ORAL ARGUMENT – 10/08/03
02-1007
NORTHERN MUTUAL V. DAVALOS

LANKFORD: We are here today on cross motions for summary judgment that were ruled against my client in the TC. The CA had a split decision (2 to 1) against my client, which brings us here on a coverage issue, duty to defend in an automobile insurance policy.

The two predominant issues before the court is 1) in a duty to defend situation on a liability policy, if the carrier tenders a defense without attempting to reserve any coverage of defenses can the insured or policyholder still reject that tender and still expect to have coverage for the defense? And second, whether article 21.55 of the Texas Insurance Code applies to a duty to defend situation?

Actually a third issue is if there is a 21.55 application to induce then has Northern County fulfilled the time requirements under the statute?

I think the single most key important fact in this case that I believe everything turns on is that Northern county when it was faced with a request for a defense sent a letter to the insurer indicating that they have an attorney who is ready to provide a defense. We recognize you have already hired an attorney and you have already filed an answering suit. They are not the attorney of our choice. We want our attorney. Furthermore, we want to choose the venue of the defense of your case.

Never attempted to raise any coverage issues or preserve them. And on the face of that, the policyholder turned it down. And it took two letters to fully explain that. And that is the main reason why I've offered the court the handouts to look at, because those are the four operative letters that I believe control. The first letter being the Dec. 26, 1996 letter from one of the two policyholder lawyers to the insurance company that basically says, Here's the lawsuit. Don't file an answer until you talk to my other attorney who is already preparing all the answers.

OWEN: What happens in a situation where there's a car accident, and each side say they're egregious in their injuries, and both sides sue one another saying you're at fault, and one of the plaintiffs is your insured? What is the liability policy insurer's obligation to defend in that situation? Does the plaintiff have to give up their claims against the other party? How does that work?

LANKFORD: I think it's important to focus on this is an insurance policy's contract that the parties have agreed to...

OWEN: Does the plaintiff have to make an election? Does the insured have to say, No. I've decided I want to be a plaintiff and I'm going to forego demanding a defense, or is there

some way to split it up? What does the case law say both in Texas and other states on what the insured's obligation to defend is?

LANKFORD: I believe 1) the cases are clear. There is an obligation to defend, to tender a defense. What I have not seen resolved anywhere, which I believe is why we are here, is because no cases directly dealt with that conflicting situation where the insured wants to prosecute its case in another forum, and the carrier wants to defend it in a forum that is more favorable...

OWEN: Forget forum.

PHILLIPS: She's talking about a case where everything is in there and your best defense is that this was an act of God. So nobody was involved. But your client may stand the opportunity to win millions of dollars by showing the other side was at fault.

OWEN: Where both drivers say the other was horribly negligent. And they are both suing each other. So what's your obligation to defend under those circumstances?

LANKFORD: Our obligation is to tender a defense if the insured will accept it.

OWEN: And if the insured accepts it, does the insured have to give up their claims as a plaintiff if you decide to settle. If you decide to say, we're going to pay money to the other side to make this all go away, which would make the plaintiff's claims go away, your insured's claims make plaintiff go away. What are the respective rights and obligations?

LANKFORD: The carrier has the absolute right to settle anytime it wants to. In fact, in these types of policies that you're focused on, on the real policies which this is about...

OWEN: Do you have any case law that deals with this situation either in Texas or other states?

LANKFORD: Conflicting claims. No. I have not seen any. I think that's important because of the conflicting issues that the policyholder have the ability to make the choice. It's his choice as to whether he wants to have the protection of knowing he has coverage by accepting the defense that the carrier has tendered, or if he wants to pursue his claim in another forum, then he has the option and the ability and the power to decide I want to go to the another forum and so I will give up the protection of coverage.

But I think the key point is that that decision is not made by the carrier, but the carrier has the right to insist on having complete and exclusive control in the defense when there is no question of coverage.

PHILLIPS: So do you think the word conflict as we use it in our cases is only conflict over coverage, not conflict over what might be the best overall result for the insured?

LANKFORD: Yes. And I haven't seen a case from this court that has ever dealt with an issue where the conflict was described any other way other than coverage. And that's important because I don't think you could find a case anywhere where a theoretical conflict could not come up where the insured wants to handle the case differently. He wants a different trial strategy. And that completely eviscerates the whole concept of having control of the defense. If the ability to control the defense is always trumped by the insured wanting a different defense, but still insisting on wanting to have the defense paid for and having full coverage when there's no coverage question.

