By Bob Cunningham

MCGINNES V. PHOENIX INSURANCE CO: JUST WHAT IS THE TEXAS SUPREME COURT THINKING?

Texas recently joined the majority of states whose highest courts hold that decades-old standard form liability policies require insurers to defend their policyholders from letters the Environmental Protection Agency ("EPA") issues under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") that notify the policyholder that it is a Potentially Responsible Party ("PRP") and seeks to compel information and contribution of costs in a pollution clean-up action.

In *McGinnes Industrial Maintenance Corp. v. Phoenix Insurance Co. and Travelers Indemnity Co.*,[1] a bare majority of the Texas Supreme Court decided that these EPA letters and orders constitute a "suit" triggering the insurers' "right and duty to defend any suit against the insured seeking damages," pursuant to policy wording.[2] Four members of the court dissented.[3]

The specific result is important for the litigants and for insurance matters involving EPA pollution actions, of course. But the majority and dissent's strikingly different interpretations are of more general interest to insurance coverage practitioners to illuminate divergences in how the court is addressing challenges of insurance wording. Of particular note is what the court did not do: neither the majority nor the dissent approached the problem from an "ambiguity" perspective.

I. Background and Legal Issue Presented to the Court

The Fifth Circuit posed the issue to the Texas Supreme Court, seeking guidance on certified question:

> Whether the EPA's PRP letters and/or unilateral administrative order, issued pursuant to CERCLA, constitute a "suit" within the meaning of the CGL policies, triggering the duty to defend.[4]

As the Fifth Circuit outlined, McGinnes released waste into ponds located adjacent to the San Jacinto River.[5] During the period from 1967–71, Phoenix and Travelers provided coverage for McGinnes under standard form commercial general liability (CGL) policies.[6] The policies all provided that:

> [Insurer] shall have the right and duty to defend any suit against [McGinnes] seeking damages on account of ... property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient....[7]

The policies did not define the term "suit."

The EPA sent a "General Notice Letter" to McGinnes in 2007 identifying it as a PRP that disposed of hazardous waste at the sites, advising that McGinnes may be required to perform cleanup or pay for cleanup performed by the EPA, and inviting negotiations towards settlement.[8]

In 2008, the EPA sent a "Combination General Notice Letter and 104(E) Information Request Letter" repeating many aspects of the first letter, and also requiring response to a host of questions relating to McGinnes's waste-disposal activities and its relationship with Waste Management. That letter indicated that McGinnes could incur fines of up to $32,500 per day if it failed to timely respond, and could suffer criminal liability if it furnished false statements.[9]

In 2009, the EPA sent a "Special Notice Letter" intended to facilitate settlement by PRPs; providing McGinnes with the opportunity to enter into negotiations because the EPA believed McGinnes might be responsible for the cleanup of the site under CERCLA; and requesting a "good-faith offer" to settle with the EPA within sixty days. That notice letter indicated the EPA had already incurred response costs at the site exceeding $350,000 and demanded that McGinnes pay such costs.[10]

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When McGinnes allegedly did not provide the requested good faith offer, the EPA sent a final letter attaching a "Unilateral Administrative Order" requiring McGinnes to conduct a Remedial Investigation and Feasibility Study at the site; advising that McGinnes would be subject to civil penalties for each day it refused to comply with the order without cause, together with possible punitive damages; and stating that the EPA reserved the right to bring an action to recover any response costs incurred at the site.[11]

All of the letters sent and actions taken by the EPA were under the authority of CERCLA.

Insurers declined McGinnes's demand for defense under the CGL policies against the actions taken by the EPA. McGinnes filed suit against insurers for defense fees and for declaratory judgment, and the parties filed cross motions for partial summary judgment as to the duty to defend.

The district court held for insurers, finding that at the time the policies were issued, no administrative action existed for pollution clean-up as CERCLA had not yet been promulgated. Therefore, the parties would have understood "suit" to mean a court proceeding before a neutral jurist, and so the duty to defend correspondingly applied only to a court proceeding and not to EPA actions.

The Fifth Circuit accepted interlocutory appeal but found that unlike many other states, Texas courts provided almost no guidance on this particular issue.[12] Nor could the Fifth Circuit readily discern which arguments the court might find persuasive among those posed by the respective parties.[13]

McGinnes, relying on dictionary definitions of "suit," contended that it is ambiguous and should be interpreted in favor of the policyholder because one meaning is narrow and requires formal legal action while another meaning is broader and means any effort to gain an end by legal process. McGinnes also noted Fifth Circuit jurisprudence upholding pollution cleanup costs as "property damage," to argue that it would be highly anomalous not to trigger the duty to defend an action seeking damages that are within coverage. McGinnes also contended that Texas law should follow the majority of other jurisdictions that have interpreted "suit" broadly to cover these types of EPA actions.

Insurers agreed with the district court's point that "suit" was understood to mean a court proceeding at the time the policies were issued and reflected that intention by the parties. They argue that prior Texas precedent and certain portions of CERCLA using the term "suit" to mean a court proceeding should govern the meaning ascribed in the insurance contract. Insurers further contended that the broad interpretation of "suit" advocated by McGinnes does not differentiate it from the term "claim" as used in distinction from "suit" elsewhere in the policies.[14] And the insurers argued that an EPA action did not have the characteristics of complaint allegations, so could not trigger the "eight corners rule" for determining whether a duty to defend is owed. With respect to the majority of cases in other states in agreement with McGinnes's position, the insurers argued that the minority employed superior textual interpretation more consistent with Texas law.

