IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 92-2474

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CGL UNDERWRITERS, Subscribing to Policy TR-1398,

Plaintiff-Appellee,

versus

EDISON CHOUEST OFFSHORE, INC.,

Defendant-Appellee, Cross-Appellant,

versus

UNDERWRITERS SUBSCRIBING TO POLICY ST-57361 and PLACID OIL COMPANY,

Defendants-Third Party Plaintiffs-Appellants-Cross-Appellees,

versus

NEW YORK MARINE MANAGERS and PROGRESSIVE INS. CO.,

Third Party Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 89 2020)

(October 22, 1993)

Before KING and BARKSDALE, Circuit Judges, and DUPLANTIER,[*] District Judge.

PER CURIAM:[**]

CGL Underwriters brought an action for declaratory judgment against Placid Oil Company ("Placid"), Placid's Underwriters, and Edison Chouest Offshore, Inc. ("Chouest"). CGL filed a motion for summary judgment, which the district court granted. Placid and Placid's Underwriters appeal the judgment, and Chouest cross-appeals.

I.

Factual Background

On February 28, 1986, Placid Oil Company and Edison Chouest Offshore, Inc., entered into a time charter under which Placid acquired the use of the M/V DAMON CHOUEST, an anchor handling/supply vessel owned by Chouest. Under the time charter, Chouest was obligated to provide Placid with $10,000,000 in comprehensive general liability insurance as an additional insured.[1] Chouest obtained $1,000,000 of coverage for Placid as

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[*]District Judge of the Eastern District of Louisiana, sitting by designation.

[**]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

[1] The insurance obligations were spelled out in a section of the time charter styled "Exhibit 'B' Required Insurance." Paragraphs 2, 4, and 6 of this section read as follows:

2. Comprehensive General Liability Insurance, written to include the following endorsements and minimum limits:

an additional insured from CGL Underwriters (styled by the

ENDORSEMENTS	LIMITS
Personal Injury Completed Operations Broad Form Contractual Liability Broad Form Property Damage Premises Waiver of Subrogation Placid as an Additional Insured	Combined Single Limits per occurrence of $10,000,000

4. Protection and Indemnity Insurance on the SP 23 Form or equivalent, written to include the following endorsements and minimum limits:

ENDORSEMENTS	LIMITS
Chartered Vessel Members of the Crew Marine Contractual Tower's Liability In Rem Collision Liability Admiralty Coverage II Death on the High Seas Jones Act Seamen Waiver of Subrogation Placid as an Additional Insured	Combined Single Limits per occurrence of $10,000,000

6. * * *

In each of the above described policies, [Chouest], with respect to [Chouest] operations, agrees to waive and agrees to have its insurers waive any rights or subrogation they may have against Placid, Penrod, joint lessees, affiliates or subsidiary companies, their officers, directors, employees, or agents of any of them. It is further agreed that each such policy, other than Worker's Compensation policies, shall name Placid and its contractors, joint lessees and affiliated and subsidiary companies as an Additional Insureds **[sic]** with respect to [Chouest's] operation hereunder. However, [Chouest] shall be solely responsible for deductibles required under such policies, and [Chouest] shall not under any circumstances call upon Placid for payment of such deductibles and [Chouest] shall defend, indemnify and hold harmless Placid, its contractors, joint lessees and affiliated and subsidiary companies, their officers, directors, employees and agents from and against any and all claims, demands, courses of action or suits with respect to such deductibles whatsoever the reason for or howsoever occurring whether as a result of the negligence in whole or in part of Placid, its contractors, joint lessees or affiliated and subsidiary companies.

parties and referred to herein as "Chouest's Underwriters") under Policy TR-1398, and Chouest obtained the remaining $9,000,000 of coverage for Placid from New York Marine Managers and Progressive Insurance Co. The time charter also contained cross-indemnification clauses whereby Placid agreed to indemnify Chouest for claims by Placid employees under certain circumstances, while Chouest agreed to indemnify Placid more broadly for any and all claims based on the acts or omissions of Chouest or its employees, as well as for claims against Placid by Chouest employees.[2] The time charter's primary term was to run

[2] The indemnity clause reads, in pertinent part, as follows:

