

**NO. 06-1018**

---

**IN THE SUPREME COURT OF TEXAS**

---

**D. R. HORTON-TEXAS, LTD.**

*Petitioner*

**v.**

**MARKEL INTERNATIONAL INSURANCE COMPANY, LTD.**

*Respondent*

---

**AMICUS CURIAE BRIEF OF  
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA  
IN SUPPORT OF MARKEL'S MOTION FOR REHEARING**

---

**Caroline Scott  
Texas Bar No. 17907700  
CASEY, GENTZ & MAGNESS, L.L.P.  
98 San Jacinto Boulevard, Suite 1400  
Austin, Texas 78701  
(512) 480-9900  
(512) 480-9200 (Fax)**

**ATTORNEYS FOR AMICUS CURIAE  
PROPERTY CASUALTY INSURERS  
ASSOCIATION OF AMERICA**

**February 2, 2010**

**IDENTITY OF PARTIES, AMICUS CURIAE AND COUNSEL**

Petitioner

D. R. Horton – Texas, Ltd.

Counsel

Robert B. Gilbreath  
Hawkins, Parnell & Thackston, LLP  
Highland Park Place  
4514 Cole Avenue, Suite 500  
Dallas, Texas 75205

Blake S. Evans  
Stephen W. Burnett  
Schubert & Evans, P.C.  
900 Jackson Street, Suite 630  
Dallas, Texas 75202

Respondent

Markel International Insurance  
Company, Ltd.

Counsel

Les Pickett  
James M. Tompkins  
James T. Bailey  
Galloway, Johnson, Tompkins,  
Burr & Smith  
1301 McKinney, Suite 1400  
Houston, Texas 77010

W. Neil Rambin  
S. Vance Wittie  
Sedgwick, Detert, Moran & Arnold LLP  
1717 Main Street, Suite 5400  
Dallas, Texas 75201

Additional Party to the  
Court of Appeals' Judgment

Sphere Drake Insurance, Ltd.

Counsel

Robert A. Shults  
Jacob De Leon  
McFall, Sherwood & Breitbeil  
1331 Lamar – Four Houston Center  
Houston, Texas 77010

Amicus Curiae

Texas Association of Builders  
and National Association of  
Home Builders

Property Casualty Insurers  
Association of America

Counsel

Lee H. Shidlofsky  
Douglas P. Skelley  
VISSER SHIDLOFSKY LLP  
7200 N. MoPac Expy., Suite 430  
Austin, Texas 78731

M. Scott Norman, Jr.  
Texas Association of Builders  
313 East 12<sup>th</sup> Street, Suite 210  
Austin, Texas 78701

David S. Jaffe  
National Association of Home Builders  
1201 15<sup>th</sup> Street., N.W.  
Washington, D.C. 20005

Caroline Scott  
CASEY, GENTZ & MAGNESS, L.L.P.  
98 San Jacinto Boulevard, Suite 1400  
Austin, Texas 78701

**TABLE OF CONTENTS**

	<u>Page</u>
INDEX OF AUTHORITIES.....	iv
INTRODUCTION AND STATEMENT OF INTEREST.....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT AND AUTHORITIES.....	3
I.    Interpreting the Duty to Indemnify to Extend Beyond the Duty to Defend Undermines Decades of Texas Law.....	3
II.   The Opinion Drives a Hole Through the Eight Corners Rule.....	6
III.  Pleadings Will Become Less Accurate or Misleading.....	7
CERTIFICATE OF SERVICE .....	9

**INDEX OF AUTHORITIES**

	<u>Page</u>
<u>Cases:</u>	
<i>Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.</i> , 267 S.W.3d 20 (Tex. 2008) .....	6
<i>GuideOne Elite Ins. Co. v. Fielder Road Baptist Church</i> , 197 S.W.2d 305 (Tex. 2006) .....	6
<i>Heyden Newport Chemical Corp. v. Southern General Ins. Co.</i> , 387 S.W.2d 22 (Tex. 1965) .....	3, 4
<i>Lamar Homes, Inc. v. Mid-Continent Cas. Co.</i> , 242 S.W.3d 1 (Tex. 2007) .....	6
<i>National Union Fire Company v. Merchants Fast Motor Lines, Inc.</i> , 939 S.W.2d 139 (Tex. 1997) .....	3, 6
<i>Pine Oak Builders, Inc. v. Great American Lloyds Ins. Co.</i> , 279 S.W.3d 650 (Tex. 2009) .....	6
<i>Zurich American Ins. Co. v. Nokia Inc.</i> , 268 S.W. 3d 487 (Tex. 2008) .....	6
 <u>Statutes, Rules Regulations:</u>	
TEX. R. APP. P. 11 .....	1
 <u>Other Authorities:</u>	
33-34 Am. Jur. <i>Insurance</i> § 684 (2d Ed., updated May 2009) .....	5
Couch on Insurance § 172:2 (3 <sup>rd</sup> Ed. , updated Dec. 2009) .....	4, 5

## **INTRODUCTION AND STATEMENT OF INTEREST**

Property Casualty Insurers Association of America (PCI), pursuant to TEX. R. APP. P. 11, respectfully submits this brief as amicus curiae in support of Markel International Insurance Company. Ltd.

