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## Notice

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**Liability Insurer Owes No Duty—Contractual or Extra-Contractual—to Any Insured to Provide an “Unsought, Uninvited, Unrequested, Unsolicited Defense”**

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*Insurer's Actual Knowledge That Insured Has Been Sued Does Not Establish Absence of Prejudice Resulting from Late Notice*

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*National Union Fire Insurance Company v. Crocker*, \_\_ S.W.3d \_\_, 2008 WL 400398 (Tex. Jan 25, 2008)

### Case at a Glance

A “liability insurer ha[s] no duty to volunteer to defend [an] additional insured[,]” without being asked to do so by that insured. The fact that the insurer knows that an additional insured has been sued does not create such a duty and does not “require the insurer to gratuitously subject[] itself to liability” Thus, if there is no request for coverage, there is no duty to defend. The insurer’s actual knowledge that the insured has been sued does not estop the insurer from invoking the policy’s late notice defense.

### Summary of Case

Beatrice Crocker resided in the Redwood Springs Nursing Home, which was owned by Emeritus Corporation. Crocker was injured when an employee of Emeritus, Richard Morris, opened a door and struck Crocker. Morris was acting within the course and scope of his employment, though he was fired shortly after the incident. Crocker made a claim and sued both Emeritus and Morris.

*Underlying Case.* National Union Fire Insurance (“NUF”), an AIG company, defended Emeritus but not Morris, although he was an additional insured under the relevant CGL policy, as NUF knew. NUF also knew that Morris was sued and served. Morris himself was not aware that he was covered, although he knew he was a named defendant. However, NUF did not

inform Morris that he was an insured, nor did it offer to defend him. Nevertheless, NUF did repeatedly try to contact Morris about Crocker's claim by certified mail, by phone, and by leaving phone messages. It tried this before and after Crocker filed suit. Defense counsel for Emeritus tried to talk privately with Morris at a deposition, but Morris refused, although he talked privately with counsel for Crocker. Morris did not appear at trial.

*Underlying Trial.* After the evidence was presented at trial, the court granted Crocker's motion to sever the claim against Morris. The jury then found in favor of Emeritus. Thereafter, the judge entered a default judgment on the severed claims against Morris and in favor of Crocker for \$1million.

(There is something extremely odd about what happened in the underlying case. According to the Supreme Court, the jury refused to find Emeritus liable because it did not find Morris negligent. This conclusion follows from the wording of the questions submitted to the jury. One wonders why the state district judge would have entered the default judgment against Morris. His action, although perhaps permitted from the point of view of certain technicalities in Texas Civil Procedure, was certain to be reversed, as—indeed—it was after enormous sums were spend on pointless insurance litigation. All of what is said in this paragraph is not actually said by the unanimous Supreme Court, but it is implied in its footnotes and at least once in its text.)

*Insurance Suit.* Crocker then sued NUF to collect the judgment claiming that she was a third-party beneficiary of the contract. Just as she would have if her case against NUF were a subrogation case, Crocker's stepped into Morris's shoes, and her rights were limited to his. NUF defended on the grounds that Morris did not give it notice and did not ask for a defense. The United States District Court for the Western Division of Texas decided for Crocker, and it did so on two grounds. First, it ruled that NUF must show prejudice in order to establish a notice-based policy defense. Second, NUF breached its contractual duty to defend Morris by failing to notify him that it would defend him. NUF appealed. The Fifth Circuit certified three questions to the Texas Supreme Court, and it answered two of them—the first and third.

*First Certified Question:* "Where an additional insured does not and cannot be presumed to know of coverage under the insurer's liability policy, does

an insurer that has knowledge that a suit implicating policy coverage has been filed against its additional insured have a duty to inform the additional insured of the available coverage?" The court answered Q-1 *No*. It gives two basic reasons. First, the meaning of a contract is to be found in the language of the contract, if possible. The NUF CGL policy contains no language even tending to suggest that the insurer has a duty to inform any insured about the existence of insurance or coverage. A liability insurer is not legally obligated to leap forward into a legal fray if it is not asked to do so. Notice-of-claim and request-for-defense are necessary conditions of the insurer's relevant obligations, although obviously not sufficient conditions.

Second, the deciding court in this case—the Texas Supreme Court—has articulated clear and binding precedent governing this case. In *Weaver v. Hartford Accident & Indemnity Company*, 570 S.W.2d 367 (Tex. 1978), the court held that "the liability insurer had no duty to volunteer to defend the additional insured." The fact that the employee in *Weaver* did not know that he was an additional insured made no difference to the court, as it explicitly said. Most significantly, the *Weaver* court indicated that a liability insurer need not gratuitously subject itself to liability, if not asked to do so by a relevant insured.

The *Weaver* case is not the only precedent. This court affirmed its previous decision and logic in *Harwell v. State Farm Mutual Automobile Insurance Company*, 896 S.W.2d 170 (Tex. 1995), even though the facts in *Harwell* were quite different from those in the present case. Together *Weaver* and *Harwell* make the point that notice and request provisions of insurance contracts serve two essential purposes: "(1) they facilitate a timely and effective defense of the claim against the insured, and more fundamentally, (2) they trigger the insurer's duty to defend by notifying the insurer that defense is expected." An insurer's knowledge of a person's status vis a vis an insurance policy does not impose a duty to act on an insurer; the insurer needs a request before it commits itself and its wealth to protecting an insured. If the opposite were true, a liability insurer would have to spend resources on frequently "tracking" down to the courthouse to check on a filed case and might even provide a defense when the insured did not want one—at least one from that insurer.

