

## CONFUSION AND POLLUTION

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Several centuries ago, Shakespeare wrote a delightful comedy entitled *Much Ado About Nothing*. The case of *Kelley-Coppedge, Inc. v. Highlands Insurance Company*, 980 S.W.2d 462 (1998) wasn't very funny, but it could be entitled *An Arcane Uproar Over Not Much*. All the players were good humored, but--in the end--it wasn't very funny.

There were more than a few dollars at stake, but the case will probably have no significant impact on pollution exclusion litigation. Partly, this is true because a decision was rendered 5-4, and partly because the lawyers who handled the case in the trial court fouled it up, so that a significant and dispositive issue never reached the appellate courts. This never happens in well-conducted pollution exclusion (or any other) litigation.

A front page article in BUSINESS INSURANCE for November 23, 1998 describes the case as a "victory for contractors." There has been some fervent discussion of the case at various environmental law and environmental insurance loss CLEs. Unfortunately, much of the early discussion of this case has been overblown, overwrought, and overdone. It is time for perspective. Although the decision of the Texas Supreme Court was certainly a victory for Kelley-Coppedge and a limited (5-4) personal triumph for its lawyer--a splendid fellow if ever there was one, the decision was hardly a real victory for contractors who are insureds. If the case has any significance at all, it is to be found elsewhere. Possibly, the only victory for insureds to be found in *Kelley-Coppedge* is

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the skepticism the majority expresses about the phrase “absolute pollution exclusion.” The majority thinks that phrase is a shade strong. Such rhetorical victories are often pyrrhic.

## I.

In August 1994, Kelley-Coppedge, Inc. (“KCI”) laid a four inch natural gas pipeline along the antecedently existing easement in Wise County, Texas, where KCI had a right-of-way. KCI had workers and equipment at the job site. It was digging a substantial trench there, placing pieces of four inch diameter pipe along the trench, attaching new pipe intervals to the line of pipe already laid, welding, testing to make sure that its welding was done properly, filling in the trenches it went along, supervising its crew of workers at the location, and in general doing what such contractors do. Before the accident, KCI was obligated to (and apparently did) perform a variety of activities which were substantial and time consuming. KCI’s presence at the site was neither fleeting nor transitory.

As the operation progressed, one of KCI’s workers punched a hole in another pipeline with a large machine known as a ditcher. Sixteen hundred barrels of crude oil spewed all over the location where KCI was working. The oil was discharged onto the construction site, and it dispersed onto the nearby land as well. After the accident, KCI formed agreements with another oil company and the adjoining landowners to remediate the surrounding soil to Texas Railroad Commission standards.

## II.

Highlands issued commercial general coverage to KCI, with a standard absolute pollution exclusion. This exclusion has two parts, f.(1) and f.(2). The term “pollutant” is defined within Exclusion f, for the entire exclusion, in relevant part as follows:

[The term] [p]ollutants means any. . .liquid. . .or contaminant, including . . . acids, alkalis, chemicals and waste.

Unquestionably, oil is a pollutant. No one disputes this observation. In relevant part, Exclusion

f.(1)(a) states as follows:

This insurance does not apply to. . .“property damage” arising out of the actual. . .discharge, dispersal, seepage, migration, release or escape of pollutants. . .[a]t or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured[.]

The Exclusion f.(2)(a) reads in relevant part as follows:

This insurance does not apply to. . .[a]ny loss, cost or expense arising out of any. . .[r]equest, demand or order that any insured. . .clean up, remove. . .detoxify or neutralize, or in any way respond to. . .the effects of pollutants[.]

*Kelley-Coppedge* revolved around f.(1)(a). Indeed, it turned on a single word in that exclusion: the only thing which mattered was the meaning of the word “occupy.”

