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Supreme Court of Texas.
Pine Oak Builders, Inc., Appellant
v.
Great American Lloyds Insurance Company and Mid-Continent Casualty Company,
Appellees.
No. 06-0867.

February 7, 2008.

Appearances:
Joseph S. Yardas Jr., Law Offices of Joe Yardas, Conroe, TX, for petitioner.
Joseph H. Pedigo, Attorney at Law, Houston, TX, for petitioner.
Jennifer Bruch Hogan, Pillsbury Winthrop Shaw Pittman LLP, Houston, TX, respondent.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, and Don R. Willett, Texas Supreme Court Justices, en banc.

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CHIEF JUSTICE JEFFERSON: Please be seated. The Court is now ready to hear argument in 06-0867, Pine Oak Builders versus Great American Lloyds Insurance Company.

COURT MARSHALL: May it please the Court. Mr. Yardas will present an argument for the petitioner, Petitioner reserves10 minutes for rebuttal. Mr. Yardas will open the first ten minutes.Mr. Pedigo will present the rebuttal.

ORAL ARGUMENT OF JOSEPH S. YARDAS JR. ON BEHALF OF THE PETITIONER

MR. YARDAS: May it please the Court. Good morning. Gonna give you little road map of how me and Mr. Pedigo are going to split up the argument. In the Fourteenth Court of Appeals, we got a denial of our right as a duty to defend on the Glass case, specifically. And also, we've got denied our right to recover under the 21.55. Of course, our strongest argument that could cover under 21.55 is the Lamar Homes versus Mid-Continent (501 F.3d 435)which is already been decided. We would like to point out one further thing regarding-- I'm not sure if this was argued, but if you look over at Exhibit, Exhibit 2, it shows

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that the defi-- the actual definitions, the excerpted out of 21.55 and it will show down at the bottom of those except-- that there is exceptions to 21.55. The legislature knew how they accepted coverage. They accepted worker's compensation which is not paid directly to the insured. It's paid to the third party, but, but they felt like it was necessary to accept it. They could have accepted comprehensive general liability. They did not, which is strong indication that looked like they met for comprehensive general liability. Not only the indemnity part but also the duty to defend should be covered. That's my completed argument on that. Now, I would like to review the ga-- the Glass case. If you all will look at Exhibit 2, it's been chara-- it was characterized a little differently than it was and what actually happened, and I don't think that we even need extrinsic evidence to be have acco-- a duty to defend in this particular case. The actual petition allegations said that by-- said that Pine Oak Builders Inc. was negligent. They didn't say, Pine Oak Builders Inc. employees were negligent, or their subcontractors were negligent. They said "Pine Oak Builders." We all know that Pine Oak Builders Inc. is a legal fiction.

JUSTICE MEDINA: Did they need a date to decide when the occurrence is triggered so that the duty to defend arises?

MR. YARDAS: I, I'm sorry. I didn't hear what you said.

JUSTICE MEDINA: Excuse me. Is the date needed to determine when the occurrence happens so that the insurance company would be able to determine when the duty to defend was triggered?

MR. YARDAS: In this particular case, there was only one insurance company that was involved between the time that the house and the Glass case was built, and the time that the damage was discovered. It's Great American Insurance Company. If you will turn over to Exhibit No. 3, I have an excerpt right out of the record of policy that was in for all, all the policies were the same. And if you look at the highlighted part, it says, 'This insurance applies to bodily injury and property damage only if the property damage occurs during the policy period.' We know that it must have occurred sometime during that policy-- one of those policy periods of Great American and there's nothing said about manifestation in this. It says, 'Property damage occurs.'

JUSTICE HECHT: Well, but manifestation goes to what's damage?

MR. YARDAS: Goes to what?

JUSTICE HECHT: Goes to what's damage? We've-- there's a-- there's sort of damage in the metaphysical sense when a set of, of things put into motion, that's going to ultimately result in some injury that you can see. Water-leaking where it's not supposed to-- over time causes rot, over time causes something that you can see, but where along in that spectrum do you think the, the damage occurs? The moment it's, it's-- the siding is put on the house or, or when?