XIII.INDEMNITY

Placid hereby indemnifies and holds harmless [Chouest] against any and all claims or suits which may be brought against [Chouest] by an employee of Placid, Penrod Drilling Company (Penrod) or Placid's co-lessees, or by the legal representative of such employee, for bodily injury or death or loss of services which may arise out of the charter and operation of the vessel under this contract, except as to such Placid employees contemplated in the last paragraph (b) of this Article, whether such suits are based on the relationship of Master and Servant, third party or otherwise, and even through **[sic]** occasioned, brought about or caused in whole or in part by the negligence of [Chouest], its agents, employees, subcontractors or the unseaworthiness of the vessel or craft. [Chouest] shall not have any responsibility to Placid and its co-lessees or any of their underwriters or insurers, for damage occasioned to, or loss of, the property of Placid or its co-lessees used in the drilling operations, and/or property which may be on the vessel chartered hereunder, regardless of the cause of or reason for said loss.

Except as to claims by employees of Placid, Penrod and its co-lessees and as to loss of or damage to the property of Placid and its co-lessees, all as above provided for, [Chouest] hereby agrees:

(a) That it will defend, indemnify and hold harmless Placid, Penrod, and its co-lessees from any and all claims, demands or lawsuits brought against Placid, Penrod, and/or its co-

until November of 1987, and Placid had an option to extend the charter for another year.

In 1987, Placid became involved in the development of an offshore mineral lease in an area of the Gulf of Mexico described as Green Canyon Block 29. Placid decided to construct an underwater oil and gas pipeline from the Green Canyon project to onshore facilities. To assemble this pipeline, Placid needed to tow sections of pipeline across the floor of the Gulf, and Placid desired to use the DAMON CHOUEST for this operation. Because this use was apparently not contemplated in the original time charter, the parties discussed extending the time charter to

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> lessees, or any one or more of them, which are based on the acts or omissions of [Chouest], its sub-contractors or employees or of the Master and crew operating and navigating the vessel, while performing the work herein undertaken under this Charter. This provision also applies to all such claims based on acts of an individual whose service is secured by [Chouest], even though he may become, in law and in face **[sic]** an employee or servant of Placid while performing the service. [Chouest] further agrees that it will indemnify and hold Placid, Penrod and its co-lessees free and harmless from any fine, penalty or assessment based on the manning, operation, equipping or maintenance of the vessel arising during the term of this Charter.
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> (b) That it will defend, indemnify and hold harmless Placid, Penrod and its co-lessees from any and all claims, demands, or lawsuits brought against Placid and/or its co-lessees, or any one or more of them, by any individual, legal representative of the individual, or assignee whose services are engaged by [Chouest] to perform any of the work herein undertaken, regardless of whether the person whose services are so engaged by [Chouest] is in legal contemplation the employee of [Chouest] or Placid, whether such claims and suits are based on the relationship of Master and servant, third party or otherwise, and even though occasioned, brought about or caused in whole or in part by the negligence of Placid or its co-lessees, their respective agents, employees or subcontractors, or the unseaworthiness of the vessel or craft.

include the project. Gary Chouest, President of Chouest, testified in a deposition that he was concerned about his company's possible liability to third parties as a result of the tow, and so asked Placid Vice-President Phil Clarke that Placid hold Chouest harmless and indemnify it against any damage which might be done to property owned by others.

After Gary Chouest spoke with Clarke, Placid attorney Miles Davidson contacted Mr. Chouest and said he would prepare a hold harmless agreement. He prepared the agreement, referred to by the parties and herein as the "indemnity addendum," and sent it to Mr. Chouest by letter dated October 13, 1991.[3] This addendum, it may be noted, did not purport to modify Chouest's obligation to provide insurance coverage for Placid. Prior to embarking on the Green Canyon project, Placid arranged for insurance coverage

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[3] The pertinent portions of the indemnity addendum read as follows:

> PLACID OIL COMPANY ("PLACID") hereby agrees to indemnify and hold EDISON CHOUEST OFFSHORE, INC., and the vessel DAMON CHOUEST ("CONTRACTOR") harmless from and against any claims, demands, liabilities losses or expenses of whatever kind or nature incurred, made or asserted as a result, or in consequence, of towage services provided by CONTRACTOR for the pipeline bottom tow for the PLACID Green Canyon development project.
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> This Indemnity Agreement shall apply to claims, demands, liabilities, losses or expenses of whatever kind or nature excepting only claims, demands or losses by CONTRACTOR or CONTRACTOR's master, crew and agents. Indemnity provisions of the Agreement between PLACID and Edison Chouest Offshore, Inc., dated February 28, 1986 shall remain in effect excepting only modifications by this Indemnity Agreement.

in the amount of $100,000,000 from Underwriters Subscribing to Policy ST-57361 ("Placid's Underwriters").