Exclusion f.(2)(a) played no role in the case. In Texas, as in many jurisdictions, if an insurer intends to rely upon an exclusion, the insurer must plead the exclusion as an affirmative defense. The lawyers representing Highlands in the trial court did not plead f.(2)(a) or raise it in the summary judgment motion, and summary judgment was granted against Highlands on the basis of f.(1)(a) alone. The lawyers who handled Highland’s case on appeal attempted to reinsert f.(2)(a) back into the case repeatedly, but their efforts were to no avail. Based upon perfectly orthodox grounds, the appellate courts declined to let new material be injected into the case. Probably, no one involved in the litigation of this matter, or thoroughly familiar with the facts of the case would argue that the result would have been the same had f.(2)(a) been pleaded. The case was decided by the trial court on the basis of stipulated facts. They do not address any fact potentially relevant in any detail. Had

f.(2)(a) been pleaded, the bare-bones stipulation relied upon by the trial court, the intermediate-level appellate court, and the Texas Supreme Court never would have sufficed. Probably, no one would disagree with this proposition. Nevertheless, f.(1)(a) was the focus of the entire case, and within that exclusion, the meaning of the term “occupy” was all that mattered. (There was another pleading error which will be discussed presently.)

### III.

KCI had prevailed in the trial courts. Highlands prevailed in the intermediate-level Fort Worth Court of Appeals. KCI prevailed again in the supreme court, but just barely. No party argued that the word “occupy” was ambiguous. Consequently, the whole idea that someone had a burden of proof was pretty well meaningless. To be sure, KCI had moved for summary judgment, was defending its summary judgment, and was trying to get the court of appeals reversed. This would suggest that it somehow bore a burden of proof. On the other hand, summary judgment was at stake, and the appellate courts review the summary judgments *de novo*. In addition, an insurer bears the burden of proof when trying to show that an exclusion applies. Thus, at least informally, Highlands itself bore some burden.

Highlands position was simplicity itself. It contended that a person or a group occupies a space if it is *there*. It suggested that if an entity takes up significant parts of an occupied space, then it occupies the space. Highlands relied upon *Tri-County Service Co., Inc. v. Nationwide Mut. Ins. Co.*, 873 S.W.2d 719 (Tex. App.--San Antonio 1993, writ denied) and *Hernandez v. Heldenfels*, 374 S.W.2d 196 (Tex. 1996) and a smattering of other cases. On Highland’s view, airline passengers occupy their seats, and even trespassers occupy premises.

In contrast, KCI held the view that one occupies premises only if it has some sort of the property or equitable interest therein and perhaps a right of exclusive possession. KCI relied principally upon *United States Fidelity & Guar. Co. v. B&B Oilwell Serv., Inc.*, 910 F. Supp. 1172 (S.D.Miss. 1995) and *Schumann v. New York*, 610 N.Y.S.2d 987 (Ct. Cl. 1994).

Both sides cited *Gregory v. Tennessee Gas Pipeline Co.*, 948 F.2d 203 (5th Cir. 1991). In that case, the court held that a city which owned the land under a lake but not the water on the lake, nevertheless occupied the lake, it “maintain[ed] and use[d] the lake and its waters for drinking water supply. To occupy something is to hold it or keep it for use,” said the court. KCI suggested that *Gregory* held that in order to occupy premises somebody has to own it for the long haul. In contrast, Highlands suggested that *Gregory* stood for the proposition that someone occupies premises if they are there and use it in the short run.

Kelley-Coppedge also argued that Highlands interpretation of f.(1)(a) would render f.(1)(d) meaningless. Of course, no interpretation of one part of an insurance contract should render another meaningless, and every interpretation of an insurance contract should try to give effect to all provisions. Thus, no construction of an insurance contract should render any part of it gibberish or any part of it completely redundant. The relevant part of f.(1)(d)(i) when read in context, provides as follows:

This insurance does not apply to property damage arising out of the actual discharge, dispersal, release or migration of pollutants at or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insureds’ behalf are performing operations:

If the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor[.]

KCI argued that if Highlands interpretation of f.(1)(a) were adopted, then f.(1)(d) would be rendered meaningless. KCI's point was that if f.(1)(a) were interpreted as Highlands suggested, then f.(1)(d) would be redundant. Obviously, KCI was not suggesting that Highland's reading would render f.(1)(d) gibberish.

#### IV.

The majority of the court consisted of Chief Justice Phillips and Justices Abbott, Enoch, Hankinson, and Spector. Justice Rose Spector, who was defeated for re-election in the fall of 1998, wrote for the majority. She has written a number of opinions on insurance law in recent years. For example she wrote several important bad faith cases. Justice Spector did not embrace any of the cases the parties had cited, although she gave the principal ones brief glosses. In particular, she rejected Highland's view that the *Heldenfels* case stood for the proposition that "occupy" means "being there," and she observes that this case suggests, although it does not hold, that one occupies premises only if one has an exclusive right to possess those premises. At the same time Justice Spector goes out of her way to point out that the meaning of the term "occupy" was not at issue in *Heldenfels*, so that no discussion there of the term "occupy" is anything more than dicta, although that dicta points in the direction of the idea that "occupy" means more than your presence.

