

concealments regarding defects in the property.

The Raineses tendered the underlying suit to Safeco for defense and indemnity under both the homeowners' policy and the umbrella policy. Safeco denied coverage and refused to defend or indemnify the Raineses. The Raineses retained counsel at their own expense and prevailed in the underlying suit on summary judgment and on appeal. The Raineses then initiated an action against Safeco in Missouri state court, alleging breach of the insurance policies for failure to defend the underlying suit, and seeking the fees and other expenses incurred in their defense of the underlying suit. They also sought attorney's fees for the action against the insurer. Safeco removed the action to a federal district court in Missouri, based on diversity jurisdiction. Interpreting the policies under Kansas law, the district court granted Safeco's motion for summary judgment.

The Eighth Circuit affirmed, determining that because the undisputed facts did not suggest the possibility of coverage under Kansas law, Safeco did not breach the policies by declining to defend the Raineses in the underlying suit. The Raineses' homeowner's policy covered claims against the insured for damages because of "property damage caused by an occurrence to which this coverage applies." The policy defined "occurrence" as "an accident, including exposure to conditions[,] which results in: ... property damage." In turn, "property damage" was defined as "physical damage to or destruction of tangible property, including loss of use of this property." The terms of the Raineses' umbrella policy were not materially different from those of the homeowners' policy.

The Eighth Circuit concluded that the policies' language unambiguously limited Safeco's duty to defend and indemnify to cases where the insured was exposed to liability for "property damage" caused by an "occurrence." The Raineses argued that the definition of "occurrence" was ambiguous because the policy defined the term as "an accident" but left "accident" undefined. Lyons did not seek to hold the Raineses liable for "property damage" caused by their alleged wrongful conduct, however. Rather, Lyons sought damages for economic harm arising from the Raineses' alleged "statements and concealments" concerning the property's condition. The Eighth Circuit observed that in near-identical circumstances, a Kansas court of appeals held in *Bush v. Shoemaker-*

Beal, 26 Kan.App.2d 183, 987 P.2d 1103 (Kan. Ct. App. 1999), that an underlying claim alleging negligent misrepresentation by sellers concerning undisclosed termite damage to a home exposed the defendant to liability for economic loss, not damage to tangible property. The *Bush* court concluded that an action claiming negligent misrepresentation fell outside the homeowner's policy coverage because the property's damaged condition "was not caused by the negligent misrepresentations." In the absence of "persuasive data that the highest court of the state would decide otherwise," the Eighth Circuit concluded that the Kansas Supreme Court would hold, based on *Bush* and other case law, that Lyons's underlying suit did not seek damages for covered "property damage."

The Eighth Circuit rejected the Raineses' argument that Lyons sought more than damages for economic harm because she included "allegations of extensive damage to the property," concluding that Lyons's reference to the property's condition did not convert her claim into one seeking recompense for "property damage." The court noted that the Raineses' theory had been flatly rejected by a federal district court in Mississippi in a case later expressly approved by the *Bush* court. // Holt

Liability Insurance/Rescission

Liability Insurers May Buy Insurance Policies Back from Insureds Without Violating Public Policy

A Buy-back Contract Is Legally Permissible in Texas under Most Circumstances, Even While Underlying Litigation Is Proceeding

General Agents Insurance Company of America v. El Naggar ___ S.W.3d ___, 2011 WL 1643575 (Tex. App. Houston, May 3, 2011)

Case at a Glance

Buy-back contracts between liability insurers and their insureds do not violate public policy, even if the buy-back extinguishes the insurer's obligation to pay for the insured's liability in active litigation, unless the insured is required by statute to carry the liability insurance at issue.

Summary of Decision

Plaintiff, El Naggar, owned a furniture store. He contracted with Traxel Construction for the construction of steel building and concrete slab. The project was not a success, so in 2001 Naggar sued Traxel. The first trial ended in a mistrial, with Traxel's liability insurer funding the contractor's defense subject to a reservation of rights. At that time, the contractor and its liability insurer entered into a buy-back agreement. The insured contractor got \$50,000, and the insurer got to cancel the policy and receive a release of any liability based on the contract of insurance.

Following the buy-back, Naggar's case against Traxel proceeded to a second trial, which resulted in a judgment against Traxel, in Naggar's favor. Naggar then sued Traxel's insurer, General Agents Insurance Company (Gainsco), to collect the judgment. Among the claims against Gainsco was a request for a declaratory judgment that the buy-back agreement violated Texas public policy. On cross-motions for summary judgment on the validity of the buy-back agreement, the trial court granted Naggar's motion and declared the agreement void. After some exceptionally convoluted procedural maneuvering, Naggar's case against Gainsco eventually landed in the Texas Court of Appeals, 14th District-Houston.

The parties asked the appellate court to address a single substantive issue: Do insurance buy-back agreements violate public policy? The court's answer was no, at least under the circumstances of this case. In so ruling, the court set forth the general principles to be applied in deciding whether insurance buy-back agreements violate public policy. The question whether a contract is contrary to public policy is a question of law for the court. Texas law and public policy favor the voluntary resolution of disputes, and this includes settlements with releases, which will be upheld unless they violate public policy expressed in statutes and views of the Supreme Court of Texas. The critical factor in determining whether an insurance policy buy-back violates public policy is whether the insurance policy at issue is statutorily mandated. Here, Naggar was unable to cite a statute requiring the CGL policy at issue. This factor distinguished the present case from *Ranger Insurance Co. v. Ward*, 107 S.W3d 820 (Tex.App.—Texarkana 2003, pet. denied), in which a court refused to allow the buy back of a statutorily required liability policy issued to an aerial applicator of pesticides.

Comment

The court is certainly right about the law as it stands. Buy-backs, like this one, are legal and not contrary to public policy. Is this a good idea? Or should it be changed? Small contractors like Traxel whose insurers are disputing coverage are particularly vulnerable to the insurance policy buy backs. Such buy-backs have the potential to change the construction industry. People will tend to use large contractors with lots of assets. People will tend to require liability insurance policies which contain promises forbidding buy-backs running to the insured's customers. People will require surety bonds. And so forth. As a consequence, the cost of small construction projects will increase, and that will not be good for small, or small-ish, business. Ironically, a judicial decision that purports to promote freedom of contract will have effect of harming small business. // Quinn

Life Insurance

Seventh Circuit Upholds ERISA Plan Administrator's Decision to Pay Life Insurance Benefits to Deceased Employee's Children, Rather Than to Assignee of Deceased Employee's Estate

Plan's "Facility-of-Payment" Provision Gave Plan Administrator Discretion to Chose Whom to Pay

Jackman Financial Corp. v. Humana Insurance Co., ___ F.3d ___, 2011 WL 2119757 (7th Cir., May 31, 2011)

Case at a Glance

Seventh Circuit upheld an ERISA plan administrator's decision to pay life insurance benefits to the deceased employee's children under a "facility-of-payment" provision of the plan, which allowed the administrator to chose whom to pay, at its discretion, from a list of potential beneficiaries when the named beneficiary was deceased. The court rejected the claim of a finance company, which lent funds to the employee's mother for the employee's funeral, and claimed to be entitled to a portion of the benefits