1. PCI is a trade group representing the more than 1,000 property/casualty insurance companies who are members of PCI. PCI members are domiciled in and transact business in all 50 states as well as the District of Columbia and Puerto Rico. Its member companies write over \$180 billion in direct written premium, or over 37.4 percent of all the property/casualty insurance written in the United States. PCI members write 44 percent of the nation's auto insurance, 30.7 percent of all homeowner's policies, and 41.7 percent of the private workers' compensation insurance market.

2. PCI member companies include all types of insurers, including large national insurance companies, mid-size regional writers, insurers doing business in a single state and specialty companies that serve specific niche markets. PCI member companies include stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the United States property and casualty insurance industry.

## **SUMMARY OF ARGUMENT**

The holding that the duty to indemnify can impose liability when there is no duty to defend undermines decades of established Texas case law. Worse yet, the decision affects commercial general liability insurance, the most common form of commercial insurance utilized by small and large businesses across Texas.

The expansion of the duty to indemnify defeats the policy purpose behind the well-established “eight corners” rule applicable to the duty to defend in Texas, and pointlessly will result in greater insurance costs to businesses.

Holding that the duty to indemnify can be greater than the duty to defend will result in plaintiffs either pleading less clearly, or potentially “lying behind the log” and trying to hide crucial facts that should be pled.

## ARGUMENT AND AUTHORITIES

### **I. Interpreting the Duty to Indemnify to Extend Beyond the Duty to Defend Undermines Decades of Texas Law.**

The Court's December 11, 2009 opinion in *D.R. Horton v. Markel* unfortunately introduces a new and costly interpretation of the duty to indemnify which will force a change to insurers' handling of commercial general liability ("CGL") claims. By holding that the duty to indemnify can be broader than the duty to defend, insurers will be forced to defend a claim even when there clearly is no duty to defend. The insurer may reach that conclusion because of the possibility, following *D.R. Horton v. Markel*, that it may unexpectedly have to indemnify its insured for *possible* facts and claims not actually pled. In other words, the insurer now must anticipate and then fight a phantom.

Prior to this ruling, the duty to defend was widely understood in Texas to be broader than the duty to indemnify. Although the duty to defend and duty to indemnify are two distinct duties, the two are clearly closely related. Following the 1965 decision in *Heyden Newport Chemical Corp. v. Southern General Ins. Company*, the understanding of both insurers and policyholders was that the Court broadly interpreted the duty to defend,<sup>1</sup> stating that when reviewing the policy and

---

<sup>1</sup> *Heyden Newport Chemical Corp. v. Southern General Ins. Co.*, 387 S.W.2d 22, 26 (Tex. 1965), *see also National Union Fire Company v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997).

pleadings “a liberal interpretation of their meaning should be indulged.”<sup>2</sup> So, in many cases the insurer is held responsible for the expenses of defense even though ultimately the duty to indemnify may be proven to be non-existent. Fair enough, because the policyholder bargains for the duty to defend in the CGL policy. But never, before December 2009, did the Texas Supreme Court say that in the absence of the broadly interpreted duty to defend, there still could be a duty to indemnify. The policy results of this decision are bad for all sides, and PCI urges the Court to grant Markel’s motion for rehearing.

Texas case law on the duty to defend in relationship to the duty to indemnify was squarely in the mainstream of U.S. jurisdictions, prior to *D.R. Horton v. Markel*. To illustrate just how mainstream the approach was prior to December 2009, we turn to secondary sources, an insurance treatise and the legal reference American Jurisprudence. Couch on Insurance, a frequently cited treatise, explains the majority rule:

#### Relationship to Duty to Defend

The standard a court uses to determine whether an insurer has a duty to indemnify is **narrower** than that used to determine whether a duty to defend exists. [Citation omitted.] The fact that a court has already determined that the insurer had a duty to defend, based on the potential policy coverage of the alleged bodily injury and/or property damage, leaves for later determination the ultimate issue of whether the insurer must indemnify the insured. That ultimate determination is based on whether the insurer became legally obligated to pay damages

---

<sup>2</sup> *Heyden*, 387 S.W.2d 22, 26 (Tex. 1965).

because of a bodily injury or property damage that does, in fact, fall under the policy coverage. [Citation omitted.]

[Emphasis added.]<sup>3</sup>

Even more explicitly, American Jurisprudence describes the majority rule as follows:

An insurer's duty to indemnify and duty to defend are separate and distinct. [Citation omitted.] An insurer's duty to defend is broader than its duty to indemnify. [Citation omitted.] **There must be a duty to defend before there is a duty to indemnify.** [Citation omitted.] **Thus, a finding that the insurer has no duty to defend therefore automatically means that there is no duty to indemnify....**<sup>4</sup>

[Emphasis added.]