During the construction of the pipeline, in November 1987, one of the underwater tows collided with an underwater pipeline owned by Zapata Exploration Company ("Zapata"). Zapata brought suit in October 1988 against Placid, Chouest, and other parties involved in the tow. Placid tendered its defense to Chouest's Underwriters, and in a letter dated May 11, 1989, Chouest's Underwriters agreed that Placid was entitled to a defense as an additional insured under Policy TR-1398 and agreed to accept Placid's tender of defense. Chouest's Underwriters also made known to Placid its intention to seek contribution from any other insurance company that had insured Placid against this type of liability. As a result, Placid refused to forward material pertinent to the defense against Zapata's claims to Chouest's Underwriters. Instead, Placid and Placid's Underwriters conducted their own defense against Zapata, ultimately settling the case for $1,900,000. Chouest and Chouest's Underwriters participated in the mediation leading to this settlement, and no party challenges the reasonableness of the settlement.

Procedural History

On June 13, 1989, Chouest's Underwriters filed a declaratory judgment action against Placid, Placid's Underwriters, and Chouest, seeking to avoid liability for any damages arising out of the collision with Zapata's pipeline. Chouest's Underwriters presented several arguments, primarily that the indemnity

addendum terminated Chouest's obligation to insure Placid and that any obligation owed to Placid by Chouest's Underwriters was terminated when Placid refused to cooperate with the defense offered to it by Chouest's Underwriters. Placid and Placid's Underwriters answered and also filed a counterclaim and cross-claim against Chouest's Underwriters and Chouest based on Policy TR-1398 and Chouest's obligation to insure Placid under the time charter. Chouest answered and cross-claimed against Placid and Placid's Underwriters, claiming that it was entitled to be indemnified for all its expenses incurred in connection with the Zapata claim. Placid and Placid's Underwriters later filed a third party action against New York Marine Managers and Progressive Insurance Company.

On January 4, 1990, Chouest's Underwriters filed a motion for summary judgment. Placid and Placid's Underwriters filed a response and filed their own motion for summary judgment. On March 2, 1992, the district court entered an order and final judgment. The court held that the indemnity addendum did not alter or change the insurance obligation contained in the time charter, but rather modified only the indemnity provisions of that agreement. In reaching this conclusion, the court invoked the parol evidence rule and excluded all extrinsic evidence offered by Chouest to prove the parties' intent. Thus, Chouest's obligation to provide Placid with insurance coverage continued after the indemnity addendum was executed. The district court further held, however, that Placid refused to cooperate in the

defense offered by Chouest's Underwriters as required by Policy TR-1398. The court relied on Texas law in reaching this conclusion. Thus, the district court entered summary judgment in favor of Chouest's Underwriters and denied the motion for summary judgment of Placid and Placid's Underwriters. This appeal followed.

II.

Standard of Review and Choice of Law

We review the granting of summary judgment de novo, applying the same criteria as applied by the district court in the first instance. Harbor Ins. Co. v. Urban Constr. Co., 990 F.2d 195, 199 (5th Cir. 1993). Summary judgment is proper only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Id. We consider all of the facts contained in the pleadings, depositions, admissions, answers to interrogatories, affidavits, and the inferences to be drawn therefrom in the light most favorable to the non-moving party. Id. District court interpretations of insurance policies are also reviewed de novo. Id.

It is axiomatic that the admiralty jurisdiction of the federal courts in contract cases depends on "the nature and subject matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions." Thomas J. Schoenbaum, Admiralty and Maritime Law § 3-10 (1987) (quoting New England Mut. Marine Ins. Co. v. Dunham, 78 U.S. (11 Wall.) 1, 29 (1871)). Charter parties and

other arrangements for the hire of a vessel clearly come within admiralty jurisdiction, as do maritime insurance contracts. Id. Construction of maritime contracts is governed by federal maritime law. Theriot v. Bay Drilling Corp., 783 F.2d 527, 538 (5th Cir. 1986). Although federal law governs the interpretation of marine insurance contracts, we apply the law of the state where the marine insurance contract was issued and delivered if there is no federal law, legislative or judicial, relating to the question. Elevating Boats, Inc. v. Gulf Coast Marine, Inc., 766 F.2d 195, 198 (5th Cir. 1985). We agree with the parties that Texas law is appropriately applied to the interpretation of these marine insurance contracts.