The five person majority in *Kelley-Coppedge* appears to have based its decision mostly upon the proposition that if f.(1)(a) were construed as Highlands suggests, then f.(1)(d) would be rendered meaningless.

By negating coverage for a contractor's entire operation at a job site, the court of appeals interpretation [of f.(1)(a)] leaves section f.(d) nothing to exclude. Under the court of appeals' interpretation, there would be absolutely no reason to include (d)[,] since (a) already excludes all of the contractor's operations, whether or not the

contractor owns or controls the premises upon which it is performing operations. On that reading, a contractor's off-premises coverage is completely eliminated.

*Id.* at 467. This argument led the majority to “agree with *Gregory* that to ‘occupy’ means ‘to hold or keep for use,’ and we conclude that KCI’s interpretation of the word ‘occupy’ section f.(1)(a) is to only reasonable interpretation.” *Id.*

V.

The four-person minority consisted of Justices Baker, Gonzales, Hecht, and Owen. Justice Raul Gonzales wrote for the minority. He has now resigned from the court and joined the Austin office of a large Texas law firm, where he intends to do appellate litigation, ADRs, arbitration, and to develop a NAFTA-related practice.

Frequently, when appellate courts are divided, various blocks disagree on which facts to emphasize. Often they disagree upon what inferences should be drawn from the facts. Such was not the case here. All of the justices agreed on the facts, but the dissenters plainly and straightforwardly disagreed with the majority’s definition of the term “occupy.”

To be sure, Justice Gonzales agreed that if someone holds or maintains property then he may occupy it. However, that truth does not imply that occupying of property presupposes holding and maintaining it. Moreover, one does not have to have a right of exclusive control (or even the fact of exclusive control) in order to occupy premises. Indeed, Justice Gonzales points out that this is an implication of both the *Gregory* and the *Heldenfels* cases. Moreover, said the dissenters, while KCI performed its pipe laying operations, it had something tantamount to exclusive control over the property, since it had a contractual right of way on the easement.

The dissenters distinguished both the *B&B Oilwell Service* and the *C. O. Falter, Inc.* cases upon the grounds that they merely said that occasional, episodic, limited work did not amount to the continuous occupation of property, whereas KCI's physical presence on the easement was "not occasional, limited, or brief; nor was it merely engaged in routine maintenance operations."

Justice Gonzales also dismissed Justice Spector's treatment of f.(1)(d) upon the grounds that they have "independent, non-overlapping meanings[.]" *Id.* at 469. After all, f.(1)(d) applies to an insured's subcontractors, while f.(1)(a) does not.

More significantly, the minority sought to weaken the principle that no contract should ever be interpreted in such a way as to render a piece of it redundant. According to the minority, some redundancy and overlap is to be expected. "It is not uncommon for contracts to have redundant terms, expressions and provisions, especially when specific provisions require regulatory pre-approval or when standard-form contracts are crafted to accommodate a wide variety to clients and circumstances. The use of several terms and overlapping provisions is usually intended to clarify the scope and intent of the instrument and insulate it from any misunderstanding." *Id.* (Citation omitted.)

## VI.

As Justice Gonzales points out ever so briefly, the majorities reading of f.(1)(a) and how it fits together with f.(1)(d) is defective. As a result, the decision of the majority is demonstrably wrong. When we say this we mean it quite literally. The majorities error can be displayed with the certainty of a mathematical proof.

Exclusion f.(1)(a) contains three parts. First, it refers to "any premises, site or location." Second, it refers to "any insured." Third, it refers to the way premises (etc.) are related to an insured,

namely: whether they were “at any time owned or occupied by, or rented or loaned to” any insured.

Under f.(1)(a) there may be many types of insureds: landowners, renters, operators of businesses, and others. There is no reason to believe that a contractor-insured named as an insured could not be excluded from coverage by the language of Exclusion f.(1)(a). After all, the exclusion refers to “any insured,” and CGL policies are routinely sold to contractors. The majority appears to acknowledge this fact.

