’s phones. The plaintiffs complained that the radiation potentially damages human cells when the phones are used without a headset. Samsung tendered defense of the underlying suits to Federal under its CGL and excess policies. Federal sought a declaration that the policies did not cover the underlying suits and also sought reimbursement for amounts Federal had spent defending some of the suits pursuant to a reservation of rights. The trial court granted Federal’s motion for summary judgment on coverage, but declined to award reimbursement.

On appeal, the court reversed and ren-

dered in part. Samsung contended that the underlying complaints of “adverse cellular reaction,” “cellular dysfunction” and “biological injury” were sufficient to trigger the policies’ coverage for “bodily injury,” and analogized the injuries to those in asbestos cases. Federal argued that “bodily injury” requires “a practical loss of functionality, not a mere ‘cellular effect’” that results in no detectable impairment or illness. The court rejected Federal’s position. Because the policy does not define “bodily injury” as Federal describes and because the Texas Supreme Court in *Trinity Universal v. Cowan* concluded that only a physical rather than mental injury is required to constitute “bodily injury,” the court held that the underlying complaints stated a potentially covered

claim. In essence, the court implicitly agreed that the exposure rule rather than the manifestation trigger should be applied to the claims of bodily injury.

Federal further argued that the damages sought – a cell phone headset for each class member – were economic losses and not damages resulting from the bodily injury. Following the lead of other courts that had considered the issue, the court held that the costs of the headset were damages sought “on account of” or “by reason of” the plaintiffs’ exposure to the radiation. Accordingly, the underlying complaints potentially stated a claim for “damages because of bodily injury” under the Federal policies.

B. Hall Contracting, cont.

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of the Evanston policy makes the duty to pay and the duty to defend co-extensive.” However, the court added that groundless, false or fraudulent allegations could still create a duty to defend under that policy if the suit allegations sought damages to which

the insurance applied. In other words, a petition specifically alleging damages covered under the policy would invoke the duty to defend, i.e. the eight-corners rule. The court’s “analysis” appears to be little more than additional justification to consider extrinsic evidence in this case and not a wholesale rejection

of the eight-corners rule or endorsement of using extrinsic evidence to contradict specific allegations of the underlying liability suit.

E-Discovery, cont.

(Continued from page 1)

may not exploit the routine data destruction process and must put litigation holds in place in order to be protected under this rule.

Finally, the amendments to the Rules recognize the inevitable fact that production of large amounts of ESI will likely result in more inadvertent production of privileged material. Rule 26(b)(f) permits the parties to agree upon a procedure for dealing with inadvertent production of privileged material and to ask the court to include that procedure in its scheduling order. Absent such an agreement, upon discovery that privileged material has been produced, the producing party may request and the requesting party is required to return, sequester, or destroy the information and to make reasonable efforts to retrieve the information from any third-parties to which it has been provided. The requesting party may not use the information until the court has determined whether the claimed privilege applies and whether there has been a waiver of such privilege.

These new rules mean that both in-house and outside counsel need to have an understanding of the electronic information storage systems of their clients, including the types of systems, the information stored and maintained on those systems, and how such information can be accessed. Of course, a company’s attorneys also need to be aware of and understand the retention/destruction policies applicable to the various information systems, as well as the “routine operations” that might affect ESI. In-house counsel need to know how to put litigation holds on relevant materials stored in all information systems. If the company does not have a document retention policy in place for ESI, such a policy should be implemented and carefully followed as soon as possible. In addition, counsel needs to include an assessment of the ESI issues in its initial assessment of the case and be prepared to address those issues in the initial Rule 26(f) conference. The reality of modern record-keeping and the recent focus on ESI in the Federal Rules means that parties will make ESI discovery requests more frequently and more forcefully. Having a thorough knowledge and understanding of this issue will help attorneys protect their clients from unduly burdensome and harassing requests.