III.

A.

The Indemnity Addendum

The first holding we review is the district court's conclusion that the indemnity addendum modified only the indemnity obligations embodied in the time charter and did not alter the insurance obligations embodied therein. Placid argues that this conclusion is correct under Ogea v. Loffland Bros. Co., 622 F.2d 186 (5th Cir. 1980), and its progeny. Chouest argues that the instant case is distinguishable from Ogea and that the district court should have considered extrinsic evidence in interpreting the agreement between the parties. According to Chouest, the circumstances and purposes of the indemnity addendum clearly demonstrate that both the insurance and indemnity

obligations incorporated in the time charter were modified by the indemnity addendum.

Ogea is the seminal case in interpretation of maritime contracts such as the one involved in the instant case. That case involved a slip-and-fall accident that occurred on an oil drilling platform owned by Phillips Petroleum Company and operated by Loffland Brothers. Id. at 187. The contract between Phillips and Loffland provided that Loffland would indemnify and hold Phillips harmless from any claims by Loffland personnel arising out of Loffland's operation of the platform, and Phillips agreed to the same with respect to any claims by Phillips personnel. Id. at 188. The contract also required Loffland to procure $500,000 of comprehensive general liability insurance to protect Phillips. Id. at 188-89. When Cecil Ogea slipped and fell on the platform, he filed suit against Loffland, and Loffland sought indemnity from Phillips. Id. Viewing the contract as a whole, we held that "the parties intended that Phillips would not be liable for injuries incurred on its off-shore platform up to $500,000.00." Id. at 190. The indemnity provisions would come into effect only after the exhaustion of the insurance. Id. Placid also cites Klepac v. Champlin Petroleum Co., 842 F.2d 746 (5th Cir. 1988), which involves little more than a straightforward application of the Ogea rule to essentially the same fact pattern. The district court concluded that the instant case is legally indistinguishable from

Ogea, and thus held that Chouest's obligation to provide insurance coverage for Placid was paramount.

Chouest and New York Marine Managers and Progressive Insurance Company argue that Ogea is distinguishable from the instant case, seizing on the existence of the separate indemnity addendum as a material difference from Ogea and its progeny. In Chouest's view, the district court erred when it held that the contract, including the indemnity addendum, was unambiguous and susceptible to only one meaning -- the meaning consistent with the holding in Ogea. Chouest contends that the district court should not have invoked the parol evidence rule to exclude evidence of the circumstances surrounding the execution of the indemnity addendum, but rather should have considered such evidence in order to arrive at an interpretation consistent with the intent of the parties. In the alternative, Chouest argues that there was a mutual mistake in the execution of the indemnity addendum, that it did not embody the intentions of either Placid or Chouest, and that the document should be reformed to reach the result intended. At the very least, argues Chouest, summary judgment was improper because of the issues of fact regarding these matters.

We agree that the district court erred in invoking the parol evidence rule in the instant case and that the court should have considered the circumstances surrounding the execution of the indemnity addendum before deciding whether or not the contract as a whole was ambiguous. The parol evidence rule excludes

extrinsic evidence only when such evidence is offered for the purpose of varying or contradicting the terms of an integrated contract; it does not exclude evidence offered in aid of interpreting and giving meaning to the terms of the contract. 3 Arthur L. Corbin, Corbin on Contracts § 543 (1960). It is only after consideration of the extrinsic evidence that the rule applies -- if in light of the circumstances and purposes of the contract the court finds it to be unambiguous and integrated, parol evidence of a party's subjective intentions cannot be used to change the contract's meaning. Pennzoil Co. v. Federal Energy Regulatory Comm'n, 645 F.2d 360, 388 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982). In Pennzoil, we went on to note that, "since perception is conditioned by environment, it is proper to consider the contract's commercial setting even though the contract is not facially ambiguous." Id. (citing Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1046 (5th Cir. 1971)) (emphasis added).

As Professor Corbin explains, "any and all surrounding circumstances may be proved so long as they are material and relevant on the issue of what the contract is and what meaning should be given to its words." Corbin, supra, § 543. Ambiguity in a contract does not necessarily demonstrate itself on a reading of the document alone, but may be created by the conjunction of the document's terms and surrounding circumstances. As a result, a contract is properly said to be ambiguous "when it is reasonably susceptible to more than one

meaning, in the light of the surrounding circumstances and after applying established rules of construction." Watkins v. Petro-Search, Inc., 689 F.2d 537, 538 (5th Cir. 1982) (citations omitted). Ambiguity easily arises when the contract is applied to its subject matter in changed circumstances. Pennzoil, 645 F.2d at 388. The new use of the DAMON CHOUEST as an underwater towing vessel obviously constituted sufficiently changed circumstances for the parties to negotiate an addition to their original contract. It does not defy logic that this change in the parties' purpose might create ambiguity, even if none existed before.

