

“in no event” taken by itself. One plausible way to think about this is to say: “No matter what else has happened, the policyholder must give notice before X date.” If that is what the phrase means, then the policyholders not giving notice would not void the giving of notice. It would be a way of saying, “Please try to give notice ASAP.”

The dissenters are resting their case on the Free Society Theory of contract. It goes like this: Whatever two parties agree to in a contract that is not illegal and not the product of fraud, is what it is, and it would be contrary to the axioms of having a free society to try and change it using governmental authority—or, at least, judicial authority. Of course, this doctrine was formulated in ancient common law days before the dawn of millions of form insurance contracts which were mostly not to be negotiated except with respect to price. And, of course, it is unclear what would happen in a strictly common law court given that the language of the contract was said therein to be a “condition precedent,” when it clearly was not. Perhaps, on the very ground, it would be ignored entirely.

And things get worse. The common law rule of strict conformity came before the age of complex mergers and policy extensions. Remember, the original named insured here was FlashNet, and it was merged into Prodigy. It would be interesting to know here, who knew what and who read what.

The real issue here may actually complicate the situation. Arguably, the real issue here is the cost and difficulty of proving and disproving prejudice or its opposite. Arguably, the insurer is just trying to control its costs when it demands ASAP reporting of loss. Perhaps the insurer, which probably does not have a duty to defend, is simply trying to give itself plenty of time to follow the underlying case, so that when it is asked to pay a settlement, or judgment (if it is), there is plenty of time for it to think about what ought to be done or what it is obligated to do. Might this not actually be essential to a D&O, claims-made policy, where the essential nature of the policy is to enable cost control? In which case, one wonders, why was this not one of the issues developed in the case before it got to the Texas Supreme Court. // Quinn

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## Policy Limits

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**Fact Issue Existed Regarding Whether Insurer Issued One Policy or Two for Purposes of Determining Limits of Coverage Applicable to Accident**

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*Insurer Covered Five Cars Using Two Documents with Different Policy Numbers*

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*Progressive County Mutual Insurance Company v. Kelley*, \_\_\_ S.W.3d \_\_\_, 2009 WL 795528 (Tex. March 27, 2009)

### Case at a Glance

Progressive issued a family insurance on five cars. The coverage was issued on two documents; four cars were listed on one document, while the fifth was on another, and those documents had different policy numbers. After sustaining more than a \$1 million in medical expenses following an auto-animal accident, a daughter living with her named insured parents filed a UIM claim. Progressive paid limits under one \$500,025 policy, but refused to pay more. It claimed that it issued one policy. The injured insured claimed there were two policies, at least. The trial court and the court of appeal resolved the dispute over the number of policies as a matter of law, with the trial court ruling in the insurer's favor and the court of appeal in the insured's favor. The Texas Supreme Court reversed in a per curiam opinion without having heard oral argument and sent the case back to the trial court to actually be tried on at least the issue of how many policies there were.

### Summary of Decision

*Factual History.* A car hit Regan Kelley (“Kelley”) while she was riding her horse. Her injuries triggered medical expenses of over \$1 million. She got \$100,000 from the insurance covering the driver. Thereafter she got \$500,025 in underinsured motorist benefits from Progressive, her family's automobile insurer. There were five cars insured. Four of them were named in one two-page document, and a fifth was named in a

second two-page document, which had a separate policy number. “Nevertheless,” as the Supreme Court put it, “Progressive denied there was a second policy and refused to make any additional payments.”

*Litigation History.* Kelley sued for breach of contract and statutory bad faith; Progressive filed a declaratory relief action; and the cases were consolidated. Both parties moved for summary judgment, based upon two issues. First, how many policies were there. Second, what was the meaning and implication of a “Two or More Auto Policies” [Anti-Stacking] provision to be found in each of the five policies?

The trial court granted Progressive summary judgment. The court of appeals reversed and granted Kelley summary judgment. It held that there were two policies, and that the anti-stacking provision violated public policy. Progressive appealed to the Texas Supreme Court, arguing that the decision of the district court should be reinstated. Neither side prevailed.

*Supreme Court Decision.* Progressive argued that it issued only one policy. It based its argument on three points. First, the policy at issue indicated that it used a “multi-car discount” in calculating premium. Second, there was an affidavit from Progressive’s “Litigation Underwriting Specialist” stating (1) that Progressive’s computer system could not handle more than four cars on a single document, so that the fifth car had to be on a separate document, and (2) that if Progressive had issued a second policy, it would have charged a separate premium for the second policy—something it did not do.

Kelley argued that the second policy has a second and different policy number and that the PRODUCT & UNDERWRITING GUIDE (“GUIDE”) constructed by Progressive itself for its own use, and relied upon Progressive’s affiant, actually supports her view.