I think that if the rule that this court comes down with from the policyholder in those types of situations has the control and the option to decide whether to preserve coverage by turning over control to the carrier, or rejecting coverage and taking control that is the best policy decision this court could make. Because again the decision always remains with the policyholder what he wants to do. If he decides to preserve coverage by taking the defense from the carrier, then he is further protected by a bad defense strategy of the defense lawyer. He has a malpractice action. If the carrier fails to settle and expose the policy holder to an excess judgment, then the carrier can be held liable under Stowers. So the insured is protected and has control of its fate. And yet the contractual rights that are bargained for by the insurance carrier at the beginning of the policy of wanting to have control of the defense is also preserved and respected.

I believe in a situation where a suit has been filed and the carrier and the policyholder are trying to quickly decide what they want to do, a bright line test offers the easiest guidelines to them of what to do rather than trying to analyze well what's reasonable under the circumstances.

A reasonableness standard will merely throw more questions to more courts to decide what's reasonable and what's not reasonable under the situations. And really provides little guidance to the people who are basically in the pit having to make the decision when the suits been filed and someone needs to file an answer.

WAINWRIGHT: You said previously that conflict as used in our cases you believe only means conflict over coverage. I believe there is no conflict over coverage here, and that the intermediate appellate court made a mistake there. Correct?

LANKFORD: Yes. And I believe that's also why one justice...

WAINWRIGHT: In your letter of Jan. 9, 1997, one of the letters that you submitted on page 2, second full sentence reads: if they continue to defend you in the Dallas county lawsuit and continue to pursue the motion to transfer venue, we will take the position that there is no liability protection under the Northern County Mutual Ins. Co. policy issued to you. Does that sentence bring into play coverage? Does it say in essence that if you continue insured to follow the strategy you're following regarding venue that we're going to take away coverage.

LANKFORD: I think it's saying that the reality is if you will not accept our defense then we

can't defend you, because there is in effect no coverage because you're not respecting our right to control defense.

The basic question of will you except the defense that we are offering, I don't think that's the coverage question. The policyholder has cited I don't want coverage. I want to control my fate.

PHILLIPS: What if this was a Stowers type situation. I assume here there was no question that the damages were going to be well within the policy limits. Then does the client have any say over venue, or other trial strategy questions? Is it their choice merely to send a Stowers letter and hope that you can get it settled within that amount and if they can't, then they just have to choose your venue. They either have to abandon your level of coverage altogether, or choose to go with your trial decisions and pay the rest of the money.

LANKFORD: They are protected under what this court has said in Stowers that's exactly what you said.

PHILLIPS: So if there's no demand, if the plaintiff has made no demand and they are looking at a possible $1 million verdict, and you've got $100,00 coverage, and you insist on trying it in a venue that they think is going to _____ coverage, those excess damages _____. But the plaintiffs made no demand within the policy limits. They're stuck with your decision about venue and trial strategy, or they have to let you go. Let's suppose your trial strategy is a roll the dice strategy. You're going to try a very aggressive attack on the other party that's either going to win with the jury, or it's going to inflame passion. That's totally your decision and they just have to live with that.

Since there's no dispute over coverage if they don't like that strategy of rolling the dice, and either you get off scott free or you pay your maximum and leave them with huge excess, then they have to forego all coverage and defend themselves.

LANKFORD: It wouldn't have been all that different if they had moved the venue. They still would have been exposed to...

PHILLIPS: What I said, you don't have any disagreement with?

LANKFORD: No.

PHILLIPS: And you got $100,000 of coverage, you're entitled to call the shots for how that case is defended. And if the strategy you want to use leaves them at risk for excess that's - they can have a lawyer there in a second chair as an advisory role, but that's what they get under the policy?

LANKFORD: And the reality, I think in today's world is there would be a settlement demand within policy limits to trigger that Stowers.

PHILLIPS: Well it might or might not. They may have assets.

LANKFORD: If a plaintiff wanted to be sure to try to cover as much of what his exposure was, he would want to be sure and get the insurance company...

PHILLIPS: You can't always get insurance _____.

LANKFORD: I believe that under the cases and the agreement of the parties that "there is a right to control the defense" must mean something or the right means absolutely nothing.

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RESPONDENT

TICER: I want to talk to you about what this case is not about that keeps getting argued over and over. And that is, that there is no breach of any cooperation by my client, Mr. Davalos. None whatsoever. Their own representative says, "No. There was coverage available to him." "Did Mr. Davalos ever do anything to negate the coverage?" Answer. "No." "And would your answers be the same for Ms. Davalos?" "That's correct". "And did their lawyers ever do anything to negate coverage?" Answer. "No."

PHILLIPS Are you saying that's a binding admission?

TICER: I think that's an absolute binding admission. He is their representative. He is the person that wrote the letter to Mr. Lankford as giving you the letters that are in front of you. He's the one that explains what his letters mean.

PHILLIPS: Why didn't you move for a directed verdict?