This ambiguity is heightened by the indemnity addendum's dramatic shift of liability onto Placid and away from Chouest. Under the original time charter, the only risk borne by Placid was for claims by its own employees; Chouest bore the risk of liability to its employees and to third parties. Under the addendum, however, Placid bore the risk of liability to third parties, to its own employees, and apparently to Chouest's employees as well, excepting only the vessel itself and its crew. The original time charter provided that Chouest was obligated to insure Placid "with respect to [Chouest's] operation hereunder." The addendum does not speak of or purport to modify any insurance obligations, but Chouest's argument is not without force that its obligation to insure Placid under the original time charter was not intended by either party to carry over to towing operations conducted under the new and separate addendum. These problems

prevent the easy integration of the new indemnity addendum into the existing time charter, and Chouest was entitled to present parol evidence to explain the background circumstances that prompted the parties to draft the addendum in the first place.

In the alternative, if the district court correctly held that the contract is unambiguous and correctly interpreted that contract, Chouest argues that the indemnity addendum embodies a mutual mistake of the parties and that it is entitled to reformation of the instrument. Although the burden on a party seeking reformation of an instrument because of mutual mistake is a heightened one, requiring clear and convincing evidence, the party may use parol evidence to prove the mutual mistake. Travelers Indem. Co. v. Calvert Fire Ins. Co., 798 F.2d 826, 835 (5th Cir. 1986), on rehear'g on other grounds, 836 F.2d 850 (5th Cir. 1988). Chouest directs this court's attention to deposition excerpts in which Mr. Chouest and Mr. Clarke indicate that the purpose of the addendum was to place the risk of the bottom tow on Placid. Chouest emphasizes that the interpretation of the addendum placed on it by the district court and by Placid is wholly inconsistent with the desire expressed by Mr. Chouest that any exposure to liability fall on Placid rather than on Chouest or its insurers.

In light of the evidence presented by Chouest regarding the intent of the parties and the circumstances surrounding the execution of the indemnity addendum, we cannot say that summary judgment against Chouest regarding the proper interpretation or

possible reformation of the time charter as modified by the indemnity addendum is appropriate. We intimate no view as to the proper outcome of the case once all admissible evidence is before the trier of fact, nor do we express any opinion as to Chouest's claim for indemnity for the expenses Chouest incurred in connection with the Zapata claim. See Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 857 n.19 (1982) ("[I]f the District Court failed to consider relevant evidence, which would have been an error of law, the Court of Appeals, rather than make its own factual determination, should have remanded for further proceedings to allow the trial court to consider the evidence."). Because Chouest's proffered evidence was erroneously excluded, we reverse the district court's holding that the amended time charter did not alter Chouest's obligation to provide insurance coverage to Placid and remand for further proceedings.

B.

Did Placid Breach the Duty to Cooperate?

Our disposition of the issue regarding the district court's interpretation of the indemnity addendum does not dispose of the main point of contention between Chouest's Underwriters and Placid. Regardless of whether Chouest owed Placid a duty to provide insurance coverage, it is clear that Placid was an additional insured under Policy TR-1398 provided by Chouest's Underwriters. When the Zapata claim arose, Chouest's Underwriters informed Placid that it would undertake the defense of Placid against Zapata and requested Placid to forward

materials pertinent to the Zapata claim to counsel selected by Chouest's Underwriters. Placid balked because Chouest's Underwriters announced an intention to seek contribution from any other insurers who had issued policies to Placid covering the same type of liability. The district court held that Placid's refusal to cooperate with Chouest's Underwriters in its defense against Zapata violated the duty of cooperation set forth in Policy TR-1398,[4] and that Chouest's Underwriters were thus not liable to Placid for sums paid to settle the Zapata claim.