Both sides treated the issues as issues of law, and neither side suggested—but rather denied—that there was any ambiguity involved. The Texas Supreme Court moved the case to a different playing field. Although the questions in this case dealt with the interaction between, and the relationship between, two documents, the rules of insurance policy construction applied, so the starting points must be the documents themselves. The separate identity numbers and the lack of a specific reference to another document suggested that each of the

documents was separate and independent. Extrinsic evidence was inadmissible on this issue since the documents were clear on their face, and not latently ambiguous. However, the court found that the mention of the “multi-car discount” in the document which covers only one car “creates some ambiguity.” What it creates is a “latent ambiguity,” so that the use of evidence external to the face of the document is relevant. This evidence may include (a) “the content of the first document, (b) the content of the affidavit submitted by Progressive, (c) the content of the internal GUIDE constructed and used by Progressive, (d) and significant differences between the 4-car document and the 1-car document.”

The most interesting thing about the GUIDE was that it expressly said that no more than four policies can be found in any one policy, and if there are 5+ cars, there must be a “second policy.” Progressive argued that this locution simply means that there must be a separate document, but the language of the GUIDE is at least ambiguous.

Typically, in insurance cases, when a provision of a policy is ambiguous, it is interpreted in favor of the insured. This was not such a case. The Court explicitly said that it “was not interpreting a particular exclusion or provision within an insurance policy.” The issue here, it said, pertained to two different documents, and whether they constituted a single policy. Hence, implied the Court, the usual rule of insurance law did not apply. In this case, after reviewing both documents and the external evidence, the Court held that “the documents are ambiguous, and therefore, a fact finder should resolve the meaning.”

Upon this ground, the Texas Supreme Court reversed the judgment of the court of appeals, and sent the case back for trial. Its said nothing about the anti-stacking issue. It reasons were obvious, if not stated. *If there was only one policy, then that issue did not come up. If there were two policies, and only then, was there something to fret about.*

### Comment

One point is fairly obvious. If one examines the language of the court’s unanimous opinion carefully, it is inclined to think that the policyholder should prevail. It would not be surprising if the Court is impliedly hinting or suggesting that this issue should be resolved in favor of the policyholder. But what

might its silence as to the Anti-Stacking provisions suggest?

Second, the Court has suggested that ambiguities in policies—and especially in exclusions—should be resolved by courts as a matter of law. If this language means what it says, alleged fact controversies about the meaning of important exclusions is over, e.g., as with pollution exclusions. Of course, this will not actually happen. // Quinn

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## Procedure/Abstention

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### Federal Court's Discretion to Stay Declaratory Relief Action Is Limited When Defendant Asserts Counterclaim for Damages

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*Deferential Brillhart Standard of Review  
Does Not Apply*

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*New England Insurance Company v. Barnett*, \_\_\_ F.3d \_\_\_, 2009 WL 456406 (5th Cir. Feb. 25, 2009)

#### Case at a Glance

When a federal court is asked to stay a declaratory relief action in favor of a pending parallel state court action, the existence of a counterclaim for monetary relief limits the court's discretion.

#### Summary of Decision

An attorney entered into a transaction under which a client/business partner transferred shares in a business to the attorney with the understanding that the shares would be transferred back to the client upon his request at a later date. However, the attorney transferred the shares to a third party and refused to return them when the client demanded them. The client filed an action against the attorney in a Louisiana state court. The attorney notified his professional liability insurer of the suit, and the insurer provided a defense subject to a policy exclusion for dishonest acts. The attorney filed a third-party demand against the insurer, seeking indemnification in the event that he was found liable to the

client.

Fourteen years after the client's suit was filed, the attorney and client reached a settlement under which the attorney paid \$100, assigned his rights under the insurance policy to the client, and entered into a consent judgment of \$4 million, to be paid under the policy. The insurer objected to the terms of the settlement, challenging the validity of the assignment and consent judgment. The client filed a second lawsuit in state court against the insurer and other parties.

The insurer then filed the instant action for declaratory relief in a federal district court, seeking a determination that the assignment of rights was invalid and that the client could not enforce the consent judgment. The client filed a counterclaim seeking a determination of the legal issues in his favor and all damages to which he was entitled. Acting *sua sponte*, the district court stayed the declaratory relief action in favor of the pending state court action. In so doing, the district court applied the standard set forth in *Brillhart v. Excess Insurance Company*, 316 U.S. 491 (1942), which gives federal courts broad discretion in determining whether to hear an action brought under the Declaratory Judgment Act when a parallel state court action is pending.

The Fifth Circuit vacated the district court's stay order. Initially, the court observed that the deferential *Brillhart* standard of review does not apply where a declaratory relief action involves coercive relief as well as declaratory relief. In such cases, a federal court's discretion is more narrowly circumscribed and is governed by the "exceptional circumstances" standard set forth in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). The court then reaffirmed prior Fifth Circuit decisions holding that the *Colorado River* standard applies whenever a declaratory relief action seeks both declaratory and coercive relief, unless the claim for coercive relief is frivolous or is asserted solely to avoid *Brillhart*.

This brought the court to the issue of whether the counterclaim seeking coercive relief should be considered in deciding whether to apply the *Colorado River* standard, or whether the focus should be only on the plaintiff's pleadings. The court concluded that the counterclaim should be considered in determining the nature of the declaratory relief action. In so ruling, the court reasoned that the