TICER: Actually I moved for summary judgment. I would like to answer J. Owen's question, which I thought was an outstanding question. What does a plaintiff have to give up to get his defenses? And the answer is nothing to get their defense. Absolutely nothing. And there is case law that this case law has decided. It's old case law. It's Automobile Underwriters v. Long, 63 S.W.2d 356. I' reading from page 359. This is not a case that's right on facts. But the court says, When an insurance company contracts to defend suits against the insured, it is bound in good faith to perform this obligation and has no right to insist upon the insured signing away his rights as a condition precedent to the performance of this duty.

Not what we're really talking about here is what you wrote J. Phillips in Traver is primarily the duty to accept or reject settlement offers. That's primarily the control of the defense. And when no conflicts exist they may make other decisions. I think the language purposefully used conflicts and not limited to conflicts in coverage...

OWEN: What if I don't like the counsel that my insurance company has chosen and

I demand that I have another counsel. Isn't that another conflict?

TICER: It could be. It depends on the nature of the circumstances. You have to examine each case individually.

OWEN: Now I say, I don't like the expert witness that you hired. I want you to hire somebody else. Or I don't think you've taken enough depositions. I want you to take ten more. These are strategy calls at some point.

TICER: And that is why we have an independent lawyer assigned to defend the case that is entitled to make those strategic decisions on behalf of the client in the best interest of the client. That's what we talk about in ethic...

OWEN: So you're saying anytime the insured is unhappy with the insurance company's defense, the strategy calls, the insurance company is obligated to hire an independent counsel?

TICER: No. They are obligated to hire an independent counsel to defend the insured under the duty to defend.

OWEN: But who ultimately gets to make the strategy calls? The independent counsel or the insurance company?

TICER: I think absolutely the lawyer does. And I think Tracer is very clear about that.

OWEN: Who's lawyer?

TICER: The lawyer that represents the insured gets to make those decisions in conjunction with his client. And the reason we know that is we look to Traver and we look to Ethics Opinion 533.

OWEN: The insurance company hires you and your acting independently and you make these decisions. And the insured says, I don't like what Mr. Ticer's doing. I want somebody else. And the insurance company's not employing _____ lawyer. You're giving your best advise, hired by and paid for by the insurance company to the insured. And the insured says, I don't like your advise.

TICER: I think it has to be a material conflict. Just because you don't like me, I don't believe is a material conflict.

OWEN: I don't like your strategy calls. I don't like the experts you have chosen.

TICER: I think that can be a material conflict. And you have to examine the

circumstances. And Ethics Opinion 533 talks about insurance companies and these billings guidelines and telling the defense lawyer or the lawyer defending the insurance insured what he can or can't do. Whether you get to take this deposition. Whether you get to hire this expert. Whether a paralegal performs this kind of task or not. Those are decisions that are left to the professional judgment of the lawyer. Strategy and professional judgment to me are almost, if not the same, are synonymous. It's their tactics. And in this case it's even larger than that. What gets lost in this case is, we have a lawsuit. We sued the other driver and what we believed to be the insurance company in Matagorda County for violations of the policy, and failing to take care of some policy benefits that we are entitled to.

There's a conflict right there. Right off the bat. We are adverse to them in another venue. And then they step in and they say. You know what? We want to control this other lawsuit even though there's a material conflict already there. They admit that that there is a material conflict.

OWEN: Let's suppose you have two people who hit each other in two automobiles, and each says the other is grossly negligent and sues the other. What do their respective liability carriers have to do? Does the insurance company have to make an election and what happens to the right to control the litigation and the right to settle under those circumstances?

TICER: I don't believe the insured has to make an election.

OWEN: What if the insurance company's lawyer says, Look.. I think it's 51% that we are going to get tagged for $1 million. And in my professional judgment this case should be settled. Does the insurance company have the right to settle under those circumstances?

TICER: Absolutely. And that's not what this case is about.

OWEN: I'm just asking about the law. They have the right to cutoff your claims against the other side.

TICER: It won't cutoff our claims. There's case law that says they cannot by settling with the other side...

OWEN: I would like to see those cases.

TICER: That is Hurley v....

OWEN: You cite it on page 19. Are there any other cases in Texas or any other jurisdiction?

TICER: There is a federal case and I will send a letter to you and tell you what those are. I think the Hurley case really goes to the heart of it that they cannot cutoff my client's claim by

settling. And that's not at issue in this case.

OWEN: I'm just trying to find out what's everybody's respective rights and obligations to the duty to defend. So what's the function of the insurance defense lawyer in that circumstance if he can't settle the case? The plaintiff's lawyer is making the call what's the function of the insurance company's defense lawyer?