No Occurrence in Defective Construction Case

Century Sur. Co. v. Hardscape Const. Specialties, Inc., 2006 WL 1948063 (N.D. Tex. Jul 13, 2006)

Texas courts continue to struggle with the question of whether there has been an occurrence in the context of defective construction cases. In this duty to defend case, the court found there was no occurrence in a defective construction setting despite allegations of negligence by the injured party. The case has the typical construction case factual scenario: a developer (Hillwood) hired a contractor (Hardscape) to construct swimming pools and the contractor hired a subcontractor (Elite) to do the work. When the construction was complete, cracks began to appear in the walls and floor of one of the pools. The cracks got bigger over time and both pools began to show signs of structural problems. The decking surrounding the pools became uneven. As a result, the

pools and surrounding decking had to be demolished, and the developer, Hillwood, filed suit against Hardscape and Elite and others for negligence, gross negligence, breach of contract, and breach of implied and express warranties.

Hardscape made demand on Elite's insurer, Century, for defense and indemnity, based on the subcontract's indemnity/hold harmless provisions. Century asserted its policy did not provide coverage because the construction errors did not constitute an "occurrence." The court cited numerous recent Texas decisions that had considered this question in construction defect cases and noted that the Fifth Circuit had recently certified the issue

to the Texas Supreme Court in *Lamar Homes, Inc. v. Mid-Continent Cas. Co.* The court held that the allegations did not assert an "occurrence." Although Hillwood's claims contained more than conclusory allegations of negligence, the supporting facts showed that the alleged negligence arose out of the contractual and breach-of-warranty claims. "In other words, Hillwood's negligence claims merely recharacterize the gist of its petition-breach of warranty and contract. Hillwood's claims boil down to an argument that its injury was that the pools it was promised and paid for were not the pools it received, which is not an 'occurrence' under the policy." Because there was no duty to defend there was also no duty to indemnify.

Garage Policy Does Not Cover Repossession Activities

Classic Performance Cars, Inc. v. Acceptance Indem. Ins. Co., Case No. 4:05-cv-03929 (S.D. Tex. Sept. 13, 2006)

Classic Performance, a used car dealer, was sued in two state court suits for injuries that arose from repossession activities. In the first suit, the purchasers alleged that Classic failed to abide by an agreement extending their final payment, hired someone to repossess the vehicle, and caused bodily injury and damage to their property because the repossessors "failed to use ordinary care in the manner in which they handled repossession of [their] vehicle." In the course of the repossession, one of the purchasers pursued the repossessors in a different vehicle and had an accident with another car, which caused bodily injury and property damage to the accident victims. Those victims also sued Classic and alleged that Classic's negli-

gence stemmed from "the manner in which [it] performed the repossession and breached the peace." Classic tendered both lawsuits to Acceptance under its garage policy; Acceptance denied defense based on the repossession exclusion in the policy.

The federal district court granted Acceptance's motion for summary judgment in the subsequent declaratory coverage action. The policy excludes coverage for "repossession operations," and Classic argued that this exclusion applies only to Classic's repossession through its own employees and not to conduct by third parties Classic hires. The court rejected both Classic's interpretation and its ambiguity argument as

"hopelessly strained." While adding the phrase, "even if contracted to a third party," might make the contract "perfect," the court held that such a phrase was unnecessary because the exclusion was sufficiently clear and broad enough to include third-party conduct. Because the underlying petition allegations made it "quite clear that, regardless of the particular legal theory articulated by the claimants, all of these injuries relate to the attempt to repossess the [vehicle]," the court further rejected Classic's contention that the allegations of "negligence" alone triggered the duty to defend since the factual basis of that conduct was excluded.

CGL Auto Exclusion Precludes Coverage for Injury to Child Left in Van

Lincoln Gen. Ins. Co. v. Aisha's Learning Center, 2006 WL 3012863 (5th Cir. Oct. 24, 2006)

Two-year-old Le'Yazmine McCann was seriously injured when she was left for seven hours in a van owned and operated by Aisha's Learning Center ("ALC") on a hot day in September 2002. ALC had both general liability and automobile coverage, but the insurers disputed which policy applied to the resulting lawsuit brought by Le'Yazmine's mother. On

cross-motions for summary judgment, the district court held that the CGL automobile exclusion precluded coverage. The court of appeals affirmed.

