Volume XI, No. 3 Winter 2009

CTH&G Quarterly

A newsletter presented by the law firm of Craig, Terrill, Hale & Grantham L.L.P., P. O. Box 1979, Lubbock, Texas 79408 or 1500 Broadway, Suite 400, Lubbock, Texas 79401, (806) 744-3232 telephone, (806) 744-2211 facsimile, www.cthglawfirm.com.

WELCOME TO THE WINTER EDITION OF THE CTH&G QUARTERLY!

Happy Holidays from Craig, Terrill, Hale and Grantham L.L.P.! As we close 2009 and bring to an end our Eleventh Volume of the CTHG Quarterly, we take this opportunity to express our appreciation to you, our readers, for your continued support and to offer you our best wishes for a healthy and prosperous 2010.

We are always interested in receiving your comments and suggestions for how we might improve our publication to make it of greater value to you. Please forward any suggestions you may have to merwin@cthclawfirm.com. Previous editions of the Quarterly may be accessed on our website: www.cthglawfirm.com. We look forward to hearing from you and providing you with timely updates to assist you in the up-coming new year.

JUST BECAUSE AN INSURER HAS NO DUTY TO DEFEND UNDER THE "EIGHT CORNERS RULE," SUCH MAY NOT RELIEVE THE INSURER FROM THE DUTY TO INDEMNIFY GIVEN THE ESTABLISHMENT OF SUFFICIENT FACTS IN THE UNDERLYING SUIT.

D.R. Horton -Texas, Ltd. v. Markel Int'l Ins. Co., Ltd., 2009 Tex. LEXIS 1042 (Tex. 2009).

James and Cicely Holmes purchased a house built by builder D.R. Horton-Texas Ltd. Soon after moving in, the Holmes claimed mold started to infest the house. As a result, they sued D.R. Horton-Texas Ltd. for remedial costs alleging defects around the house that allowed water to seep in through areas such as the chimney, roof, vent pipes, windows, and window frames. The Holmes petition claimed D.R. Horton responsible for the defects and negligent in attempting to repair the defected areas around the home. D.R. Horton responded by stating the member at fault was Rosendo Ramirez, a subcontractor, who performed masonry work on the home and attempted to repair some of the defects as well. Ramirez's name was never included in the petition or this lawsuit.

In order to receive coverage for his work, Ramirez obtained a CGL policy from Markel International Insurance Company, Ltd. naming D.R. Horton as an additional insurer. After being sued, D.R. Horton sought coverage from the insurance company. Markel, however, refused to extend their coverage since neither the petition nor any other legal documents pled facts alleging Ramirez's work was defective.

The trial court granted summary judgment on Markel's position that they did not owe D.R. Horton a duty to defend or indemnify it against the claims brought by the Holmeses. After affirming the trial court's ruling, the court of appeals held the eight-corners doctrine precluded D.R. Horton's claim that Markel owed a duty since none of the Holmeses' documents alleged Ramirez's work was defective. In other words, since Markel had no duty to defend, it also held no duty to indemnify D.R. Horton.

Pursuant to recent Texas Supreme Court precedent,

the analysis of the duty to defend has been strictly circumscribed by the eight-corners doctrine, while it is well-settled that the facts actually established in the underlying suit control the duty to indemnify. Markel argued that if the terms of a policy, when read according to a petition, do not give a rise to a duty to defend, proof of these allegations give no rise to a duty of indemnity. However, in light of the fact that D.R. Horton presented evidence with its response to Markel's summary judgment motion that showed Ramirez was a subcontractor for D.R. Horton for the home, and Markel's CGL policy for Ramirez named D.R. Horton as an additional insured; the Supreme Court held the evidence raised fact questions sufficient to defeat Markel's motion for summary judgment on the duty to indemnify claim. Consequently, The Court affirmed the court of appeals' judgment on the duty to defend and reversed the court of appeals' judgment on the duty to indemnify.

PARTY SEEKING MEDICAL RECORDS HAD THE OPTION TO OBTAIN DISCOVERY OF MEDICAL RECORDS OR OBTAIN AN AUTHORIZATION FROM THE PARTY BY REQUEST FOR DISCLOSURE.

In re Soto, 270 S.W.3d 732 (Tex. App.--Amarillo 2008).

The dispute at issue involved an automobile accident. The Sotos sued the Joyce Edwards alleging "personal injuries" and recovery for items such as medical expenses, physical impairment, disfigurement, and lost earning capacity. Edwards issued a request for disclosure amongst each plaintiff. In the disclosure, Edwards sought a copy of a medical authorization permitting a release of the Plaintiff's medical records and bills. In response, the Sotos changed the wording of the written response and mirrored the writing of Texas Rules of Civil Procedure 194.2(j). Rule 194.2(j) permits a party to request all reasonably related medical records and bills when a suit involving physical or mental injury damages occurred as a result of the case.

The Sotos stated "[a]ll medical records and bills that are reasonably related to the injuries or damages will be filed by affidavit and copies will be furnished to Defendant's attorney of record." None of the Plaintiffs executed the medical record and bill authorization. Edwards subsequently moved for an order compelling the Sotos to sign the authorization. The trial court then ordered the Sotos to release all medical authorizations from and after June 1, 2004.