Exclusion 1.(d) works somewhat differently. It includes not only the category “any premises, site or location” and the category “any insured,” it omits the third, relational category found in f.(1)(a), but includes a fourth category, “any contractors or subcontractors” performing operations on behalf of any insured. If the named insured is itself a contractor, then it will already be included within the category “any insured.” It will not perform operations on behalf of itself. If other contractors work for (and therefore on behalf of) the insured contractor, or for each other, then they will fall in the category “any contractors or subcontractors.” Those contractors or subcontractors--indeed any contractor or subcontractor other than an insured contractor--need not be insureds under the policy, although their activities can defeat coverage for an insured.

The majority misapprehended the way these exclusions fit together. “KCI argues that if any presence, no matter how transitory, is occupancy under section f.(1)(a), then this section excludes *all* operations of the insured, including those performed by contractors and subcontractors, regardless of whether the insured owns the property or not.” *Id.* at 465. This way of putting the matter is misconceived.

Exclusion f.(1)(a) makes no reference to any operations of the insured. Exclusion f.(1)(a) may apply even if the insured has never performed any operations at the location in question. If an

insured-contractor occupies a site, whether or not it performs operations at that site is beside the point when determining whether f.(1)(a) has been triggered. Occupancy is the only issue. Operations count for nothing. The business does not have to perform operations on a site in order to occupy it. It might store property there, or it might have just arrived, and the pollution might be discharged before it begins operations. It is true that if an insured occupies a site at any time, then the insurer has no liability for pollution on the site. Perhaps that is why the exclusion is called “absolute.” Then again the occupancy of one site does not affect coverage at any other.

Unfortunately, the majority adopted KCI’s faulty vision:

We agree with KCI that if the court of appeals was correct that any presence, no matter how transitory, constitutes occupancy under section f.(1)(a), then section f.(1)(d) is rendered meaningless. Subparagraph (a) applies to releases at or from premises owned or controlled by the contractor. Subparagraph (d) broadens the scope of the exclusion to include releases at or from premises owned by a third party at which the contractor is providing operations, *but only if* the contractor brings the pollutants onto the site. By negating coverage for a contractor’s entire operation at a job site, the court of appeals’ interpretation leaves section f.(1)(d) nothing to exclude. Under the court of appeals’ interpretation, there would be absolutely no reason to include (d) since (a) already excludes all of the contractor’s operations, whether or not the contractor owns or controls the premises on which it is performing operations. Under that reading, a contractor’s off-premises coverage is completely eliminated.

*Id.* at 462. This is the crux of the majority’s reasoning. This quotation embodies *the* crucial hinge upon which the majority’s interpretation of the term “occupy” swings. If this argument is wrong, then the majority’s conception of “occupy” is--of necessity--ill-grounded.

The reality, Exclusion f.(1)(a) does *not* exclude all coverage for every contractor which is an insured. Suppose the following:

- (1) A contractor-insured neither owns nor rents a location upon which it has contracted to do work.
- (2) The contractor-insured never sets foot on the premises, even transitorily.
- (3) All of the work which the contractor-insured has agreed to perform is farmed out to subcontractors, and the subcontractors perform operations there..

Even the inspection work normally performed by a general contractor has been farmed out to yet other subcontractors which report to the contractor at his premises and not at the job site. (There is nothing unlawful or even outlandishly unusual about such an arrangement as the one specified in (1)-(3). One of the principal functions of a general contractor is to coordinate. We live in an age of instantaneous and easy communication. All of this can be done from a distance.)

In the case specified in (1)-(3), there would be absolutely no occupation of the job site by the contractor. In no sense would the contractor occupy the premises upon which the work is being done. He would never *be there*. This would be true even though he *controlled* the premises. Exclusion f.(1)(a) would not apply. Now suppose that there is some sort of pollution dispersed from the job site and that the polluting substance was brought on to the job site by one of the subcontractors. In this case, Exclusion f.(1)(d) would apply, although f.(1)(a) would not. If a clause in the contract has some work to do--if there is a situation in which that contract clause governs the legal relationships amongst the parties--then the contract clause is not meaningless. Hence, if "occupy" means *being there*, there are situations in which f.(1)(d) would have work to do. Therefore, it is not meaningless.