MR. YARDAS: Okay. I, I have an analogy on this. If you bought a set of tires from discount tire company and the forty thousand-mile tires are going wear, wear at the end of forty thousand miles, and you drive home a mile, and you look at those tires on your car that look brand new. However, after a mile or has been somewhere, you can't see it but you know it's there 'cause that's only going to last forty thousand miles. Now, this porch that was built in the Glass case wa-- apparently, started retaining water from day one because the builder went out to try to repair it. So as soon as unpainted wood is touched by water, rotting begins. You can't see it maybe, but it's just like driving home on those tires. It's there and so rotted-- the rotting of the wood occurred the minute that house was bought and the first rain came and it continued all the way. And until finally, they filed a

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lawsuit and, and they-- the, the petition says, 'They discovered that the thing was defective on-- in February of 2000 which was still when the, the general liability policy from Great American was in effect.' So to get back to our argument on, on the fact that Pine Oak Builders was the one at the Inc. was accused of making negligent acts. We know that Pine Oak Builders Inc. can't build a house. They have to go through agents. There's two types of agents that can be-- build the house: one is employees, other's subcontract. So potentially, subcontractors built this house. And we know from reading the insurance policy under the subcontractor exemption from 'your work' exception, we know that there may have been coverage if subcontractors built this house. Now, if well-- those of us that are familiar with the building industry know even big companies like Lenore Homes build houses through subcontractors. So there's probably a statistical certainty that this house was built with subcontractors. There's certainly a potential, and of course there's a potential without abusing the extrinsic evidence that employees built the house. So under the, under the policy that we have, Great American Policy, if employees built this house, there is no coverage. But if subcontractors built the porch which I presented in my summary, summary judgment I-- just to show that subcontractors potentially -

JUSTICE BRISTER: Well, but -

MR. YARDAS: - built this.

JUSTICE BRISTER: - what we know about the construction industry is extrinsic evidence.

MR. YARDAS: Right.

JUSTICE BRISTER: And I thought you've said, we can tell from this without extrinsic evidence.

MR. YARDAS: Well, you know it's potential. I mean -

JUSTICE BRISTER: I mean, our, our knowledge that all builders build all houses with all subcontractors is extrinsic evidence. It's not in the pleading.

MR. YARDAS: Well, you're right. But if silent with regard to-- no words this Court could find that -

JUSTICE BRISTER: But your -

MR. YARDAS: - employer ...

JUSTICE BRISTER: - your argue-- I mean, yeah. I understood you start to say, 'You don't need argument. We don't need extrinsic evidence when you look at the petition.' But if we can look at the petition and we're going to read in to whom things that we all know -

MR. YARDAS: Right.

JUSTICE BRISTER: - that's-- there's can be a lot of things-- there's a lot of-- there's going to be at same time, that's going to constrict a lot of duty to defend.

MR. YARDAS: For this, for, for this Court to find that there is no duty to defend, this Court has to read into the petition that employees did the work. You have to try to find a reason that, that there is no coverage, and the only way you can do that is the knowledge. I mean, you'll have to use some knowledge. We've agree on what words mean, you know, the knowledge that either employees did it or subcontractors did it. Now, I did bring in extrinsic evidence, probably shot myself in the foot by saying, 'Here's some extrinsic evidence, and so show me that it's possible and it's potentially right that the subcontractors did the work.' He calls subcontractors did the work, but we don't need extrinsic evidence. Now, the, the court in State Farm versus Wade (827 S.W. 2d 448) where a boat was involved. There, there was in the petition, it wasn't clear whether there was a duty to defend or there

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wasn't a duty to, to defend just like in our case here. So that court permitted extrinsic evidence to show that it was about a boat that, that a gentleman had bought a bough policy that was only to cover personal use and the-- and he's use it commercially, so that permitted State Farm to show the extrinsic evidence that this boat was being used commercially and so that there was no coverage. We don't need extrinsic evidence here, we know that either there's two potentials, employees did it or subcontractor did it. As far as I know, the law of the land is, is if there's potential for coverage, then this Court supposed to find coverage. So I don't know if I answered the extrinsic question problem, but we think there's coverage without extrinsic evidence. We know there's a potential and any do. I'm finished with my argument. Anybody have any-- any questions?

CHIEF JUSTICE JEFFERSON: Is there any questions? Thank you, Counsel.

MR. YARDAS: Yes, Sir.

CHIEF JUSTICE JEFFERSON: Are you going to argue rebuttal or ... I'm, I'm sorry.

JUSTICE GREEN: Proceed. Proceed and let hergo.

CHIEF JUSTICE JEFFERSON: Okay. Proceed. Okay.