The court's answer to Q-1 obviated the need to

address Q-2, which depended on an affirmative answer to it. Here is Q-2: "If [Q-1] is answered in the affirmative, what is the extent or proper measure of the insurer's duty to inform the additional insured, and what is the extent or measure of any duty on the part of the additional insured to cooperate with the insurer up to the point he is informed of the policy provisions?" Although the Texas Supreme Court did not take this question up, it will be mentioned again in the Comment.

*Third Certified Question.* The Texas Department of Insurance has issued a regulation which "requires a showing of prejudice in certain suits before an insurer may use 'late notice' to deny coverage." (Order Number 23080, March 13, 1973). Now for Q-3: "Does proof of an insurer's actual knowledge of service of process in a suit against its additional insured, when such knowledge is obtained in sufficient time to provide a defense for the insured, establish as a matter of law[,] the absence of prejudice to the insurer from the additional insured's failure to comply with the notice-of-suit provisions of the policy?" Again the court answered *No*.

The real question here, said Justice Willett for the entire court is not whether there was prejudice. Clearly there was, NUF was exposed to a \$1 million judgment. The real question is whether NUF was estopped from denying coverage on the basis of its knowledge. The answer to this version of the question is determined by the answer to Q-1. Since NUF had no duty to notify Morris of coverage and no duty to provide a defense, it was not estopped from asserting [the insured's] breach of the policy as a bar to its liability." Absent a threshold duty to defend, there can be no liability to Morris, or to Crocker derivatively. A similar-looking point is considered by the Supreme Court's decision in *PAJ, Inc. v. Hanover Insurance Company*, 243 S.W.3d 630 (Tex.2008). The issue in the immediately former case was "whether a named insured's untimely compliance with the notice-of-suit provision is excused if the delay inflicted no prejudice on the insurer." Thus, notice and prejudice are issues in both cases, but the similarity of the two cases is only a matter of appearance. In *PAJ* there was only late notice which was stipulated to be unprejudicial. In this case, there was no notice at all. Tardiness and nonexistence are not the same thing!

"More importantly," says the court, the key issue in this case is not the same as the key issue in *PAJ*.

There, the key issue was notice of suit; here the issue is request for defense. These are quite different. "An insurer cannot necessarily assume that an additional insured who has been served but has not given notice to the insurer is looking to the insurer to provide a defense. Potential[ly, at least,] insureds, for a variety of reasons, might well opt against seeking a defense from an insurer."

*Conclusion.* NUF had no duty to notify Morris of his insured status, and it had no duty to defend him. In general, liability "insurers need not provide coverage to additional insureds who never seek it[.]" If they did, it would be an extra-contractual duty, and the supreme court will not impose such a thing. "Insurers owe no duty to provide an unsought, uninvited, unrequested, unsolicited defense."

### Comment

The Supreme Court's account of duty and its account of insurer prudence and good sense are quite different. It virtually states that the prudent liability insurer will choose to try to notify additional insureds about their insured status and about the availability of a defense. If NUF had done this, Justice Willett says, the judgment against Morris and years of subsequent and expensive insurance litigation would have been avoided. As to this matter, however, liability insurers have no duty to be prudent.

Still one can wonder about the justice of the supreme court's rule. Suppose Morris was an ignorant fellow—perhaps of little education, not much ability to read. What if Morris has led a life before the Crocker incident in which he did not trust capitalist executives, or insurance companies. Is it not likely that Morris would have little chance of realizing that he had protection waiting for him? What if he bitterly resented being fired from the nursing home, and thought the letters and calls he was receiving were designed to injure him? What if the nursing home lied to Morris about his being an additional insured and threatened him if he made further inquiries?

Is the court's "*Crocker Rule*" a just rule in dealing with guys like Morris? One is at least tempted to think that Q-1 should be answered *Yes* in situations like this. If that were to happen then the really interesting question would be Q-2. The insurer would need to undertake reasonable endeavors to contact such an additional insured and inform him, and the

additionally insured would need to have cooperated. If both of these points were true in this case, the same result might have followed. After all, NUF did try to contact Morris, and he did not cooperate. NUF would still be off the hook, and there would be a much more just-looking rule.

Now, new questions would arise. Would "Quinn's Proposed Rule" be unjustly manipulable? How could this be prevented? Would "Quinn's Rule," if generally applied, be more expensive than the "Rule of *Crocker*"? And so forth,

One thing is certain. "Quinn's Rule" would not require liability insurers *gratuitously* to enter into litigation frays. The carriers are after all paid for the policies they issue, so actions of the insurer would not involve only gratuity. Moreover "Quinn's Rule" does not require liability insurers to undertake defenses without there being consent from the informed insured—although even that is probably consistent with the actual language of the liability policy and if the carrier provided a defense when the insured did not want it, the insurer could quickly withdraw both counsel it hired and itself. // Quinn