This argument is a knock-down, drag-out proof that construing "occupy" to mean *being there* does **not** render Exclusion f.(1)(d) meaningless. The proof involves no less certainty than a valid mathematical demonstration. It is certainly true that if f.(1)(a) excludes coverage, f.(1)(d) may also

exclude coverage, although often it might not be triggered. This fact is irrelevant to the legal analysis, once one sees that f.(1)(d) can exclude coverage in circumstances when f.(1)(a) will not.

It will not do to say that f.(1)(d) would not apply because the contractor did not bring the pollutants onto the premises. If an insured contractor directed a subcontractor to place pollutants on premises, the insured would have caused the pollutants to be placed on the premises and, in that sense, would have brought them upon the premises.

#### VII.

Although Justice Spector does not develop it, the majority seems tempted by another argument. The majority seems tempted by the view that if occupancy meant sheer physical presence, then no operations of the insured, including operations of its subcontractors, would ever be covered. Of course, f.(1)(a) has nothing whatever to do with operations. This point has already been made. There is another point to be made, however. It is not the case that operations of a subcontractor are necessarily operations of the contractor. To think otherwise is to ignore the distinction between being a legal agent and being an independent contractor.

#### VIII.

This is not the majority's only mistake. The majority suggests that when "occupy" is read in context--as part of a list which includes "own," "rent," and "loan"--it is clear that "occupy" does not mean *being there*, but--instead--means *own or control*. *Id.* at 133.

It is perfectly orthodox law that contract terms be understood in context. Sometimes this is called the *ejusdem genesis* rule. However, the majority has misapplied that rule. A location can be loaned to someone for all sorts of purposes and for many different lengths of time. The owner of a patch of land could loan it to somebody else for all sorts of purposes: conducting a picnic, having

an early morning wedding, for the one-time test of an experimental bottle-rocket, and so on. The owner of a patch of land could loan it to any number of different people for many different purposes all at the same time. Thus, none of the people to whom the land was lent would have an exclusive right to control or possess the land. Indeed, the right any borrower might have to control it could be extremely limited. Since the term “loan” provides some of the context within which the term “occupy” must be understood, it is false to claim that the term “occupy” must be understood in a way which is analogous to owning or leasing.

There is another point to be made about this linguistic context. The phrasing is not that of a simple list: own, occupy, rent, or loan to. Rather, it is a balanced construction consisting of separated phrases. The actual quote is this: “at any time owned or occupied by, or rented or loaned to, an insured[.]” Thus, a balanced, oppositional, and parallel construction is set up. “Occupied by” is not like “owned.” Rather, “occupied by” is set up as a partial complement to “owned.” The same is true for the other phrase, “rented or loaned to.” In that phrase, “loaned to” is set up as something different from “rented.” In neither case does the second term of the phrase express the same idea as the first term. In fact, given the parallelism in the construction, it is quite clear that “owned” and “rented” are designed to express similar ideas and that “occupied by” and “loaned to” are designed to express similar ideas.

It seems quite clear from the summary judgment facts that the easement was something-very-much-like lent to KCI. No evidence on this point was before the supreme court (or either of the other courts), but the general industry pattern is well-known. The owner of an easement instructs a construction company to go out and do work on an easement--in this case to lay a pipeline. In other words, the owner of the easement hands it over to a construction company for a

period of time (which is in this case indeterminant) for the purpose of doing work. There is no charge for access to or the use of the land. The contractor is like a bailee. The land is (sort of) lent to the contractor. If the construction company goes out and does the work on the premises which have been loaned to it, it occupies those premises. In the normal course, it will control the property.

#### IX.

Alas, the opinion of the majority leaves the law in a more confused state than it was before. Unfortunately, the majority opinion gives several different definitions to the term “occupy” and, as a result, creates obscurity and thereby makes insurance underwriting more difficult. In a way, KCI presented its case just right. It did not argue for a specific definition of “occupy.” Instead, it argued that whatever the term unambiguously means, it requires more than mere presence. What is good advocacy, however, is not always opinion writing.

In one place, the majority states that the term “occupy” means “to hold or keep for use.” In another place, the court indicates that a contractor occupies premises only if it *owns* or *controls* them. *Id.* The majority implies that “occupy” means *to possess* and perhaps even *to possess exclusively*. Thus, the majority provides up to six meanings for the term “occupy”:

1. “Occupy” means *own*.
2. “Occupy” means *control*.
3. “Occupy” means *hold*.
4. “Occupy” means *keep for use*.
5. “Occupy” means *possess*.
6. “Occupy” means *exclusive possession*.