ORAL ARGUMENT OF JENNIFER BRUCH HOGAN ON BEHALF OF THE RESPONDENT

MS. HOGAN: May it please the Court. I believe that there are two principal issues in this case. First, is a-- the first issue sort of asks the question 'When does 'property damage' occur, so as to trigger and insurers' duty to defend'; and the second issue in this case is, asked whether the Court should now recognize an extrinsic evidence exception to the eight corners rule. I would like to start my argument with the first question, the 'occurrence', the occurs trigger question and I believe that with that question, there are sort of three main points that I would like to discuss with you today. First, I would like to urge the Court to understand that there is no trigger rule, there is no definition of occurs that favors more often or most often policy holders over insurance companies, or vice versa. In other words, whatever rule you pick, that rule will sometimes favor insurers and it will sometimes favor policy holders. You cannot tell from sitting here today and looking forward whether the rule you pick is going to benefit policy holders in a given case or insurance companies in a given case.

JUSTICE MEDINA: Well, so that even be a consideration on where the Courts have analyze the triple triggered coverage or, or triple triggered theory, "manifestation" theory, the date of "occurrence" theory and what analysis goes into all of that, and what does it matter?

MS. HOGAN: Oh, I will tell you, your Honor that there are many courts that do consider that factor as to whether coverage is going to be provided or not provided by the adoption of a particular trigger. Perhaps, it's only that courts when they're looking backwards can't avoid knowing what their-- what the rule they announce is going to do.

JUSTICE MEDINA: Is it -

MS. HOGAN: But ...

JUSTICE MEDINA: - is it because-- perhaps, some of these events are more difficult to ascertain than others. For example, as Justice Hecht gave an example of 'water damage'. Does the damage start from

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when the construction begins, and continues to the date it manifests? Can a toxic tort claim that there's an exposure to a chemical but then manifest for years later?

MS. HOGAN: Oh, absolutely it's true, your Honor that we're-- I mean, if you take a car wreck, right. Two car-seat each other. I don't care which rule you pick, right. We all know what day the damage is and it's very easy to apply. That's not a hard case, doesn't matter what rule. There's no-- there's not going to be any fight about it, right. It's that every test, exposure, actual damage injury, in fact, manifestation and continuous trigger, we've covered them all basically at that instant in time. The problems arise when you have either sort of a progressive worsening damage, where you have multiple sort of damage, where you have a single 'occurrence' or a single event. But the damage may continue over time or-- you know, when we're talking in this case, for example, we're talking about rain. That obviously is not something that the insured has any control over or any part of playing and yet it's the rain that is supposedly then what-- right, continues to cause new and independent damage and exacerbates existing damage. So those are kinds of cases, it's also true that there are problems sometimes in knowing actually when the occurrence takes place. So all of those things can make it difficult to decide what should trigger a policy. But the language of the policy, at least, I think we can be clear about what we're talking about the, the exhibits that have been handed to you. They do quote the language of the po-- of this policy and this language is the same as the language that's in the Dawns building policies that are at issue. And that language requires, right, it says that this insurance applies to 'bodily injury' and "property damage', only if: One, the 'bodily injury' or 'property damage' is caused by an occurrence - I think you all remember that language from the Lamar case and those types of cases; and two, as a separate section, the 'bodily injury' or 'property damage' occurs during the policy period. So the question becomes, 'How do you determine what property damage occurs in the policy period?' I think I would-- most Courts recognize the existence and most commentators of four tests and I think that, that nomenclature get-- does become very important here, so that we make certain that when we use-- when I use a term that at least you'll understand what test I'm referring to. Exposure is one test, and it says that, 'Property damage occurs when the initial exposure to an injury causing condition takes place.' The Fifth Circuit has adopted that rule under Texas and Louisiana law in personal injury asbestos cases. So the-- it's the exposure that triggers regardless of whether there has been any, even an infinitesimal injury, right, it is exposure. Second is sort of moving on a continuum in time is the injury, in fact, actual injury test. And that rule says that 'It is the first actual property damage that takes place regardless of whether it is compensable, regardless of whether it is known or knowable.' It is simply an injury in fact that is the definition of occurs. The third trigger test says that, that 'property damage occurs when it is manifest' and in Texas law, we've defined that to mean, that the damage is easily ascertainable and identifiable. Under each of those three triggers, a single policy would be triggered and it-- that carrier who was on the risk would pick up the entirety of the loss, right. Because in the-- other manifestation rule, so if 'property damage' manifests in year five. If we take year zero as being, the house is coming out of the ground, your five is some point in the future. Your ten will say, 'Is the lawsuit filed?' If the 'property damage' manifests in year five, the carrier that has the policy that covers that policy year

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picks up the entirety of the, of the loss without any allocation, without any apportionment. That carrier is on the hook for the entirety of the loss, right.