TICER: I don't know if you mean this or not, but it's not the insurance company's lawyer.

OWEN: The one they are paying for.

TICER: The function of him is to defend those claims against the insured and to take no action that would be adverse to any claims that the insured might have. It is no different than the plaintiff lawyer, Me, defending Mr. Davalos. I'm going to do the same thing. The only difference is, their scope of representation is limited. They cannot prosecute the affirmative claims on behalf of the insured. That's typically left to me as a plaintiff's lawyer. But they have to defend and they cannot take I believe any action adverse.

Now there's going to be strategic decisions made. There may be some disagreement about those decisions. But by and large that defense lawyer is going to act in the best interest of his client taking into account all of the circumstances in regard to that client.

OWEN: What about the language in the policy about they have the right to settle it at their option. And they disagree with you. They think that you are going to lose. That the mutual client is going to get hit with significant damages. Who has the right to decide to settle or not?

TICER: The insurance company does. That's not at issue here. That is absolutely not an issue in this case. Their right to settle, we did not interfere with their right to settle. We did nothing. We vigorously defended Mr. Davalos in the claims brought against him. They have a right to settle and they did. That does not prejudice my client's claims by settling. It does prejudice my client's claim when they are trying to get venue in another county...

OWEN: If you settle with the other side and you get a release how can you pursue your cause of action against the plaintiff, the other side?

TICER: Well actually I think the Hurley case deals with that. The insurance company doesn't prejudice my client...

OWEN: Your Matagorda County suit against the other driver is over I assume because the underlying litigation is gone.

TICER: No.

OWEN: Then who was the release for?

TICER: The release would only release the other side's claims against my client. It does not affect my counterclaim or my original claim. My claim of dominant jurisdiction to the other side.

PHILLIPS: I'm curious about how you were harmed in this situation as it actually came to pass. You're in Matagorda County suing as a plaintiff and you're still there. If the insurance company comes in and settles the case in Dallas County it just goes away and _____ plaintiff verses defendant, whereas what you seem to want was crossclaims in Matagorda County which - I mean just strategically I don't know why you're better off having somebody point the finger to you as opposed to not having the finger pointed at you. Just a clean suit and you're the plaintiff.

TICER: Our lawsuit was the first filed lawsuit. It was the dominant lawsuit.

PHILLIPS: And still is there.

TICER: Well actually what happened to it is when Mr. Askins filed a affidavit that the TC determined was fraudulent they transferred our case to Dallas County. The Dallas County court for all practical purposes abated that lawsuit until such time as the lawsuit down in Matagorda county on a change of venue the day the insurance company Charter where they represented to the insurance company at the time filed a motion to transfer venue. They filed an affidavit by Mr. Askins. He said Charter was the insurance company. He represented they didn't have any agent under the venue and under 15.01 and all that, that they didn't qualify. The court accepted that affidavit and transferred the case. We subsequently learned two things. One, that Northern County is in fact the insurance company even though they've sworn that it was Charter. And 2) had we sued the right insurance company down there it never would have been transferred because they tried the same tactic when we sued them on a breach of the duty to defend. So there was harm.

And more importantly, I don't think either side disagrees that the choice of venue has the possibility to affect the outcome of the case. Maybe in the amount of damages. Maybe in the amount of liability. For us, our client lived and operated in Matagorda County. Some of the witnesses were in Matagorda County. He made a contract of insurance with...

PHILLIPS: So the part of the case before us - and this whole thing with Charter doesn't seem to me is really before us.

TICER: Only in the sense of the background of the case.

PHILLIPS: But on the legal decision we've got to make, I can't see how a client is worse off by not having a claim against them than they are by having a claim against them. I understand how you can be worse off if you have a substantial chance of excess exposure. Of why you would be vitally interested in the venue of that case. If this part of the case can go away, why do you care

where and how it goes away?

TICER: Because it didn't initially go away. We filed our lawsuit. They filed this second lawsuit about 4 months later. Northern County did not come in and settle this case until 10 months later. So for 10 months there was another lawsuit pending. There were issues of collateral estoppel, res judicata, race to the courthouse. There was a pending lawsuit against my client. So for 10 months it made a lot whole bunch of difference that we were already there. We were the dominant case. It wasn't a case where they came in and said, You know what? You won't let us defend it, so we're just going to settle the case. That's not what happened here. And that's part of - you know in the CA they argued, Gee, we had the right to settle or defend, and we settled, so we don't get any defense costs.

PHILLIPS: So what you're saying. If you chose Matagorda first for this dispute, and then the opposing party could give _____, you insurer insists on trying it in Dallas and it gets to trial first, you say the factual resolutions up there would be res judicata of your original Matagorda suit?