The Sotos contend that the trial court abused its discretion in entering the foregoing order. The Sotos alleged that the relief exceeded the scope of Rule 194.2(j) because the time period encompassed by the authorization was overly broad. The Sotos argued that Rule 194.2(j) grants them the right to provide either the medical records or the authorization after the request. In other words, they argued the option should not belong to the party requesting the information, the Edwards, but to the Sotos instead.

In upholding the actions of the trial court, the Amarillo Court of Appeals relied on a previous opinion wherein the court opined that under the "new rules [of civil procedure] a party may obtain discovery of medical records of another party or obtain an authorization from another party by request for disclosure." As such, the court concluded the option belongs to the party requesting disclosure, not the one responding to it.

THE "SINGLE BUSINESS ENTERPRISE" THEORY OF HOLDING ONE CORPORATION LIABLE FOR THE ACTS OF ANOTHER WAS ABROGATED BY THE TEXAS SUPREME COURT.

SSP Partners v. Gladstrong Invs. Corp., 275 S.W.3d 444 (Tex. 2008).

After a five-year old boy died in a fire, the boy's parents sued SSP Partners and Gladstrong Investments (U.S.A.) Corp. on a claim of products liability. The parents alleged the fire was started due to a defective child-resistant WAX brand disposable butane lighter. SSP sold the mechanism while Gladstrong Investments designed, manufactured, and marketed the product.

SSP filed a cross-claim for indemnity against Gladstrong USA and Gladstrong Hong Kong and argued that even if Gladstrong USA was not a manufacturer of WAX-brand lighters, it is nevertheless liable for statutory indemnity because it and Gladstrong Hong Kong, which did manufacture the lighters, operated as a "single business enterprise." The single business enterprise liability theory on which SSP relies was put forward by the court of appeals in *Paramount Petroleum Corp. v. Taylor Rental Center*. There the court stated:

> [W]hen corporations are not operated as separate entities but rather integrate their resources to achieve a common business purpose, each constituent corporation may be held liable for debts incurred in pursuit of that business purpose. Factors to be considered in determining whether the constituent corporations have not been maintained as separate entities include but are not limited to the following: common employees; common offices; centralized accounting; payment of wages by one corporation to another corporation's employees; common business name; services rendered by the employees of one corporation on behalf of another corporation; undocumented transfers of funds between corporations; and unclear allocation of profits and losses between corporations.

712 S.W.2d 534, 536 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd, n.r.e.).

SSP asserts it offered evidence of all these factors.

Prior to this case, the Texas Supreme Court had not approved the imposition of joint liability on separate entities merely because they were part of a single business enterprise, and had only made mention that an issue exists "whether a theory of 'single business enterprise' is a necessary addition to Texas law regarding the theory of alter ego for disregarding corporate structure".

In analyzing if the "single business enterprise" theory should be recognized by the states highest court, the Court relied on alter ego policy considerations and reasoned that:

> Creation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace. We have never held corporations liable for each other's obligations merely because of centralized control, mutual purposes, and shared finances. There must also be evidence of abuse, or as we said in *Castleberry*, injustice and inequity. By "injustice" and "inequity" we do not mean a subjective perception of unfairness by an individual judge or juror; rather, these words are used in *Castleberry* as shorthand references for the kinds of abuse, specifically identified, that the corporate structure should not shield - fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like. Such abuse is necessary before disregarding the existence of a corporation as a separate entity. Any other rule would seriously compromise what we have called a bedrock principle of corporate law that a legitimate purpose for forming a corporation is to limit individual liability for the corporation's obligations.

Accordingly, the Court held that the single business enterprise liability theory will not support the imposition of one corporation's obligations on another in Texas Courts.

CRAIG, TERRILL, HALE & GRANTHAM L.L.P.

Robert L. (Bob) Craig, Jr., P.C.
H. Grady Terrill
Kent D. Hale
Terry L. Grantham
Hugh N. Lyle *
Leonard R. (Bud) Grossman *
Bennett G. Cook, III
Gary Bellair †
Brad J. Davidson
Barbara Bauernfeind
Angelia B. Lee
Holly Haseloff
Ryan J. Bigbee
Andrew Curtis°
Marcy M. Erwin

* BOARD CERTIFIED, PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED, CIVIL APPELLATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
° ALSO LICENSED IN THE STATE OF NEW MEXICO

A publication by the law firm of
Craig, Terrill, Hale & Grantham, L.L.P
1500 Broadway, Suite 400
P.O. Box 1979
Lubbock Texas 79408
Phone: (806) 744-3232
Fax: (806) 744-2211
www.cthglawfirm.com

Craig, Terrill, Hale and Grantham, L.L.P. provides legal services and assistance in the areas of Insurance Defense and Tort Litigation, Professional Liability, Business and Commercial Litigation, Medical/Health Related Industry, Construction Law, Corporate and Business Law, Banking, Bankruptcy and Creditors' Rights, Consumer Law, Real Estate, Estate Planning, Probate and Trusts, Appellate Advocacy, and Agricultural and Commodities Litigation.

Based in Lubbock, the largest city on the South Plains, the firm's attorneys represent a broad range of clients, from local companies and individuals to large national and international corporations, in all levels of state and federal courts, and are dedicated to providing their clients with the highest caliber of legal representation at fair and reasonable rates.

The *CTH&G Quarterly* reviews recent decisions by the Texas courts and current trends in civil litigation. It should not be construed as legal advice or opinion and is not a substitute for the advice of counsel.