The CGL policy excludes coverage for injury "arising out of the ownership, maintenance, use or entrustment to others of any . . . 'auto' . . . owned or operated by or rented or loaned to any

insured. Use includes operation and 'loading and unloading.'" After stating that Texas courts broadly define "use" as a general catchall and define "arise out of" as a simple cause-in-fact connection, the court turned to the specific factors set out by the supreme court in *Mid-Century Insurance Co. v. Lindsey*

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Workers' Compensation Update

Travis County District Court Finds Medical Dispute Resolution Process Unconstitutional

As of September 2005, the Texas legislature abolished the use of State Office of Administrative Hearings (SOAH) adjudicative procedures for resolution of medical payment and medical necessity disputes between health care providers and carriers. Prior to September 2005, a provider who was dissatisfied with a carrier's reduction of an invoice based on lack of medical necessity could appeal a Texas Workers' Compensation Commission (TWCC) finding on the issue to SOAH for a "do-over" in an adversarial contested case hearing. The legislative changes that went into effect in September 2005, as outlined in Texas Labor Code Section 413.031, mandated that such disputes would not be resolved by a contested case hearing, but would be submitted by records only to the Division of Workers' Compensation

(formerly TWCC). Parties dissatisfied with Division findings were limited to an appeal to Travis County district court under a substantial evidence standard. No adversarial hearings were held in such disputes.

On November 1, 2006, Travis County district court judge Stephen Yelenosky issued an opinion in Cause No. D-1-GN-06-000176; *HCA Healthcare Corporation et al. v. Texas Department of Insurance and the Division of Workers' Compensation*, holding that DWC's failure to offer the parties an adjudicated contested case hearing in payment disputes is unconstitutional because a "paper review," without the opportunity for cross examination and to offer additional evidence, does not provide due process.

We anticipate that in the next month or so the district court will issue an additional order concerning whether payment disputes decided without a contested case hearing must be remanded to DWC for a contested case hearing. We predict that regardless of additional orders entered by the court, the parties will appeal the trial court's finding to the Third Court of Appeals in Austin and that there will be a subsequent appeal to the Texas Supreme Court. We are probably several years away from a final determination in this matter. We will continue to watch it closely.

TWCC/DWC Has Exclusive Jurisdiction of Fraudulently Obtained SIBs

GuideOne Ins. Co. v. Cupps, 2006 WL 3247918 (Tex. App.—Fort Worth Nov. 9, 2006, n.p.h.)

We have found that medical providers often attempt to make an end-run around the state-mandated procedures for resolution of medical disputes in the workers' compensation context. Frustrated by the exclusive remedy provided by the Workers' Compensation Act, medical providers often file suit in district court alleging common law causes of action like negligence and fraud, arguing that such causes of action do not come within the jurisdiction of the state agency. They are generally unsuccessful.

In *GuideOne Ins. Co. v. Cupps*, 2006 WL 3247918, the Fort Worth Court of Appeals rejected a similar attempt by an insurance carrier. Almost five years after Betty Cupps began receiving supplemental income benefits (SIBs) from workers' compensation carrier GuideOne for her total disability, GuideOne's investigation revealed that the SIBs were fraudulently obtained. GuideOne sued Cupps for fraud, conversion, negligent misrepresentation and violation of the Theft Liability Act. Cupps moved for summary judgment and dismissal because GuideOne had not exhausted its administrative remedies with the Texas

Workers' Compensation Commission ("TWCC") (now Texas Department of Insurance, Division of Workers' Compensation). The trial court dismissed the suit; the court of appeals affirmed.

GuideOne argued that it was not required to exhaust its administrative remedies because (1) TWCC does not have exclusive jurisdiction, and (2) the Workers' Compensation Act (the "Act") does not provide an adequate remedy through the process of administrative violation to obtain repayment of fraudulently acquired SIBs. With regard to the first issue, the court held that the Act provides detailed, comprehensive procedures for contesting an employee's entitlement to SIBs and also for initiating an administrative violation proceeding if an employee fraudulently obtains SIBs. In addition to the benefit review conference, optional arbitration, contested case hearing, and appeal, the Act provides judicial review once the carrier "has exhausted its administrative remedies." Furthermore, the Act contains a specific provision that requires repayment by a claimant who has obtained "an excess payment" through fraud. This remedy of an administrative viola-

tion proceeding is also subject to judicial review. The court concluded that the pervasive regulatory scheme, the availability of a remedy for overpayment of the SIBs, and the express provision of judicial review indicates the legislature's intent that the Commission first resolve the issues of an employee's entitlement to SIBs and whether those benefits were fraudulently obtained.