JUSTICE HECHT: Despite the language about continuous exposure.

MS. HOGAN: Even despite the language about continuous exposure, because -

JUSTICE HECHT: If it worsened in year eight.

MS. HOGAN: Even if it gets worsened in year eight and -

JUSTICE HECHT: That carrier, carrier during that period of time would not be liable for loss.

MS. HOGAN: No. That's right, not under, not really un-- not under any of these triggers as they are proper, you know. Sort of confined to their terms understood, but so manifestation, you, you pick up the entirety of the loss even though it's worsened over time, and even though no one knew about it from the beginning.

JUSTICE HECHT: So it -

MS. HOGAN: The exception -

JUSTICE HECHT: - it was not clear, it was not clear to me. But you're saying, we're, we're just talking about the starting, the initial trigger.

MS. HOGAN: That's right.

JUSTICE HECHT: And then it's the, the continuous language applies to that liability that, that is incurred then and not to some subsequent insurers liability.

MS. HOGAN: That's right. And your Honor, it, it did-- I mean, the continuous language occurs in the definition of what an occurrence is, right. And that's to, to determine whether you have one occurrence under a policy or you have multiple occurrences under a policy, but where you have a-- it, it's an attempt and, and really this Court explained that in a footnote in the APIE versus Garcia case. It recognizes what that language is intended to do and what in effect it does do in policies. And that, right, it, it's a way to say that even if you have this continuing ongoing exposure that that's all a single occurrence and that also then fits into the idea of why the policy damage-- policies-- I mean, this manifestation rule works the way it does. Because then we say, 'When does policy damage occur?' It occurs in the year that it manifests and then the insurance company is on the hook for everything else. There's only one point in time that which it manifests that carrier picks-up the entirety of the risk.

JUSTICE O'NEILL: Wouldn't it be pretty easy to put end to the policy?

MS. HOGAN: Well, your Honor I-- if, if-- I mean, quite honestly, I think that you have to look at the way that policies do get drafted, and it is ...

JUSTICE O'NEILL: Well, my understanding in the briefing is that, that, that language was considered but rejected?

MS. HOGAN: I, I would dis-- I mean, I, I think that the Dawns building lawyers can address that specifically, to on both sides of that case. My understanding is this, that, that is not entirely accurate in terms of drafting history, and I think if you look back in time, even over the, does-- the policies that exist in the various cases, the way the language has moved forward in time. There it, there had in the insuring agreement, there has not been a, a point in time that which there's been anything other than the occurs language, and we have moved forward in time where we have courts all over the country and within those-- their own states having adopted particular rules -

JUSTICE BRISTER: All different rules.

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MS. HOGAN: So ... And all different rules. It is not the insurers' through a ...

JUSTICE BRISTER: How can you run a business - How can you run a business where you have one contract, which means all different things in all states.

MS. HOGAN: Well, your Honor, I mean, that's why I, I think you find, right. As -

JUSTICE BRISTER: Why don't you change the policy?

MS. HOGAN: - as of-- Because we don't just get to change the policy, your Honor. I mean, that quite honestly is just the bottom line. I mean, it maybe that the insurance company wants to be in approved, right, that policy gets presented to the insured and it's a 'take it or leave it'. But that policy is not something that the insurance company drafts for an individual policy holder and gets to put in whatever language it chooses. That is not the way policies are drafted. So that's the reason that you find yourself in this position and-- we would like, you know, from the insurance industry, you want to know why we want a manifestation rule, because it's easy and it's cheap, and that is really what it amouints to. We fully understand that we're going to lose, with a 'manifestation' rule in any number of circumstances, and we're going to win with the 'manifestation' rule and some other insurance carrier. Perhaps, none, but often times, some other insurance carrier is going to pick up the risk.

CHIEF JUSTICE JEFFERSON: Wouldn't insurer want us to adopt the rule that is the majority in the country?

MS. HOGAN: I, I think not. Probably, your Honor, I think that-- I mean, in this case, you see the insured's arguing for the rule that gets them-- the coverage in their case. And I, I certainly understand that and appreciate it. But as I say, when you look forward, I don't think that you can, that you can pick a rule even if you picked a continuous trigger rule. You have it maximized insurance coverage. In fact, you've probably minimized insurance -

CHIEF JUSTICE JEFFERSON: Coming for your -

MS. HOGAN: - coverage in some cases.