TICER: It would be. It would force us at that time to elect to make a counterclaim in that lawsuit if those issues were actually tried to a verdict. And that is why the venue was important to us.

OWEN: And that's what I don't understand. Once that case was settled why didn't that make your claims against the other side go away? What did the settlement say?

TICER: The settlement says that there was the resolution of a _____ undisputed claim. They paid them money. And the people that sued Mr. Davalos were paid and it doesn't affect any resolution.

OWEN: So he can turn around and sue them now?

TICER: Well yes. He already has sued them before he ever...

OWEN: But that release doesn't affect his lawsuit against them?

TICER: Absolutely not.

OWEN: How did two people who were suing each other settle only one side of it? I don't understand that.

TICER: It happens all the time. Let's just say that you and I were involved in a lawsuit. You sued me first and then I sued you. And we're both defended by our insurance carrier in an automobile accident. And they said, well we like J. Owen's claim a lot better than Mr. Ticer's claim. We're going to pay her $50,000 to settle. Your claim is gone, but my claim against you still

proceed because there's been no resolution of those claims other than by settlement, which is not an adjudication on the merits.

WAINWRIGHT: What if it was impossible to settle without settling both sides? What if the insurer said, I can settle this claim against my insured but only if we can settle the claims going both directions? In this case, given your client's contract to the insurance policy, the insured had the right to do that where the contract language says, we will settle or defend as we consider appropriate any claim or suit?

TICER: Only subject to the reasonableness of a Stowers type analysis. As I hear your question, I don't hear that it's a Stowers type claim. I believe it could be that. I've never seen an insurance company ever condition - we'll pay you if you pay us, and we will wipe each other out. It's never been done.

HECHT: What if you can't settle part of the case. You have to settle the whole case. The other side won't settle unless you settle it all. Then does the insurer make that decision or who? That's the question.

TICER: I'm not sure I understand the circumstances of how that would _____.

HECHT: Plaintiff sues the defendant, defendant counterclaims. The insurer says we'll settle for $50,000. The other side says, I'm not going to settle unless we settle the whole case. That surely is typical.

TICER: I think so.

HECHT: Then who makes that decision?

TICER: I think the insurance companies can make those kind of decisions so long as it doesn't prejudice any claims that their insured has, and the other insurance company so long as it doesn't prejudice any claims that their insured has. I believe they can make that. But if they try to do that and force a settlement, force the plaintiff and defendant to settle with each other on their affirmative claims, I do not believe they have the power.

The important thing here is what was the harm? They said there was no prejudice for anything we did. And if they are saying that we breached the cooperation clause by not turning over the defense, so what. There was no prejudice. And therefore there was no breach.

It's no different than if I'm sued, I don't turn in the lawsuit for 6 months, nothing happens on the lawsuit for 6 months and I give it to the insurance company and I say, Heah, here's this lawsuit. And they go "Wait a minute. Six months. How long have you been sitting on this"? About 6 months. Nothing really going on in the case. They said, well we're not going to defend because you didn't promptly send us the papers or assist us. That won't work in Texas

because you have to show prejudice. So you've got a prejudice analysis here that has to be taken into account. That's what this court has said. For a breach of cooperation clause you've got to show prejudice. Breach of cooperation is only two things this court has ever said. And that is 1) imposing liability on the insurer (it never happened here); and 2) did the insurer lose a viable defense by something the insurer did? Not at issue here.

So there's no breach. They are obliged to defend.

O'NEILL: The better strategy position on the defense side is to be in Dallas. The better strategy decision on the plaintiff's side is to be in Matagorda. What is the insurer's duty?

TICER: That may be true for the insurer. But part of the equation that's missing is the lawyer representing the insured and its his judgment along with his client that controls not what the insurance company wants.

O'NEILL: Let's just presume that the lawyer that the insurance company is paying to defend the insured says, we're going to be better off in a defense mode in Dallas. Plaintiff on affirmative claim is better off in Matagorda. What is the insurer's duty then? I don't know what the insurer is supposed to do because if it gets moved to Matagorda and that prejudices the defense where are they left?

TICER: I don't believe it can prejudice the defense because as a matter of law under the cases this court has held, that a venue decision is a breach of cooperation. Now if you want to talk about maybe a Stowers type claim where you can really show that venue really made the difference...

O'NEILL: But what I'm saying is that they are conditioning their defense...

TICER: Absolutely.

O'NEILL: Because that's the strategy choice that they can better enhance the defense to be in Dallas. They are doing what they think is the insured's best interest on defending them.

TICER: Well in this case they want to tell you pre-_____ they are doing what they perceive as the insured's best interest, but that's not it. They are doing what's their best interest because they are a defendant in the lawsuit too, and they are the ones that are conceivably beyond the hook.