The court further noted that GuideOne did not "seek any damages unrelated to or independent of the allegedly overpaid SIBs." Accordingly, the court held that GuideOne "cannot circumvent this exclusive legislative authority simply by restating its claims under other legal theories."

Finding of “Knowing” DTPA Violation Does Not Necessarily Preclude Finding of “Occurrence”

National Union Fire Ins. Co. v. Puget Plastics Corp., 450 F.Supp.2d 682 (S.D.Tex. Sept. 6, 2006)

In *National Union v. Puget Plastics Corp.*, the court held that a jury’s finding of a “knowing” violation of the DTPA by the insured does not automatically preclude an event from being an “accident” or “occurrence” for purposes of indemnity coverage under a general liability policy. Puget Plastic Corporation manufactured component parts, specifically, plastic water chambers for tankless water heaters sold by Microtherm. The plastic water chambers manufactured by Puget began to fail, causing damage to the water heaters, as well as to homes and businesses where the water heaters were installed. Microtherm filed suit against Puget and its parent company Arctic and a jury found in favor of Microtherm, awarding a total of \$36,081,807.18 against PPC on DTPA causes of action for false/deceptive/misleading acts, unconscionable conduct, and breach of warranties. The jury found that all of the above conduct was done “knowingly” under the DTPA.

National Union then sought a declara-

tion that it had no duty to pay Puget’s defense costs and damages resulting from the jury verdict. The court first held that the “Products-Completed Operations Hazard” (“PCOH”) is not a separate grant of coverage and, therefore, still requires an occurrence in order to trigger coverage. The court then held that the finding of “knowing” DTPA violations did not preclude finding an “occurrence” or “accident” under the policy. The court distinguished a finding of “knowing” conduct from “intentional” conduct, holding that a finding of “knowingly” only requires “actual awareness” while a finding of “intentionally” requires “actual awareness . . . coupled with the specific intent that the consumer act in reliance.” The Court surveyed many important Texas cases on the “occurrence” requirement and concluded that “knowing conduct can still constitute an accident unless the actor either: (1) intended the harm that occurred or (2) should have reasonably expected the harm.”

The court ultimately held that there

were fact questions relating to the second prong of this test, i.e., whether Puget should have reasonably expected the harm. The specific allegation of wrongdoing was that Puget molded the chambers at temperatures below the recommended processing temperatures. Although there was some evidence that Puget was aware that lower processing heat might result in tank failure, there was no evidence that Puget was aware or “reasonably anticipated” that this failure could cause damage to other property, such as the destruction of the entire water heater or damage to buildings in which the heaters were installed. Therefore, the Court held that “to the extent Defendants have admissible evidence to show there was property damage to third parties, there is a rebuttable presumption of an occurrence.” The court also noted that in the coverage action, it would “look beyond the judgment in the underlying case to determine if Puget intended the harm or should have reasonably anticipated that

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Limits of UIM and Liability Coverages Can be Stacked

Janowiak v. Allstate Prop. & Cas. Ins. Co., 201 S.W.3d 200 (Tex. App. — Houston [14th Dist.] Aug. 8, 2006, n.p.h.)

Laci Janowiak, a minor, was injured in a car accident while riding in a vehicle owned and operated by the Dellasalas. Both Dellasalla and the driver of the other vehicle, Salas, were at fault, and Salas was uninsured. After settling with her parents’ UM carrier for limits, Laci also settled with the Dellasalas’ liability carrier, Allstate, for the policy limits of \$25,000. However, because Laci’s damages exceeded these benefits, she sought the UIM limits under the Dellasalas’ policy as well. The trial court granted Allstate summary judgment based on its argument that the policy allowed only one recovery for each person injured in one accident. The court of appeals reversed and remanded.

Allstate relied primarily on the “offset” provision in the liability coverage portion of the policy, which reads:

Any payment under the Uninsured/Underinsured Motorists

Coverage or the Personal Injury Protection Coverage of this policy to or for a covered person will reduce any amount that person is entitled to recover under this coverage.

Allstate argued that this provision was intended to limit recovery under the policy for any one person to the limits for liability coverage.