CHIEF JUSTICE JEFFERSON: - predictability writing policies all over the nation that do you, I mean, if, if there are fifty different pa-- you know, interpretations that's going to hurt your business. So is there any incentive for the Court to try on insurer's behalf of-- and for predictability for about policy holders and another company to, to just join whatever the majority proposition is.

MS. HOGAN: I, I think if you can discern the majority, your Honor, then, then that would certainly be something to consider. I think it is very, very difficult to discern any type of majority or minority rule in these cases. They literally are all over the map and they are different in 'property damage' cases from personal injury cases. Their ...

JUSTICE HECHT: Should, should they be?

MS. HOGAN: Your Honor, I do not-- I mean, I do not believe that they should be, because I think that the language of the policy is identical. But it-- but I will -

JUSTICE HECHT: The nature of the damage is to ...

MS. HOGAN: That's, that's correct, your Honor. Then that's what I'm going to say. I will concede that it-- with particular personal injury claims as opposed to property damage, you can see why courts choose, right. I mean, if you read book what the Fifth Circuit wrote in the Ashcroft case about asbestos coverage, a proportional injury claim. So I think, they said, Manifestation is what we're going to pick for

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asbestos for property damage -
JUSTICE WILLETT: Where are we on -
MS. HOGAN: - but we're going to pick this rule."
JUSTICE WILLETT: - on your run down of the, of the-- yeah, three points under issue number one -
MS. HOGAN: That's right.
JUSTICE WILLETT: - we, we, we covered that no trigger-- that there's no trigger rule that would always favor one side of the other or the other two.
MS. HOGAN: The, the other two are, that the 'manifestation' rule is the most easily -
JUSTICE WILLETT: Right.
MS. HOGAN: - applied for, and that's true for courts, for policy holders and for insurance companies. They ...
JUSTICE WILLETT: You may lose sometime under that, you may want sometime. It just depends.
MS. HOGAN: That's right, it just depends.
JUSTICE WILLETT: Okay.
MS. HOGAN: And then the third is that I think that the 'manifestation' ruled thus impact comport with the claim language of the policy and then I know that is an argument that is, is made in the case that follows us also, is that, that injury in fact, languages what most closely meets the, the plain language of the policy. But I think you Justice Hecht understand, am I right, the definition of 'property damage'. First of all, from the policy itself, the definition of property damage means 'Physical injury to tangible property, including all resulting loss of use of that property.' I don't end in the law, which I think comports with that. 'Property damage' is not metaphysical, it is not, not compensable. And as we're talking about from a legal standpoint, right, then, then 'property damage' connotes 'Some diminution in value or some loss of function, some loss of use because we measure property value in term-- property damage, in terms of value and the decline in value.' If you say that, that rot begins from the first moment that water touches wood, then 'property damage' began in these cases before that stucco, that synthetic stucco was even applied, right. The studs are put up on the house before the synthetic stucco goes up and then we're going to be looking back-- I mean if, if that's what we're going to say that, that's the-- that's 'property damage' is a drop of rain-- touching a stud in a house. Are we going to look back in time for that?
JUSTICE MEDINA: You know, I was thinking the same thing when that statement was made. But let's take an example of an environmental claim would-- perhaps you have underground storage tanks that leaks. It's not discovered for years later. And some scientists argue that damage begins from the first leak and when it reaches through the soil and migrates outside. And in those instances, courts I think have applied dif-- all, all three of these here of your test. And, and it's very difficult to try to figure out which one. I think we should apply for the, for the citizens of Texas.
MS. HOGAN: Over again. It's, it's difficult specially when you're looking at it prospectively -
JUSTICE MEDINA: How do you like the -
MS. HOGAN: - but that's why -
JUSTICE MEDINA: - special rule for environmental claims, special rule for asbestos claims and special rule for this type of 'property damage' claims that we have here before us?
MS. HOGAN: I honestly don't think that you need one. I believe

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manifestation, right, when we recognize that manifestation is going to be when the damage is easily ascertainable.

JUSTICE WAINWRIGHT: Is that when the first piece of paint flicks off the wood because the water has been flowing over it for a period of time?

MS. HOGAN: No. I, I wouldn't -

JUSTICE WAINWRIGHT: So it weakens.

MS. HOGAN: - I wouldn't say so. I think you actually mean if -

JUSTICE WAINWRIGHT: When does it manifest?

MS. HOGAN: Well, it manifest when it's easily ascertainable and identifiable and there is under the case law 'no duty to investigate', right. We, we don't say that the, that the property owner has to go, do testing to see. So I, I think it becomes-- I think it's the same as -

JUSTICE WAINWRIGHT: Specifically -

MS. HOGAN: Well -

JUSTICE WAINWRIGHT: - when does it manifest?