Placid presents essentially three arguments for reversal. First, Placid argues that its actions did not constitute a

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[4] The relevant portion of Policy TR-1398 provides as follows:

4. Insured's Duties in the Event of Occurrence, Claim or Suit:

* * *

C. The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of injury or damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

5. Action Against Company: No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

failure to cooperate. Next, Placid argues that any failure to cooperate on its part occasioned no prejudice to Chouest's Underwriters. Finally, Placid argues that any failure on its part to cooperate with Chouest's Underwriters was excused because of a conflict of interest between it and Chouest's Underwriters. As a preliminary matter, Chouest's Underwriters argues that Placid should be barred from raising this excuse to the duty to cooperate for the first time on this appeal. Placid retorts that the summary judgment against it was improperly rendered by the district court sua sponte because it had no notice that Chouest's Underwriters was pressing failure to cooperate as a defense to coverage. Our review of the record reveals that these contentions of procedural default are not well-founded, so we proceed to the merits of Placid's arguments.

As noted in Part II, supra, we refer to Texas law for the content of the duty to cooperate in this marine insurance case. Placid argues that, under Texas law, its actions did not constitute a breach of the duty to cooperate in the defense against Zapata's claims. In the alternative, Placid argues that prejudice is an element of any defense based on the duty to cooperate and that, at a minimum, a genuine issue of fact exists as to whether Chouest's Underwriters were prejudiced by any failure to cooperate. The district court interpreted Texas law not to require an insurer to show prejudice in order to establish failure to cooperate, citing Members Mut. Ins. Co. v. Cutaia, 476 S.W.2d 278, 279 (Tex. 1972), and Kimble v. Aetna Casualty and

Sur. Co., 767 S.W.2d 846, 849-50 (Tex. App. -- Amarillo 1989, writ denied).

We address first the issue of whether Texas law requires an insurer to show prejudice before it can raise failure to cooperate as a defense. Placid argues that the district court's holding that no showing of prejudice is required is an incorrect statement of the law of Texas. We agree.

We begin by noting that the duty of an insured to cooperate with its insurer in any defense the insurer might conduct is generally separate and distinct from the duties of the insured to furnish its insurer with notice of an insurable occurrence or to forward any suit papers received by the insured. These duties were spelled out in separate sections in Policy TR-1398, and they have been treated differently by the Texas courts. We observed this distinction in United States Casualty Co. v. Schlein, 338 F.2d 169, 174 & n.5 (5th Cir. 1964) (Texas law). In that case the insurer refused to defend its insured because the insured made false statements in a deposition and thereby allegedly breached his duty to cooperate. Id. at 170-71. We noted that "Texas imposes on the insurer claiming a breach [of a cooperation clause] the burden of establishing that the false material statements prejudiced the insurer." Id. at 174 (citing Griffin v. Fidelity & Casualty Co., 273 F.2d 45, 48 (5th Cir. 1959)). In a footnote, we observed that Texas does not require proof of prejudice with respect to certain other policy conditions, such as duties to give notice of the occurrence and notice of suit.

Id. at 174 n.5 (citing Klein v. Century Lloyds, 275 S.W.2d 95 (Tex. 1955), and National Sur. Corp. v. Wells, 287 F.2d 102, 105 (5th Cir. 1961)).

Placid has amply demonstrated that Texas adheres to the rule we enunciated in Schlein that prejudice is an element of an insurer's defense based on a breach of the duty to cooperate clause. In Frazier v. Glen Falls Indem. Co., 278 S.W.2d 388, 392 (Tex. Civ. App. -- Fort Worth 1955, writ ref'd n.r.e.), the court observed in dicta that no breach of the cooperation clause can arise absent some prejudice to the insurer. The rule played an integral part in the case of McGuire v. Commercial Union Ins. Co., 431 S.W.2d 347 (Tex. 1968). In that automobile collision case, Karen Pryor sued Billy McGuire on behalf of her decedent, Charles Pryor. Id. at 349. McGuire counterclaimed. Id. Karen Pryor sent the citation to decedent's insurer and proceeded to settle her claim against McGuire. Id. at 349-50. Decedent's insurer then filed a declaratory judgment action, seeking a determination that it was not obligated to defend the McGuire counterclaim or pay any amount adjudged against Karen Pryor in favor of McGuire. Id. at 350. The insurance company argued that the settlement and agreed judgment prejudiced its ability to defend against the McGuire suit. The court recognized that,

> because of the provisions of an insurance policy granting the insurer the right to defend suits and requiring the assured to cooperate with the company, the assured cannot make any agreement which would operate to impose liability upon his insurer or would deprive the insurer of the use of a valid defense.