The court disagreed. First, the court noted that the UM coverage contained no express reciprocal offset provision. “Thus, if we were to adopt Allstate’s interpretation of the offset provision, the issue of whether an insured could recover a maximum of \$25,000 or \$50,000 would depend on the order of the payment of his or her claims.” The court found this interpretation unreasonable, but held that, even under Allstate’s interpretation, the offset would not apply in this case because the liability limits had already been

paid. The court held that the correct interpretation of the offset was merely to prevent any double recovery by the insured when both liability and UM coverages applied. The court noted that this construction was also supported by the “maximum limit of liability” language that is contained within each separate coverage of the policy and therefore applies on a “per coverage” rather than global policy-wide basis.

Finally, the court held that, even if its construction of the policy was incorrect, the offset or other limiting language of the policy was invalid. Because the Legislature has mandated minimum limits for liability and UM/UIM coverage and the supreme court has held that policy offsets are valid only to the extent that they do not prevent recovery of actual damages or reduce protection below the minimum statutory limits.

Court Blocks Plaintiffs' Attempted End-Run Around *Fiess*

Gordon v. Allstate Texas Lloyd's, 2006 WL 2827233 (S.D. Tex. Sept. 27, 2006)

In this mold damage case, the Southern District foreclosed homeowners' last remaining argument for mold coverage under the former Texas HOB policy. In *Gordon*, the homeowners sought breach of contract and extra-contractual damages for Allstate's denial of their claim for mold damage as the result of a plumbing leak. The court had stayed the case pending the Texas Supreme Court's answer to a certified question from the Fifth Circuit on the meaning of the mold exclusion in *Fiess v. State*

Farm Lloyds. After the supreme court answered that question "No," the court reopened the case and reconsidered Allstate's motion for summary judgment on the breach of contract claims.

The homeowners argued that despite the supreme court's holding in *Fiess*, the court's earlier opinion in *Balandran* meant that the enumerated exclusions, including the mold exclusion, were "repealed" in cases of accidental discharge from a plumbing system. The court disagreed. Because *Fiess* specifi-

cally held that mold damage to a dwelling is excluded regardless of whether the water damage causing the mold is otherwise covered, the court concluded that any other result would be inconsistent with *Fiess*. The court noted, however, that *Fiess* did not address the effect of the exclusion repeal provision on claims of mold damage to personal property.

Roof Damage Appraisal Case — UPDATED

Johnson v. State Farm Lloyds, 2006 WL 3042104 (Tex. App.—Dallas October 27, 2006, n.p.h.)

In this roof damage appraisal case, the court of appeals withdrew its earlier opinion and reissued a new opinion while denying State Farm's motion for rehearing. The ultimate outcome did not change, however: the court held

that the "amount of the loss" as used in the appraisal clause includes questions involving the extent of the loss when it is undisputed that a covered cause of loss has caused some damage. The court reversed the trial court's summary judgment in favor of State Farm, ren-

dered judgment in Johnson's favor, and remanded solely on the issue of attorney's fees.

National Union v. Puget Plastics, cont.

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the harm would occur.

In a section discussing whether there was "property damage" in the underlying suit, the court held that damage to the water chambers themselves was excluded by the business risk exclusions, but that damage to the water heaters or to the buildings in which the heaters were installed would constitute property damage, "so long as there is

actual damage, as opposed to those water heaters which may fall into the category of 'impaired property.'"

Finally, the court held that in resolving fact issues whether there was "property damage" and whether the damage was intended or should have been reasonably anticipated, the evidence would not be confined to the judgment in the underlying case, but it would consider (1) the evidence presented at the underlying

trial and (2) new evidence relevant to the issues which remain to be resolved.

The court therefore denied in part and granted in part the cross motions for summary judgment and certified the order for interlocutory appeal.

Lincoln General v. Aisha's, cont.

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to determine whether an injury arises from use of a vehicle. Those factors include whether: (1) the accident arose from the inherent nature of the automobile; (2) the accident arose within the natural territorial limits of the vehicle before use has terminated and (3) the vehicle itself produced the injury. In addition, the court noted that the parties' intent to use the vehicle as such

was important. The court held that even though the van was no longer in motion, its purpose of transporting the children to ALC was not complete with regard to Le'Yazmine at the time she was injured. Furthermore, the vehicle was not a mere situs for the injury but was a producing cause because vehicles trap heat in a way that makes them particularly dangerous. The parties also intended that the van be used to transport Le'Yazmine to ALC. The court noted that its

holding was consistent with the majority of jurisdictions to consider the issue.