Insurers defend thousands of lawsuits under CGL policies in Texas every year. For both the insurer and the commercial policyholder, it is essential to be able to rely upon stable and predictable case law. Those features of the rule of law allow both sophisticated parties to negotiate the coverage that the insured actually wants to buy. Unpredictability in the case law that expands the duties of the insurer, however, means that insurers may be taking on costs that they did not intend, and so must charge accordingly for additional risks. Just as unnecessary medical tests ordered to avoid liability drive up medical claim costs, unnecessary

---

<sup>3</sup> Couch on Insurance § 172:2 (3<sup>rd</sup> Ed., updated Dec. 2009).

<sup>4</sup> 33-34 Am. Jur. *Insurance* § 684 (2d Ed., updated May 2009). The treatise does cite one case for the minority view that there could be a duty to indemnify greater than the duty to defend due to factual determinations outside the pleadings.

legal work required to avoid a newly expanded duty to indemnify will drive up business insurance costs.

## **II. The Opinion Drives a Hole Through the Eight Corners Rule.**

In Texas, the duty to defend is governed by the “eight corners rule.” This well established rule, reiterated by the Court some six times since 1997,<sup>5</sup> serves an important policy purpose. It clearly sets out a process for insurers and litigants alike, so all parties know when the duty to defend will be invoked. By adopting the eight corners rule, the Court has established clear standards that can be followed from careful review of a few specific documents. Plaintiffs know how to plead their cases, and defendants and their insurers know what to look at to see if the duty to defend exists. This admirably results in clarity for all parties; it favors neither side.

But this doctrine of the duty to defend no longer will be useful in a world with an expanded duty to indemnify. The worst outcome for the insurer is to learn that there is a duty to indemnify when the insurer fairly thought, based on the eight corners rule, there was no duty to defend. A great deal is lost in a case if liability or a right to indemnification is found when the insurer has not provided a defense.

---

<sup>5</sup> *Pine Oak Builders, Inc. v. Great American Lloyds Ins. Co.*, 279 S.W.3d 650, 654 (Tex. 2009). *Zurich American Ins. Co. v. Nokia Inc.*, 268 S.W. 3d 487, 490 (Tex. 2008), *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 31 (Tex. 2008), *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 9 (Tex. 2007), *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 307 (Tex. 2006), *National Union Fire Company v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997).

The insurer is not able to call upon the seasoned expertise of its counsel of choice. The counsel does not have the benefit of the in-house expertise and resources of the insurer. The ability to control the case and to decide when settlement would make sense, to assess the potential risks of various strategies, to size up the witnesses and to see how the evidence affects the finder of fact, are all lost. The logical result is that if the duty to indemnify exceeds the duty to defend, then the insurer may well decide to defend even though it would not be contractually required to do so under the eight corners rule. Eventually, that means higher costs for businesses buying insurance.

### **III. Pleadings Will Become Less Accurate or Misleading.**

If the duty to indemnify is broader than the duty to defend, at a minimum plaintiffs will have less incentive to fully and carefully plead their cases. What the Court appears to be endorsing is the idea that cases that are inadequately prepared and pled can overcome that problem at trial. The astute plaintiffs' counsel will be left to consider the strategy implications. It is generally not in the plaintiffs' interest to have experienced insurance defense counsel on the other side; so should the plaintiff now strategize the case so that it is poorly defended, hoping that nevertheless a verdict will come in that can then be presented to the insurer as a *fait accompli*? This result is not possible if the duty to indemnify is narrower than the duty to defend. When the duty to indemnify is narrower, if the plaintiff hopes

to obtain an insurance recovery, then it must invoke the duty to defend, meaning that it must fully prepare the case and plead the facts that would bring in insurance coverage.

PCI asks that the Court reconsider the negative policy implications of its holding on the duty to indemnify, and grant the Motion for Rehearing.

Respectfully submitted,

---

Caroline Scott  
Texas Bar No. 17907700  
CASEY, GENTZ & MAGNESS, L.L.P.  
98 San Jacinto Boulevard, Suite 1400  
Austin, Texas 78701  
(512) 480-9900  
(512) 480-9200 (Fax)

ATTORNEYS FOR AMICUS CURIAE  
PROPERTY CASUALTY INSURERS  
ASSOCIATION OF AMERICA

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2<sup>nd</sup> day of February, 2010, I forwarded a true and correct copy of this Amicus Curiae Brief to the following counsel of record, via certified mail, return receipt requested:

Robert B. Gilbreath  
Hawkins, Parnell & Thackston, LLP  
Highland Park Place  
4514 Cole Avenue, Suite 500  
Dallas, Texas 75205

Blake S. Evans  
Stephen W. Burnett  
Schubert & Evans, P.C.  
900 Jackson Street, Suite 630  
Dallas, Texas 75202

Les Pickett  
James M. Tompkins  
James T. Bailey  
Galloway, Johnson, Tompkins, Burr & Smith  
1301 McKinney, Suite 1400  
Houston, Texas 77010

Robert A. Shults  
Jacob De Leon  
McFall, Sherwood & Breitbeil  
1331 Lamar – Four Houston Center  
Houston, Texas 77010

---

Caroline Scott