Significantly, many of the six ideas used to define “occupy” are different from each other. It is possible to control a location which one does not own. Clearly, one can control, hold, or keep for use, premises one does not own or even possess. Trespassers can control, hold, and keep premises for use, even if their status in activities are illegitimate. Trespassers can be occupiers; however, they cannot have ownership nor legal possession of property. (According to § 7 of the RESTATEMENT (FIRST) OF THE LAW OF PROPERTY (1936), the term “possession” is to be defined as follows: “If possessory interest in land exists in a person who has (a) a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land; or (b) interests in the land which are substantially identical to those arising when the elements stated in Clause (a) exist. Thus, someone can occupy land without possessing it.) It appears to be possible to hold premises which one is not keeping for one’s own use. It is possible to hold premises one does not own. One can possess premises one does not exclusively possess. And so forth.

Moreover, the precise meaning of the phrase “to hold or keep for use” is not clear. The phrase seems to involve a genuine disjunction. Thus, one can hold premises without keeping them for use. Someone else might suppose, however, that the court’s phrase translates as “to hold for use or to keep for use.” Even these ideas are not identical. One can hold something for a short time but not keep it. It would be possible to hold premises for one’s future use, and yet lease them for the short term, but one would not, at that time, be *keeping* the premises for one’s use precisely because one had leased them out. Or maybe it would be appropriate to say that one was keeping the premises in one sense (by continuing to own them) but not keeping them in another (because one was renting

them out). Thus, even the term “keep” in “keep for use” is ambiguous and therefore obscure. Surely it is a mistake to define an unambiguous word in terms of an ambiguous one.

There is another ambiguity in the phrase, “to hold for use or to keep for use.” It is not clear from the face of the phrase whose *use* is involved. We might hold premises for your use, or we might hold them for mine. We might keep premises so that we might turn them over to someone else, or we might keep them so that we ourselves might use them. Which meaning is intended is not clear from the face of the phrase.

Thus, the various different meanings for the word “occupy” to which the majority subscribes makes the linguistic situation less clear than it was before. This murkiness will undermine rational insurance underwriting in this niche, as well as efficient claims administration. Semantic clarity is especially important in both insurance practice and insurance law. Millions of policies are underwritten by a large number of companies. Underwriting standards suffer and adjustment practices become more difficult when language is rendered unclear.

Defining “occupy” in terms of *possession* is unfortunate. Clearly, one can occupy a location without possessing it exclusively. Spouses occupy the same house but--as a rule--neither has the right to exclusive possession. Further, the concept of *possession* is notoriously obscure. This is true even after courts have thought about the concept for several hundred years. It is, therefore, not well-advised to define occupation in terms of possession. Paradoxically, the opinion of the majority makes the term “occupy” ambiguous, although the majority precisely denies that there exists any ambiguity.

## X.

This is not the only obscurity which the majority has injected into insurance law. The *Tri-County* case is one which has been widely discussed in environmental insurance circles. One cannot go to a CLE festival of lectures which takes up pollution insurance without hearing a disquisition upon this case. Now it is being paired with a discussion of *Kelley-Coppedge*. The opinion of the majority in the latter case appears to throw this case in some doubt, and yet they have not overruled it. It is important to remember that the Texas Supreme Court denied writ in (and therefore declined to hear) *Tri-County* in 1994.

In *Tri County*, a paving contractor was on a certain construction premises for as many as four months. The majority implies that the contractor in *Tri County* was there long enough to occupy the premises. The majority suggests this proposition by refraining from overruling--or even criticizing--any aspect of the decision of the court of appeals. (Interestingly, at oral argument in this case, Justice Gonzales asked counsel for KCI if the court needed to overrule *Tri County* in order to decide in favor of KCI, and he answered in the affirmative.) Of course, there are two arms of reasoning in *Tri County*, and one of them--the one pertaining to f.(1)(d)--is untouched by this case. Nevertheless, it is significant that this court does not overrule even that part of *Tri County* which concerns f.(1)(a). Of course, there are several ways to understand *Tri County*. What the court finally says that it holds is this: the trial court properly granted summary judgment to Nationwide and denied summary judgment to Tri County because "the absolute pollution exclusion at issue unambiguously bars coverage for any liability arising out of the release or escape of pollutants by the insured in an area the insured 'occupied' or was otherwise 'performing operations.'" *Tri County*, 873 S.W.2d at 722. Significantly, this holding encompasses both f.(1)(a) and f.(1)(d). Moreover, *Tri County* was on the