As a final note, the court emphasized that the inclusion of similar language in the coverage provisions of automobile policies and exclusions of CGL policies evidences an intent to avoid overlapping coverage and that those terms and provisions should be interpreted consistently.

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Hanna & Plaut, L.L.P. is an AV-rated law firm formed in February 1998 and is recommended by Best's Directory of Insurance Attorneys. Primarily a civil litigation law firm handling state and federal trials, appeals, alternative dispute resolution, and client counseling, our practice includes insurance coverage and "bad faith" litigation, insurance defense, construction litigation, commercial litigation, and administrative law, including workers' compensation. At Hanna & Plaut, we pride ourselves on being responsive to our clients' needs; advice and counsel at the outset of a dispute or even before a dispute arises is often the most valuable service we can provide. We are aggressive in defense of our clients and we get excellent results.

Legally Sound Holiday Wishes From Hanna & Plaut

Please accept with no obligation, express or implied, our best wishes for a holiday celebration practiced within the most enjoyable traditions of the religious persuasion or secular practices of your choice. . . and a fiscally successful, personally fulfilling, and medically uncomplicated recognition of the onset of the generally accepted calendar year 2007.

By accepting this greeting, you are accepting these terms. This greeting is subject to clarification or withdrawal. It is freely transferable with no alteration to the original greeting. It implies no promise by the wisher to actually implement any of the wishes for her/himself or others, and is void where prohibited by law. It is also revocable at the sole discretion of the wisher.

This wish is warranted to perform as expected within the usual application of good tidings for a period of one year, or until the issuance of a subsequent holiday greeting, whichever comes first, and warranty is limited to replacement of this wish or issuance of a new wish at the sole discretion of the wisher.

Happy Holidays!!!

Spotlight on: David Plaut

In this issue, we focus on David Plaut, one of the founding partners of the firm. David graduated from Johns Hopkins University with honors in 1985 and the University of Texas School of Law in 1989. He was articles editor of the Texas Law Review and served as a law clerk for United States District Judge Edward Prado in San Antonio for two years before beginning private practice.

1. What inspired you to become a lawyer?

My father (Jon Plaut) is a lawyer and was Director of Environmental Compliance for Allied/Signal Corporation and was involved with the NAFTA commission for years. My mother (Anne Plaut) was the editor of several New Jersey newspapers and was always involved in

politics at a local level. I think I knew pretty early on that I was destined for a career in law.

2. What is your favorite aspect of practicing law?

I love trying cases -- telling a story that you hope will persuade the judge and jurors to see things your way. In an era of alternative dispute resolution and mediation, fewer cases get tried these days and that's too bad for us because going to trial is the fun part of this job. Putting the case together for the judge and jury is always a logic puzzle, and I enjoy that aspect of trial practice as well.

3. What do you do in your spare time?

I spend a lot of time coaching my sons Eddie and Sammy in various sports.

I go from season to season, soccer in the Fall, basketball in the Winter, and baseball in the Spring. I played lacrosse and soccer in high school and college and my boys want us to add lacrosse to the mix of sports we're currently juggling. I'm an avid reader, gardener, and runner when I can find the time.

4. What are you reading?

I'm reading classics I never read in college. I just finished Alexander Dumas' "The Three Musketeers" which was sensational, and I'm about 100 pages into "Don Quixote" right now (and I have the feeling I'll be reading it for the rest of my life given how much I read each night before I fall asleep).

5. Where do you take out-towners?



When the weather's nice (nine to ten months out of the year) we're out on Lake Travis skiing and hanging out with friends. The lake is gorgeous and just a short hop from downtown. Austin has a terrific music scene that everyone knows about on 6th Street, but it also has great restaurants and clubs clustered together in the warehouse district between 2nd and 5th streets west of Congress

Avenue. We had friends in from Tucson recently and had a great meal at El Chile on Manor Road, with its interior Mexican cuisine, before heading downtown to Betsy's Bar, which is marked by casual clutter and good music. Sunday morning we all went to Cisco's Tex-Mex restaurant in East Austin for the "Cisco Special" -- beef enchiladas, a taco, sizzling fajita meat drizzled in lime, with rice and beans. No one left hungry! I've also been taking folks to Austin's newest art museum, the Blanton, which occupies a beautiful new building on the southern edge of UT, and which houses a great collection of modern art in its permanent collection.