O'NEILL: If the insurer were not in there and there were no claims against the insurer, if you presume the defense is better off in Dallas, the plaintiff is better off in Matagorda, no suit against the insurance company, what then? What's the insurer's duty there?

TICER: That's not this case. But if it was this case, I would say you would leave that

to the independent professional judgment of the lawyer representing the insured in conjunction with the insured. Let the two of them decide what is best. If for instance, they go to Matagorda County and they stay there and they get hammered there, then the insured looks to the lawyer and says, Did you make a bad tactical decision and give me bad advice? Then we are into Traver. On the other hand, if the insurance company looks to the defense lawyer and says, Did you steer us the wrong way, and do we have some kind of equitable subrogation type claim or something of that nature for your bad advice? But that's not this case.

That's why I wish this court hadn't taken this case because that is not it. But I can see the court is struggling with those issues.

OWEN: Well what is "right for control of the litigation" in the policy if it doesn't mean I get to make the calls?

TICER: It means exactly what J. Phillips says it means. It means the right to accept or reject settlement offers and to make other decisions normally vested in the client assuming no conflict. However, you've got to put the caveat to that. And you've got 5.04 of the disciplinary code talking about the independence of the lawyer and by 33 of the Ethics opinion that says these are professional decisions that are given to the lawyer defending the case. And there's the issue. They do have control whether to settle or not to settle. That is absolutely not an issue in this case.

PHILLIPS: How did you end up suing? You thought you were suing your own insurance company and you sued the wrong company?

TICER: My local counsel drafted the petition to which I signed off on. We were led to believe it was Charter. When we filed a motion to transfer venue, Mr. Askins filed an affidavit saying we are the insurer for Timoteo Davalos. We do not have an agent here. They answered interrogatories answers that said, that there was no other potential parties. They didn't cite any verified pleadings.

PHILLIPS: This is very unusual for a person who has been in an automobile accident to sue their own carrier at the same time they sue the other side?

TICER: Underinsured and there can be violation for misrepresentations of the policy and those types of things. Article 21.21 does not preclude suing your own insurance company.

PHILLIPS: And this is done a lot? You sue your own company in the same petition that you sue the person who ran into you?

TICER: It is done with some degree of frequency and it is a matter of tactics. It is sometimes a matter of putting everything together, all in one lawsuit, get everybody there, get them bound by the judgment. Not two lawsuits. For instance if you have a lawsuit where you sue the other party and then get a judgment, then you come back and say, Well now I've got to sue my

underinsured carrier and do it all over again unless they agree to be bound by the judgment. You can get them all in one lawsuit, and you can typically try that so long as you don't have what we call a Mallard or Windborn(?) type deal where you're suing the insurance company for making an inadequate settlement on them. And then you've got issues under Liberty v. Akin about what comes in and what doesn't. You might have a severance or you might have separate trials. But in this case for a plaintiff's lawyer whois litigating a case it makes great economic sense to get it all in one case and get all the issues before us.

OWEN: And so as soon as you do that you've triggered what you call a conflict, and you deprive the insurance company control of the defense?

TICER: We ceded control of this case to the insurance company. They are the ones that came back and said, we've got a conflict.

OWEN: We don't want to go to Matagorda County.

TICER: We've got a conflict. We don't want to go to Matagorda County...

OWEN: But the conflict is one you created by suing them. Is that right?

TICER: I suppose it's one that we created. It's one that we had as a matter of right.

SIDE A RUNS OUT

SIDE B

... and make a claim against our own insurance company. But if we created the conflict it was easily resolved because they say our motion to transfer venue was defective. So if it was defective and they say it's defective who cares then. Go ahead and defend the case. What got this case going left instead of right was because they said, You withdraw your motion to transfer venue or we're not going to defend you. That's what made this case head to the left.

OWEN: They also asked you to withdraw your counsel and substitute _____.

TICER: Never an issue in this case. That is not the issue. The issue in this case is do you withdraw the motion to transfer venue? Notice they didn't say abate the motion to transfer venue, or we're not going to defend you. And so when they said those were the two conditions what difference did it make whether we signed a motion to substitute or not. They said they wanted to do it. If they really, truly believed that our motion to transfer was defective take it, run with it, have it overruled, let's drive on. We did nothing wrong. If the motion was defective, the court overruled it. Why didn't they do that? They are the ones that say that. They are the ones that said that we filed a defective motion to transfer venue. There are so many things wrong...

O'NEILL: What if the motion to transfer venue were a good motion and they thought that it would really damage the insureds to be sued in Matagorda County? Don't they have an obligation to fight that? Well that's the conflict you're talking about I guess.