Id. (citations omitted) (emphasis added). This principle operates to relieve the insurer of liability only when it is "actually prejudiced or deprived of a valid defense by the actions of the insured." Id. at 353. Thus, McGuire clearly stands for the proposition that a breach of the duty to cooperate by an insured relieves the insurer of liability only if the insurer is prejudiced in its right to defend the suit.

Placid's opponents cite Cutaia, as did the district court, for the proposition that no showing of prejudice to the insurer is required. In that automobile collision case, the plaintiff sued the defendant, and the defendant's insurer received actual notice of the suit within two days of the accident. Id. at 278. The defendant never forwarded suit papers to his insurer as required by the insurance policy, and the case ended in judgment against the defendant even though his insurer did provide a defense. Id. at 279. The plaintiff then proceeded against the insurer to collect on the defendant's policy; the court held that the insurer was not required to perform because of the breach of the duty to forward suit papers by the defendant. Id. at 281. The court refused to imply a provision into the insurance policy that failure to comply with the conditions precedent would be excused if the insurer suffered no harm or prejudice, leaving such a decision to the Texas State Board of Insurance or the legislature. Id.; see also Weaver v. Hartford Accident and Indem. Co., 570 S.W.2d 367, 369 (Tex. 1978) (citing the holding in Cutaia in another case involving the duty to forward process);

Dairyland County Mut. Ins. Co. v. Roman, 498 S.W.2d 154, 157 (Tex. 1973) (same); Lopez v. Royal Indem. Co., 496 S.W.2d 942, 943 (Tex. Civ. App. -- San Antonio 1973, no writ) (same).

We agree with Placid that Cutaia and its progeny did not disturb the holding of McGuire, a case decided only four years before Cutaia and in fact written by the same justice of the Texas Supreme Court. The Cutaia court specifically noted that "[o]nly the condition regarding the forwarding of suit papers is involved." Id. at 278. Cutaia, in fact, does not even mention McGuire, much less specifically overrule it. The Texas courts of appeals have continued to require prejudice in cases based on alleged breaches of the duty to cooperate. In Oil Ins. Ass'n v. Royal Indem. Co., 519 S.W.2d 148 (Tex. Civ. App. -- Houston [14th Dist.] 1975, writ ref'd n.r.e.), the insurer of a refinery was called upon to pay a loss caused by an explosion. Id. at 150. The insurer, Royal Indemnity, had reinsured certain losses with other insurance groups, and it sued Oil Insurance, which had reinsured fire and explosion risks. Oil Insurance's attempt to shift liability onto a second reinsurer failed, and it tried to avoid liability by arguing that Royal Indemnity did not cooperate with Oil Insurance. Id. at 150, 151. The court held that "[u]nder Texas law, a failure to cooperate without some resulting prejudice to the insurer is not a breach of a contractual duty to cooperate." Id. at 150 (citing Frazier, Schlein, and Griffin).

We are further persuaded by the recent case of Filley v. Ohio Casualty Ins. Co., 805 S.W.2d 844 (Tex. App. -- Corpus

Christi 1991, writ denied). In that case, the insured's demolition business inflicted property damage onto the plaintiff, Filley. Id. at 845. Filley filed suit against the insured, who disappeared, and obtained a default judgment. However, in Filley's subsequent suit against the insured's insurer, the trial court entered judgment against Filley because the insured breached the notice and cooperation provisions of the policy to the prejudice of the insurer. Id. The court of appeals affirmed the finding that the lack of notice and cooperation prejudiced the insurer, id. at 847, strongly suggesting that a finding of prejudice is required.

In light of these cases, we believe that the Cutaia rule that no showing of prejudice is required applies to the duty to forward suit papers only and that Cutaia is distinguishable from the instant case.

Placid's opponents attempt to distinguish the cases cited by Placid holding that prejudice is an element of the failure to cooperate defense. Specifically, they emphasize that the duty to cooperate in the instant case was a condition precedent to recovery on the policy, and that under the policy "no action" would lie against the insurer unless the condition was satisfied by Placid. According to Placid's opponents, the cases cited by Placid did not involve such contractual clauses.

We do not agree that the requirement of prejudice turns on whether the failure to cooperate defense is based on a condition precedent, finding no authority for this proposition. In

Frazier, an early case involving the cooperation clause and requiring prejudice as an element of breach, the court clearly categorized the clause as "a provision of the policy of insurance which was a condition precedent to the [insurer's] liability thereunder." Frazier, 278 S.W.2d at 390. The Filley case, which seems to import a prejudice requirement into both the duty to notify and the duty to cooperate, clearly involved a "no action" clause similar to the one in Policy TR-1398. Filley, 805 S.W.2d at 846. We therefore understand Texas law to require an insurer relying on breach of the cooperation clause as a defense to liability to show prejudice from the breach, regardless of whether the duty to cooperate is cast as a "condition precedent."