construction premises for a period of four months. This was much longer than Kelley-Coppedge was present on the presence where it was laying a pipeline. Moreover, the argument presented by Tri County was not that it never occupied the premises. Its argument was that it occupied the premises during the day but not at night. Thus, the holding of *Tri County*, insofar as it pertains to f.(1)(a), can be reconstructed this way: if a contractor occupies a construction premises, then its occupation does not intermittently cease when it goes home at night.

Thus, the majority implies that if a contractor is on a premises (or at a site) for a lengthy period of time, then it occupies the premises or site. The majority also says, however, that if a contractor's presence is transient, it does not occupy the premises. Unfortunately, the majority gives no indication as to where transient presence ends and occupation begins. Perhaps the majority is suggesting that this distinction is a factual matter. Additionally, KCI's presence in the oil field where it was laying the pipeline at the time of this accident was not "transitory" as suggested by the majority. This is evidenced by the summary judgment proof entered into the record.

More significantly, from a public policy point of view, it appears as though some contractors are going to be occupiers of premises, and some are not. Pollution clean-up costs can be horrendous, as everyone knows. As a consequence, insurers will wish to charge one price to contractors which occupy premises, another price to contractors which do not, and a third to those with an unclear status. One would also expect economically efficient underwriting to obtain information, commitments, and perhaps warranties from insureds about whether they occupy premises. This process will needlessly complicate insurance underwriting.

## XI.

There is a feature of the supreme court litigation of the *Kelley-Coppedge* case which is not apparent from the face of the decision. A number of amicus briefs were filed. Various trade associations of contractors caused several such briefs to be filed. A trade association for insurance agents filed an amicus brief. The Office of the Public Insurance Counsel filed an amicus brief. (In Texas, the Public Insurance Counsel is a statutorily created ombudsman who is charged with looking out for the interest of insurance consumers.) These briefs were filled with materials which had never been submitted to any trial court, including parts of insurance contracts not at issue in this case, a handbook of the Texas Association of Insurance Agent concerning CGL policies, materials from the old State Board of Insurance (the predecessor of the current Texas Department of Insurance), materials from the ISO, transcripts of hearings before the State Board of Insurance, assorted extraneous pollution exclusions, and pages from various types of study materials.

Some of the amici took absurdly strong positions. One of them, for example, argued that independent contractors cannot occupy the land upon which they work. This is nonsense, of course. Consider the following hypothetical example. The Patton Land Company owns a parcel of land. It wants construction done on it. It hires the Jacob Construction Company, to manage completely the entire project. Jacob, an independent contractor, hires planners, engineers, lobbyists, architects, and a variety of construction companies to shape the land, put in sewage, and build streets. It also hires the Paul Building Company to put up some buildings. Paul in turn hires a number of subcontractors to help: roofers, window people, plumbers, HVAC companies, and so forth. Thus, we have several layers: there is the owner (Patton); there is the general contractor (Jacob); there is the builder (Paul); and there are Paul's subs. Now suppose that Paul is an independent contractor

with respect to both Jacob and Patton. Thus, we posit that Jacob does not supervise the work of Paul, at all. Now suppose that Peter Plumber, working for the plumbing subcontractor, is injured on the site by a defect in it and sues Patton, Jacob, and Paul. Whatever else is true about the lawsuit, it would be absurd for Paul to move for summary judgment on the grounds that he was an independent contractor and therefore could not be an occupier-in-control of the premises, because he's not an occupier. It would be ridiculous for Paul to assert that he was immune from liability because only occupiers of land can be liable to the employees of their subcontractors, and he cannot be liable because--although he controls the premises--he is an independent contractor with respect to Jacob, and behind him Patton. A similar point can be made with respect to Jacob. Independent contractor status has nothing to do with whether one occupies land.