TICER: And that's left to the independent judgment of the lawyer that the insurance company retains who's representing the insured and the two of them in conjunction with each other make that decision. I'm not saying there aren't difficult decisions to make here. But we're talking about conditioning a very valuable right under the policy on a condition that doesn't exist in the policy. And this is a very narrow set of circumstances here that we are talking about. We are not talking about that, and that's why...

PHILLIPS: Even if you're right, let's suppose the Dallas case settles first - well it had gone to trial and you had an adverse judgment that you were at fault. It paid off the damages and that ruined your chance to hit it big in Matagorda County. Then that's one situation. But here none of that happened. Once you got venue straightened out, assuming you did in Dallas County and got back in Matagorda, you still had everything going your way didn't you?

TICER: By the time they settled this case, I believe that our case had been transferred to Dallas County. It is very significant that we had to protect ourselves against collateral estoppel and res judicata. And what would have occurred had it progressed to a trial is, we would have made a counterclaim in that other lawsuit and had to litigate it that way. Because if a jury arrived at a decision on Mr. Weinberg's suit against us, we would have been bound by the rules of res judicata and/or collateral estoppel as to whatever they found. And if we didn't make the claim...

PHILLIPS: But since it settled and you didn't have to do that.

TICER: No. But all this occurred after we tendered an _____.

OWEN: Where is your lawsuit against the Weinberg's today?

TICER: They paid us.

JEFFERSON: But even in Dallas County if you had to have filed a counterclaim you would have had your trial there in Dallas County.

TICER: Yes. And we would have lost a very value right. What everybody agrees is a valuable right is the right of venue that may have the potential to influence the outcome of a case.

JEFFERSON: Is that just in terms of the jury or are you taking about the location of witnesses or what? Should we as a court look around Texas and say, We agree with you that venue is more favorable here in terms of the jury pool than it is over here.

TICER: I don't believe you have to get to that issue. I think you have to look at the

insurer refused to defend unless and until we did something that they wanted us to do. Which we believe compromised our claims that had already been filed.

I don't believe you have to engage in that broad _____ what's better and what's not. I would think that you can limit it yourself and I would encourage the court to limit itself to that issue. To look at and say we conditioned our defense on the fact that we want you to do something that the policy says we don't have to do it.

JEFFERSON: And compromise your claim specifically _____.

TICER: Compromise our claim because we believe that Matagorda was a better venue in terms of plaintiff claims, in terms of where my client lived, the locality, his treating physician. The treating person - bringing that doctor live, I've got to tell you in trying cases it's a whole lot better than putting them up on a video because I can assure you that to bring a doctor to Dallas on a - you have to drive from Bay City to Houston, that's 1-1/2 hours, then a 1 hour flight, then he's going to be there all day. Respectfully our doctor friends want to be compensated as well as they should because they are giving up a whole day of their practice. So it's things of that nature. My client's family. It's all of those things.

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REBUTTAL

LANKFORD: In the 2.55 issue, there is one newer case since the briefing and it's the lower court opinion in Utica National Insurance v. Texas Property and Casualty, 110 S.W.3d 450. Specifically at page 458, the court there made a ruling that was evidentially not brought up to this court, but in that the court looked at the exact specific issue of is the duty to defend a claim that falls under Texas Insurance Code 21.55. And the court wrote, they said No. And the court wrote, art. 21.55 defines a claim as a first party claim made by insured or policyholder. The associates stepped into the shoes of ____ as the insurer; therefore, any claims made by the associates against Utica are third party claims and do not fall within the statutory definition of a first party claim.

OWEN: Where in the TC did you take the position that a third party claim, that's not covered under 21.55?

LANKFORD: On page 92 of the record, defendant's second motion for summary judgment where we said, that "plaintiffs allege claims other than breach of contract including art. 21.21 and art. 21.55 should be rejected. Not only because the defendant fulfilled its contractual duty, but also because plaintiff has not stated a claim as a matter of law.

Admittedly, the research in the briefing on that issue now is much more extensive than it was then. But the issue was raised, and it was argued.

PHILLIPS: I've learned from Mr. Ticer that it's apparently not unusual for a party to bring

claims against their own insured bad faith, etc. at the same time you bring the initial suit. You already have this adverse relationship with your own insured. And when that's the case doesn't that change the parameters of the duties in a rather fundamental way more than what we think of just two people in an accident suing each other?

LANKFORD: I think the difficulty comes in situations where an insurance company wants to fulfill its duty to defend and a creative lawyer can drag in conflicts that basically aren't there to begin with.

PHILLIPS: But having this suit in Dallas and getting that resolved first might greatly save your client money in terms of the overall exposure. And why isn't under Traver this a decision that the independent counsel should make and not one that's made by the insurance company ab initio before that counsel is ever even retained?