MS. HOGAN: I, I think it's a reason -

JUSTICE WAINWRIGHT: When the wood, when the paint flicks off because the wood has been wet, why is that not identifiable that the woods been wet for some period of time. That's why the paint bubbled off-- bubbled up and came off.

MS. HOGAN: Well, I gue-- I mean, I would say that, that if you know that the wood is wet, and it's see, right, and it, it's weak to you or you start seeing a sag. I don't I-- my personal opinion is this that wet wood doesn't I-- that mean I, I've had a, a leak in my house. So I would not say that my house has 'property damage' because it you know, it dries up and goes away. Everything is perfectly fine so I wouldn't say that, that become that, that makes it easily -

JUSTICE WILLETT: Can you tackle briefly on the eight corners rule and extrinsic evidence.

MS. HOGAN: Yes, your Honor. I, I think that this-- that, that question I think this Court's guide one builder about this builder road, about this Church case is absolutely directly on point.

JUSTICE WILLETT: Thank you.

MS. HOGAN: This is a case-- I'm sorry?

JUSTICE WILLETT: Thank you for the inference. It's a good comment.

MS. HOGAN: Okay. I, I think that, I think that in that case, the pleading-- the allegation in that case was that the man had been employed as a pastor at the church, or an associate pastor at the church. That was an allegation in the pleading. It was completely false. Here, the allegations in the pleading are that Pine Oak, and Pine Oak cannot operate by subcontractors under the law. Pine Oak is its agents. Pine Oak did particular things. If Pine Oaks didn't do those things, then Pine Oak has a defense and it can raise that defense in the lawsuit. But certainly, the allegation has been made by the claimant that it was Pine Oak Inc. that contracted to build the house, agreed to build the house, did construct these columns, totally constructed these columns, and you cannot take those allegations and then turn them on their heads and say -

JUSTICE BRISTER: The subs--

MS. HOGAN: - "No, it wasn't actually Pine Oak who did it."

JUSTICE BRISTER: - the subcontractor would be an agent.

MS. HOGAN: Your Honor, I don't believe under the law subcontractor would be an agent. I mean, I guess it depends on if that the subcontractor is an independent contractor or an agent, and we can't know that, but I think that those questions do go to the merits. At least, touched on, right, I mean, it, it can't be isolated out from the

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merits. Of-- in, in the other cases that exist here, you can see that the subcontractors have been named in these lawsuits. They filed third party actions back Oak and cross sections and back against Pine Oak in some of these actions. Clearly, who does the work is in dispute in these cases and would be in the Glass case.

JUSTICE MEDINA: Who would the remedy be? Would they be barred from pursuing a claim against the subcontractors or ...

MS. HOGAN: No, your Honor. They are not barred from pursuing a claimant that they, they can bring the subcontractors into that case if they choose to. And more than that, I mean, if, if, if the pleadings get amended at some point in time, then that's going the-- then everybody has to look at the duty to defend again but those things have not happened in these cases and so there is no duty to defend without extrinsic evidence.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Ms. Hogan.

MS. HOGAN: Thank you.

MR. PEDIGO: Please the Court. The one thing that we have to keep focused on in this case regarding the trigger issue when damage occurred, when you can identify the damage is that this is the duty to defend case. This is not a duty to indemnify case. In a duty to defend, as we know and what we're looking at, we're looking at-- well, I get the-- the eight corners rule applies. You're looking at the four corners of the policies and we're looking at the four corners of the pleadings. At this stage, there's not much information, there's harse-- actually hard facts. What we have-- you're, you're looking at a policy, you're looking at pleadings and we're trying to make the initial determination whether or not the insurer has a duty to defend. Not whether he's on the hook to indemnify if the underlying plain -

JUSTICE BRISTER: Despite -

MR. PEDIGO: - or seen the bait -

JUSTICE BRISTER: - how soon you've got it's a [inaudible] got different insurer as the whole period. It's when, when-- no question about that, the only question is, which one?

MR. PEDIGO: Which one? Okay. Which one? Does it make a difference? Does it make a difference in this duty to defend stage of, of this 'Which one?' We have, if, if we can identify that there is potential coverage in more than one policy, why can it not be that each insurer-- and let's say, we have different insurers on each policy. Why can it not be that each insurer now has at least, some partial duty to contribute to the defense. Now, later on when the facts start coming out in the case, now, we've got a situation who we actually know some facts and maybe those facts will point ...