Absurdity and shrillness were not the worst of it. The single most important feature of all of these amicus briefs collected together was that not one single new or different point was made by any of them, although one of them ran fifty pages, and several amici filed two briefs. Even the one amicus brief filed on behalf of the insurer presented nothing not already in play. Another significant feature of this case was that the amici filled the record inadmissible, extraneous material. Highlands filed several motions to strike that were never even ruled upon by the Court. One Justice, in oral argument, even referred to some of these "secondary material." If the Court does not negative these efforts to "load the record" in a serious way serious, then it will be open season for amici to put everything into the record but the kitchen sink in as "attachments" or "exhibits. Who knows when something will grab some clerk's attention? Obviously, this is no way to run a court.

The profligate filing of amicus briefs and exhibits has several untoward consequences for insurance litigation. First, it drives up the price. It is extremely difficult for the person or entity

against whom a plethora of briefs are filed to simply ignore them. Responses are necessary. Writing them is expensive. Second, the filing of numerous amicus briefs substantially raises the workload of the court. If nothing new is presented, why burden the court. Third, parties frequently recruit other lawyers to file amicus briefs. This often happens in insurance litigation. This recruitment plays two functions. It is an attempt to convince the judges that the case is important, and second, if judges are elected, as they are in Texas, and if major contributors to campaigns are funding and filing amicus briefs, this may--and we emphasize *may*--create a temptation for some judges. Third, multiple amicus briefs make the situation political in yet another way. Adjudication is for the parties. Courts are not legislatures. They are not committees-of-the-whole. A courtroom is not a room in which public policy hearings are held. Adjudication is for the parties. Having a variety of non-litigants throw in their "two-cents" tends to pull the adjudicative process towards the legislative process in an illegitimate way. Fourth, amicus contributors should *not* be providing courts with extraneous material which has not been filtered through the adjudicative process. Judicial notice is a fine thing, but it is for the litigants, not for the policy wonks. Significantly, although there was a passing reference to some of this material in the oral argument of the *Kelley-Coppedge* case, it apparently played no role in the court's decision. This impotence is proper.

We have seen this happen in other cases, as well as in this one. We have filed an amicus brief or two ourselves. On the basis of our experiences, we propose that the Texas Supreme Court initiate a reform. The reform should be a new rule of appellate procedure, and it should require that anyone wishing to file an amicus brief request leave from the court to do so. The motion requesting leave should set forth, briefly, the points the amicus wishes to make and perhaps some brief reference to the authorities upon which it wishes to rely. This pleading should be no more than--say--

-ten pages in length, and an amicus should be permitted to file a brief only if the court grants it leave to do so. The initial motion for leave should include some indication as to whether the party intends to file extraneous material and, if so, which ones. Possibly, the extraneous materials should be filed with that motion. The motions should be examined skeptically. *Ryan v. Commodities Trading Commission*, 125 F.3d 1062 (7th Cir. 1997) (Posner, J.) The Supreme Court of Texas should develop rules and doctrine governing amici. See Regan William Simpson, *How to Be a Good Friend to the Court: Strategic Use of Amicus Briefs*, 28 THE BRIEF 38 (Spring 1999).

The Texas Supreme Court should enforce not only these rules, but rules of evidence and rules governing lawyer conduct in dealing with amicus briefs. Hearsay material should not be permitted. Materials which violate the best evidence rule should not be received. Lawyers who are not licensed in Texas should not be permitted to file such briefs, and, since Rule 47.7 of the Texas Rules of Appellate Procedure (in effect) forbids the citing of unpublished cases, the amicus brief should not be permitted to do this, and they should be struck if they do so. Possibly the lawyers violating the rules should be referred for discipline.

## XII.

In some ways, *Kelley-Coppedge* was an insurance coverage litigator's dream. It was a contained conflict. There were no wounded bodies. The case was not awash in sympathy for dreadfully injured people. The facts were clear. The contract was crucial. The dispute boiled down to a single word.

On the other hand, the litigation was troubled. Probably, the result was influenced by a pleading error early in the case. Had all parts of what almost everyone calls the "absolute pollution exclusion" been pleaded, the case might well have come out differently. Hence, on the one hand,

there has been a clear ruling on one part of the pollution exclusion, without any alternative holdings. It's a 5-4 ruling, and we think it's wrong, but so it goes. On the other hand, the interests of justice are probably not served by litigation which is not focused on all the important issues. (Of course, that distortion was not Kelley-Coppedge's fault or the fault of its counsel. It wasn't even the fault of the amici.