LANKFORD: The insurance contract charges the carrier with the responsibility of focusing on the defense and the exposure of the client in the lawsuit. And the insurance company is wanting to limit that exposure as much as it can.

PHILLIPS: Is venue an insurance company decision, or is it a counsel decision, that counsel being hired under the doctrines?

LANKFORD: I think it can be an insurance company decision if it's important to the defense of the case. And I believe the Rodriguez case which is cited in the briefing in one of the opinions specifically mentions that is a valuable right. In many cases it can determine the outcome of a case. And if you take that valuable right away from the carrier, then you in effect you have materially affected the ability to defend the case and the exposure of the insureds _____ chosen.

O'NEILL: What about the argument that that decision comes from the counsel that assigned to the defendant to make that decision as opposed to a letter from the insurance company making that strategy choice? That's what I understand to be the complaint.

LANKFORD: That decision in most situations can lie with that defense lawyer just as in the normal lawsuit situation the lawyer as this court's recognized in Traver has the authority to make certain decisions that are involved on how the case runs. But the client always has the ultimate authority of deciding. That may be what you suggest. But I can decide because I'm the client it should be something else. And that goes back to why I suggested at the beginning of the argument that the ultimate decision maker should be the insured as to whether he wants control of the defense or not.

PHILLIPS: Our question is much simpler, and we have the same question. It's why did the insurance company make a decision that Dallas County was the proper venue rather than the lawyer that the insurance company hired for Mr. Davalos?

LANKFORD: The lawyer the insurance company hired was never allowed to accept the defense of the case. He did not represent Mr. Davalos because Mr. Davalos's lawyers would not allow him to.

PHILLIPS: Well then it was contingent on Dallas County being the venue before he got to - as you say become their lawyer wasn't it?

LANKFORD: Yes. He wasn't allowed to take control of the case because the company didn't want to have the venue choice, which...

PHILLIPS: But why is that venue choice the company's and not the lawyer they hired?

LANKFORD: Because in that situation if the insurance company is going to have a valuable right of being able to defend, then it has to be able to exercise that right of choosing where the defense is going to be.

PHILLIPS: Is there any case in any American jurisdiction that says that that's a company's right rather than either the insured's right or the independent lawyer's right?

LANKFORD: A specific case no. But I think I have to say that recognizing that Traver is a case that is discussing the duties and responsibilities of the attorney. It does not discuss the rights and duties or responsibilities of the insurance carrier. Those are two completely separate issues, which I think is why this court is struggling with this case. Because there isn't a case on point with regard to what's the right of the insurance company in that situation. We do know that if an insurance company is tendered a defense it has to defend, the company has to decide whether to accept the defense unconditionally, no coverage defenses. If you get hit we're responsible. Or send a reservation of rights, or file a DEC action.

O'NEILL: Well I think their argument is you did not accept it unconditionally. You imposed a condition on acceptance.

LANKFORD: I want to be sure that we're not arguing semantics. I agree with you that there was a condition that we want control of the case. As soon as we put a lawyer in place we're going to withdraw any motion to transfer venue. That's not a coverage condition. All the cases have addressed coverage conditions as that's triggering a conflict of interest on the insurance policy and where our rights emanate from. In those situations then the carrier cannot insist upon control of the defense. And it's the fear that this court recognized in Tilley that we don't want insurance companies hiring defense lawyers to go in and defend and at the same time either dig up coverage of facts that will destroy coverage or otherwise harm the coverage position.

O'NEILL: Again we're back to the definitional point. You say the only condition that can be imposed on the defense obligation would be a coverage condition. And because coverage was not at issue, you did not tender - I mean you tendered an unconditional defense in that sense. But

I think the sense they're arguing condition is you did not accept the defense unless they agreed to waive their venue choice.

LANKFORD: Maybe it is semantics in that if...

O'NEILL: I guess what I'm saying is it begs the question.

LANKFORD: I guess the scenario I want to suggest though is if Northern County had not sent a letter talking about venue saying here's the attorney we want; sign the substitution. They signed the substitution, a new lawyer comes in and the first thing he does is to withdraw the motion to transfer venue.

PHILLIPS: But he would have been an independent lawyer and if he was actually singing your tune rather than looking at the client's best interest he could be responsible for that.

LANKFORD: Contrary to what Mr. Davalos' lawyer decided he might have agreed that if my focus is controlling and containing and minimizing your exposure to liability you're better off in Dallas than you are in Matagorda County.

PHILLIPS: The question is, from these documents that appears not to be the case before us. And so the decision we have to make is does Traver talk about anything other than coverage? Can there be any other type of conflict? And that's really the nub of the legal argument here.

LANKFORD: Yes. And that issues come from Tilley, and Tilley was addressing coverage. adverse