JUSTICE BRISTER: Point to this soon the, I mean the standard foundation case. Plaintiff, plaintiff says, 'Foundation was defectively designed.' Defendant says, 'It's just used to know foundations correct in Houston.' The prop-- is the 'property damage' occurred when it was defectively designed, or when the day you bought the house or when you-- door, doors started not closing and I know you wanted to say, 'Well, all of them, all those people have to come in.' But that's an inefficient, an economically inefficient way to do it. That require-- that ends up duplicating services so as been more money to insurance adjustures and attorneys than we do. The people that have cracked foundations, so which one of those is it? When the allegation is you defectively designed the foundation.

MR. PEDIGO: Well, it's, it's-- that, that is so difficult in specially in the case like this. We have wood rot -

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JUSTICE BRISTER: 'Defective design' is not 'property damage'.
MR. PEDIGO: Yes, okay. The foundation ...
JUSTICE BRISTER: It can't be, can't-- is it? I mean, it's going to be when something cracks, that's 'property damage'.
MR. PEDIGO: Yes.
JUSTICE BRISTER: So that's not a, so that's going to be a manifestation rule.
JUSTICE JOHNSON: Well, I thought you said -
MR. PEDIGO: It wouldn't -
JUSTICE JOHNSON: I thought you said that 'property damage' is when it cracks.
MR. PEDIGO: 'Property damage', yeah, if, if, if it cracks -
JUSTICE JOHNSON: What if it cracks, and it doesn't fall down in three years later, what if that appear? It got appear in the-- under the house, it cracks but nobody walks on the floor for three years, and so that's when it manifests, you know. Is it when to cracks -
MR. PEDIGO: It, it could be.
JUSTICE JOHNSON: - or when it manifest?
MR. PEDIGO: It could be.
JUSTICE JOHNSON: What's your position?
MR. PEDIGO: It could be, and, and the problem is when -
JUSTICE JOHNSON: No, no, what's your position, when it cracks or when it manifests, when someone falls through the floor?
MR. PEDIGO: Is that you, you're saying that it, it manifests when someone falls through the floor.
JUSTICE JOHNSON: You got a -
MR. PEDIGO: That's the manifestation -
JUSTICE JOHNSON: - a pleasant room, with apier holding the floor up, it cracks. You can go under there and you can tell it has been, has been-- when you finally had the wreck, it cracks you can say it, it's been, you know it's sometime before. Now, I thought you said that the 'property damage' was when it cracks. Now, if it doesn't manifest till someone falls through the floor. They open the door, they walk into the vacant room, they fall through the floor. That's when it's probably manifest, I could not be able to agree on that. If that's the first notice anybody had of it.
MR. PEDIGO: I, I don't. I, I think the manifestation is when you have an identifiable damage, 'property damage', it-- I don't think that necessarily means that someone actually has to identify it, but it can be identified if, if it was looked into, if, if you, if you were able to tear the floor out and for whatever reason, happened to see it that there's a crack in here and it looks like a pretty good crack here, and I would say that the property damage occurred, when that crack occurred.
JUSTICE HECHT: And do you agree with the respondent that whoever is ins-- providing coverage at that point accept all of the liability.
MR. PEDIGO: At this point, on the duty to defend, we don't have anybody picking up all the liability.
JUSTICE HECHT: Just trying to understand how coverage issued -
MR. PEDIGO: Yeah. Okay.
JUSTICE HECHT: - works as well and is that-- your view, she said that once the 'occurrence'-- once there is, once damage occurs, the insurer was coverage then, it's that insurer's liability.
MR. PEDIGO: That's true. If you can specifically identify something like that.
JUSTICE HECHT: And somebody, later on or prior to that those coverages are not triggered by that.

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MR. PEDIGO: They're not triggered, not yet. Now, later on in the case, it-- when the facts actually start coming out, discovery is done. The fact finding process goes into play. We have some other types of facts that come out that point to some other insurer and that other insurer, now probably has to come back in the case.

JUSTICE HECHT: And we're trying to figure out what those facts are.

MR. PEDIGO: Yes. And as I mentioned in the case like this, It is not certain. We have wood rot, wood rot starts at one point, nobody knows. Somewhere along the way, somebody actually discovers it.

JUSTICE HECHT: So isn't that better to use the discovery or the manifestation?

MR. PEDIGO: I would not-- I would say that under the duty to defend portion of the case that, that the discovery rule actually is not what the insurance policies is all about. The discovery rules are that the insurance policy states that there is, there is coverage or 'property damage' that occurs during the property during the policy period, and to now impose some thing like a discovery rule. Now, just changes the whole meaning of that policy.

