

hand the assertion that the acts of Whisnant could not be deemed an occurrence or accident under the CGL policy because they were performed intentionally.” Justice Melton, the lone dissenter, would have affirmed the trial court because Whisnant’s work was performed intentionally and therefore could not be an “occurrence.”

**Comment**

The holding in *American Empire v. Hathaway* is not entirely surprising: most courts recognize that construction defects *per se* are not “occurrences,” but that consequential damage to property *other than* the insured’s faulty work can be accidental. What is missing from the opinion (and from the dissent as well) is any type of analysis: the majority simply held there was coverage, and the dissent simply argued there was not. While one can commend the justices for their brevity, the avid reader might have expected some explanation of the reasons why the majority and dissent felt their respective positions were consistent with the parties’ expectations or good public policy. That enlightenment will have to await another opinion. // Barnes

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**Liability Insurance/  
Duty to Indemnify**

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**Texas Supreme Court Recognizes Possibility of Duty to Indemnify When Pleadings Preclude Duty to Defend**

*Extrinsic Evidence May Establish Duty to Indemnify,  
While Duty to Defend Depends  
Solely on Assertions in Pleadings*

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*Burlington Northern and Santa Fe Railway Company v. National Union Fire Insurance Company of Pittsburgh, Pa.*, \_\_\_ S.W.2d \_\_\_, 20110 WL 711099 (Tex., Feb. 25, 2011)

**Case at a Glance**

Since evidence extrinsic to the pleadings in a lawsuit against an insured can establish the insured’s

liability duty to indemnify but not its duty to defend, a liability insurer’s duty to indemnify does not depend on the existence of the duty to defend and it is possible for an insurer to have a duty to indemnify in a case in which it had no duty to defend.

**Summary of Decision**

*Underlying Tort Litigation.* Santa Fe Railway (BNFE) hired SSI Mobely (SIM) to control vegetation along its right of way from 1994 through 1996, e.g., by using chemical weed-control. SIM was contractually obligated to obtain CGL coverage and name BNSE as an additional insured. SIM bought the insurance from National Union Fire (NUF).

In 1995, a collision occurred at a railroad crossing between a BNSE train and a car. The driver of the car and one passenger were killed, and a second passenger was injured. Pleadings in the tort case alleged that the cause of the accident was excessive vegetation near the relevant crossing, causing the driver to have an obstructed view of the oncoming train, and that SIM was negligent in the performance of its obligations to BNSE.

BNSE tendered its case to NUF, which denied all coverage—duties of both defense and indemnity. Eventually, BNSE entered into a “high-low” agreement with the plaintiffs, one of the terms of which was that if the jury verdict exceeded \$8M, BNSE would pay \$8M. The jury awarded \$27M, so BNSE paid the agreed sum.

*Insurance Coverage Litigation.* BNSE had filed a declaratory relief action against NUF. On cross-motions for summary judgment, the trial court awarded NUF a summary judgment and entered a take-nothing judgment against BNSE. The court of appeals affirmed. It held on the basis of the “Eight Corners Rule” that there was no duty and hence that there was no duty to indemnify.

The “Eight Corners Rule” is the Texas rule that there is a duty to defend if the facts pleaded, when liberally construed, would, if true, entail a duty to indemnify, and the opposite if the pleaded facts do not, if true, entail a duty to indemnify. In determining the duty to defend, a court may not look at facts extrinsic to the live petition, but must depend completely on the pleading. (“Indemnity” in this context is taken to mean “pay the insured’ covered loss.”) The court of appeals concluded that whether

there was a duty to indemnity depended on the existence of a duty to defend. Without the latter, the former cannot exist. The court of appeals based its decision on an influential Supreme Court of Texas decision, *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002).

BNSE challenged on two grounds: (1) the trial court had incorrectly applied the 8-corners rule when determining NUF's duty to defend, and (2) that it erred in failing to consider extrinsic evidence when considering the insurer's duty to indemnify. Of course, the latter point is a challenge to the view that the existence of a duty to defend is a necessary condition of the existence of a duty to indemnify.

NUF responded that (i) the court of appeals determined the duty to defend correctly, and (ii) "even if the court of appeals had analyzed [NUF'S] duty to indemnify in the light of extrinsic evidence, its conclusion in the light of extrinsic evidence, would have been the same." Therefore, NUF has no duty to indemnify BNSE. Apparently, NUF's position was based on its policy's "completed operations" exclusion, the applicability of which turned on whether the collision occurred after SIM's work was completed.

*Supreme Court Opinion.* In reversing, the Supreme Court of Texas stated that it need not consider NUF's duty to defend, or decide it, to rule on NUF's duty to indemnify. The court observed that the duties of defense and indemnity are independent of one another. The former depends upon what facts are pleaded, while that latter depends upon what facts are established. Thus, a duty to indemnify can exist even if the "Eight Corners" of the pleadings and insurance policy preclude a duty to defend.

Thus, its actual, presidential holding is entirely about the duty to indemnify. It agreed that under some circumstances pleadings defeat the duty to defend and also preclude a duty to indemnify. For example, if a petition pleads that a drive-by shooting is intended and/or deliberate, there can be no duty to indemnify. This is because of the "Fortuity Only Rule" adopted by the Supreme Court of Texas in *Farmer's Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997).

The court observed, however, that the rule in *Griffin* does not control this case. The pleadings in this case do not establish that SIM's work is a completed operation. For one thing, the BNSE-SIM

contract extended though 1996. For this reason, if for no other, NUF has not established that it has no duty to indemnify. On that basis, the supreme court reversed the court of appeals, without hearing oral argument, and remanded the case to that court for further proceedings consistent with the Court's opinion.

### Comment

Why does the Court say that it need not decide the duty to defend in this case? BNSE pleaded an "occurrence," i.e., an accident. It has pleaded "bodily injury." It has pleaded that the accident took place within the policy period. And the pleadings do not appear to be vague or without factual allegations. These add up to the existence of a duty to defend. Of course, BNSE's pleadings may have brought it squarely and without question into the exclusion. One is inclined to doubt this, however. // Quinn

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## Liability Insurance/ Legionnaires Disease

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### Pollution and Fungi Exclusions Not Applicable to Claim for Alleged Damages Resulting from Legionnaires' Disease Contracted at a Hotel

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#### *Legionella Bacteria Not a "Pollutant"*

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*Westport Ins. Corp. v. VN Hotel Group, LLC*, \_\_\_ F.Supp.2d \_\_\_, 2010 WL 5652435 (M.D. Fla. 2010)

### Case at a Glance

Pollution and Fungi or Bacteria Exclusions were not applicable to claims for "bodily injury" caused by Legionnaires' Disease contracted by hotel guests from spa tub and room showers.

### Summary of Decision

In this case, the United States District Court of the Middle District of Florida held that the Pollution and Fungi or Bacteria Exclusions did not preclude