Our confidence in our interpretation of Texas law is enhanced by its consistency with the insurance law of many other jurisdictions. See, e.g., Clemmer v. Hartford Ins. Co., 587 P.2d 1098, 1107 (Cal. 1978); Ramos v. Northwestern Mut. Ins. Co., 336 So. 2d 71, 75 (Fla. 1976); M.F.A. Mut. Ins. Co. v. Cheek, 363 N.E.2d 809, 813 (Ill. 1977); Miller v. Dilts, 463 N.E.2d 257, 261 (Ind. 1984); Boone v. Lowry, 657 P.2d 64, 70 (Kan. Ct. App. 1983); Western Farm Bureau Mut. Ins. Co. v. Danville Constr. Co., 463 S.W.2d 125, 129-30 (Ky. 1971); Darcy v. Hartford Ins. Co., 554 N.E.2d 28, 33 (Mass. 1990); Anderson v. Kemper Ins. Co., 340 N.W.2d 87, 90 (Mich. Ct. App. 1983); Miller v. Shugart, 316 N.W.2d 729, 733 n.1 (Minn. 1982); Cameron v. Berger, 7 A.2d 293, 295 (Pa. 1938); State Farm Mut. Auto. Ins. Co. v. Davies, 310 S.E.2d 167, 168 (Va. 1983) (applying Va. Code Ann. § 38.1-

381(a1)); Dietz v. Hardware Dealers Mut. Fire Ins. Co., 276 N.W.2d 808, 812 (Wis. 1979).

We thus hold that the law of Texas requires an insurer to show prejudice if it is to assert breach of a cooperation clause as a defense to liability. The district court erred when it held otherwise. Placid argues that its adversaries on this issue suffered no prejudice. In particular, Placid directs this court's attention to the pre-trial order in which the parties agreed that the Zapata settlement was reasonable. The brief of Chouest's Underwriters at least implicitly challenges this conclusion, arguing that Placid's non-cooperation rendered Chouest's Underwriters unable to conduct a defense because it lacked Placid's assistance in disclosing facts, witnesses, and making other significant disclosures. We decline to rule on Placid's claim in the first instance, preferring to allow the district court the first opportunity to rule on Placid's argument. We also need not reach Placid's argument that a conflict of interest between it and Chouest's Underwriters excused any breach of the duty of cooperation that might have occurred; this argument may properly be made to the district court should the court find on remand that Placid breached its duty to cooperate to the prejudice of the rights of Chouest's Underwriters.

C.

The Battle of the Underwriters

All sides importune this court to sort out the various contractual obligations of the different insurers should we reverse the district court's holding regarding the duty to cooperate defense. We decline the invitation. The district court never addressed these issues, and justice would be best served by their presentation to the district court in the first instance.

D.

Placid's Request for Costs and Fees

Placid and Placid's Underwriters argue that they are entitled to fees and expenses incurred in defending the underlying claim and suit brought by Zapata as part of the coverage provided to Placid by Chouest's Underwriters. Under INA of Texas v. Richard, 800 F.2d 1379, 1380 (5th Cir. 1986), "the determination as to whether the award of attorney's fees is appropriate in marine insurance controversies is controlled by state law." Placid argues that the law of Texas permits the recovery of attorneys' fees by the prevailing party in a suit on a contract, including suits on insurance contracts. Tex. Civ. Prac. & Rem. Code Ann. § 38.001 (Vernon 1986); see Fidelity & Casualty Co. v. Underwood, 791 S.W.2d 635, 648 (Tex. App. -- Dallas 1990, no writ). Because we are remanding for further proceedings and not rendering judgment in favor of Placid, Placid is not entitled to attorney's fees at this juncture. See Rodgers v. RAB Invs., Ltd., 816 S.W.2d 543, 551 (Tex. App. -- Dallas

1991, no writ) (stating that a party "must recover damages" as a prerequisite to obtaining fees under § 38.001).

IV.

For the foregoing reasons, we REVERSE the district court's summary judgment in favor of Chouest's Underwriters and REMAND this cause for further proceedings consistent with this opinion.