JUSTICE HECHT: Not imposing that, but we're trying to understand when the damage occurs.

MR. PEDIGO: Yes.

JUSTICE HECHT: Does it occur when you put up something that's going to leak or does it occur when the first, first time it does leak? Does it occur later on, when it leaks and starts to rot? Does it occur later than that, when it's been rotting and that's going to fall down? Where in that -

MR. PEDIGO: Okay.

JUSTICE HECHT: - spec tram doesn't occur?

MR. PEDIGO: In, in the duty to defend part of the case, what we're looking for is potential coverage.

JUSTICE MEDINA: So you're saying -

MR. PEDIGO: -We're not looking for coverage in facts -

JUSTICE MEDINA: - so you're saying that the ...

MR. PEDIGO: But we just don't have the facts -

JUSTICE MEDINA: Your, your argument is there's-- there's a duty for every carrier, there was on the risk during that entire period of time, that the-- an occurrence could have occurred.

MR. PEDIGO: Yes. Yes, I'm saying that.

JUSTICE MEDINA: So from the date of installation through the date of manifestation.

MR. PEDIGO: Yes, because that's really the only way you can handle it. At this point in time, you don't have the facts.

JUSTICE MEDINA: We understand -

MR. PEDIGO: You don't have enough facts.

JUSTICE MEDINA: - we understand the duty to defend as much harder than the duty to indemnify. But whatever the decision here is on the duty to defend. Doesn't that have a significant impact on the indemnity obligation as well?

MR. PEDIGO: No, I don't. Because at any time, when the facts come out that point to another insurance company, is actually on the hook. The, the-- there's nothing that stop the, the insured from bringing that insurance company into the case.

JUSTICE MEDINA: But we could -

MR. PEDIGO: Except that ...

JUSTICE MEDINA: - If we were to hold likethe Pine Oak, wants us to hold the manifestation theory applies. Then, itdoesn't matter when the

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first 'occurrence' as it is, when ever it'sascertainable, right. And it's -

MR. PEDIGO: Excuse me, I did not ...

JUSTICE MEDINA: - whenever the damage is ascertainable. That's the -

MR. PEDIGO: Yes.

JUSTICE MEDINA: - manifestation theory.

MR. PEDIGO: Yes, Sir.

JUSTICE MEDINA: And would only be that insurance carrier that would be on the hook for both the defense in the ...

MR. PEDIGO: Yes. If, if there's a way that we can identify that, and isolate it from the other ones. We don't know when the property damage occurred and there's really no way to know if -

JUSTICE BRISTER: But it seems -

MR. PEDIGO: - that stage should be end.

JUSTICE BRISTER: - it seems to me you're mixing up two things. It's-- House in the woods blows up and we don't know if it blew up before or after January first, and so you sue and we don't really know when it blew up. It could be either policy, yes, then both of you have a duty to defend. But you're saying, 'We don't even know what occurs is, and we therefore, we want any, anything that might be metaphysically considered an occurrence.' Triggers everybody has to come in and defend us. That's a, that's a different thing. I mean, this seems to me the legal rule ought to be-- I mean, the policy says it's 'When it occurs?' and that means one thing now. Unfortunately, Courts say it actually, means four different one things, but, that's a different thing from what we just don't know, which policy might be triggered. Occurrence is going to be one thing, as a legal rule it seems to me.

MR. PEDIGO: Well, the rule that, that appears to have been applied by most of the Courts and in the Fourteenth Court of Appeals in this case, essentially is the potential coverage. And, and in this case, we really don't have to face those types of hard questions, because the term, the policy itself which the Fourteenth Court of Appeals ought to stand very intently, was the particular language in the policy. Great American's policies all of the policies involved in this particular case, not one or two but every one of them defined 'occurrence', it means 'An accident, including continuous or repeated exposure to substantially the same general harmful conditions.' This is the language that the Fourteenth Court of Appeals have, and what they were looking at, they were looking-- doing what they were supposed to do, they're looking at the four corners of the insurance policy which includes as 'occurrence' language, and they were looking at the allegations in the pleadings. The allegations in the pleadings which such fact of three out of the five cases were very explicit that the damage began to occur from the first time the rain fell, and leaked in to the-- behind the, the EIFS.

CHIEF JUSTICE JEFFERSON: Are there any further questions? Thank you, Counselers. The case is submitted and the Court will take a brief recess.

2008 WL 2324152 (Tex.)

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