The parties expanded but essentially perpetuated these arguments in their briefing to the Texas Supreme Court and in oral argument. The court issued its opinion on June 26, 2015 and denied motion for rehearing on January 22, 2016.

II. The Issues Joined: Majority, Dissent, and Comment

The majority opinion first determined that an EPA action is a "suit" so that insurers must defend McGinnes.[15] Second, the majority examined whether pollution cleanup costs were covered as damages by the policies, and, finding that they were, determined that it would be anomalous if an EPA action seeking such damages did not also trigger the duty to defend. Third, the majority acknowledged that the great majority of other courts have likewise decided in favor of the policyholder, as another factor for Texas to follow in the interests of uniformity and predictability.

The dissent essentially followed the majority's argument framework, but disagreed with the majority's conclusions as to each point.[16]

A. Does an EPA proceeding constitute a "suit" for purposes of defense under CGL?

1. Whether an EPA action is a "suit"—Majority Opinion

The majority prefaces its argument on "suit" with a short treatment of how pollution proceedings were pursued procedurally prior to CERCLA when the policies were issued, and describes the extensive authorities granted the EPA in supplanting the traditional relief afforded through the courts prior to that statute. Then at the outset of its examination of the term "suit," the majority as much as admits and agrees with insurers that the ordinary meaning describes a court proceeding, with only a passing recognition that a broader meaning may also be ascribed.[17]

Here, a student of Texas jurisprudence would anticipate the court to apply the "plain meaning" standard and hold in favor of the insurers, or alternatively give sufficient credence to the alternative definition to find the broader interpretation reasonable and therefore rule in favor of the policyholder on the basis of an ambiguity. But no. Instead, the majority returns to the historical theme, emphasizing that at the time the policies were issued, the type of pollution damages sought in a modern EPA action were available only as a court proceeding under state statute or common law; that is, through a true "suit."

The key portion of this argument is this:

> One effect of CERCLA was to authorize the EPA to conduct on its own what otherwise would have amounted to pretrial proceedings, but without having to initiate a court action until the end of the process. The PRP notice letters serve as pleadings . . . .
>
> And part of the judicial function is ceded to the EPA by limiting a PRP's opportunity for review until the end of the process, and then limiting that review to an abuse of discretion by the EPA, based on its own record.
>
> McGinnes argues that EPA proceedings are the functional equivalent of a suit, but in actuality, they are the suit itself, only conducted outside a courtroom.[18]

This approach turns the "intent" question on its head. In the majority's view, the expectation of the parties at the time of contracting was that these sorts of pollution damages would be pursued in courts. Therefore it would be unfair to the policyholder to deprive it of a defense it would have enjoyed under the policies, by virtue of CERCLA having transferred court proceedings to the EPA as an equivalent administrative proceeding.

Employing this perspective, the majority disposes of the insurers' argument that EPA proceedings are simply demand letters or pre-suit settlement mechanisms. "The point is that before CERCLA those mechanisms were available to the EPA only in judicial proceedings."[19] This is emphasized again in the majority's observation that not all demand letters, enforcement proceedings, or administrative actions constitute "suits"; rather, an EPA enforcement proceeding is unusual because not only are they *like* judicial proceedings, they *were* judicial proceedings before CERCLA was enacted.[20]

2. Whether an EPA action is a "suit"—Dissenting View

In an extensive preamble to its reasoning, the dissent spares no feelings in enunciating its frustration that the majority seemingly ignores longstanding rules of contract interpretation, and accuses the majority of exchanging objective analysis and freedom of contract in preference for rewriting the policy to achieve results-oriented conclusions. This exposition cites numerous Texas precedents on the tools for contract interpretation—effectively throwing them in the majority's face—while strongly heralding the court's typical text-based analysis that examines the words of the contract to determine intent in virtual isolation from other factors. [21]

In contrast to the majority's novel approach, the dissent employs traditional interpretative tools to criticize the holding and advocate for a narrow construction. For the dissent, the plain and ordinary meaning of "suit" requires a court proceeding, and the alternative definition posited by McGinnes fails to hold up to common sense or close scrutiny.[22]

The dissent examines the "intent" issue by looking at what the parties would have expected the policy to cover as a "suit" for pollution damages at the time they were issued; as described by the majority, that meant court proceedings. The parties could not have foreseen—and therefore did not intend—for the policy to provide a defense for a "suit" other than an actual court proceeding. The dissent finds that dictionary definitions of "suit" likewise encompass or contemplate a form of court proceeding, and points to Texas and other court opinions that likewise use the term "suit" as co-extensive with court proceedings.

The dissent similarly rejects McGinnes's argument that defense is owed because EPA proceedings are the "functional equivalent of a suit," summarily observing that the policies provide defense for a "suit"; not for its "equivalent." For the dissent, the contemporaneous contracting intention is centered on the term "suit" and what the parties reasonably thought it meant when the policies were issued; since CERCLA did not yet exist, they could not have intended for the term to apply to EPA actions created by CERCLA. Indeed, the dissent observes that the insurance industry demonstrated a distinct aversion to covering CERCLA damages by initiating extensive CGL policy revisions severely limiting and even eliminating pollution coverage once that statutory regime came into effect.

Finally, the dissent challenges how courts can use the majority's guidance in determining what sorts of administrative actions constitute "suits," and which do not. Simply, the dissent does not appreciate that EPA actions have the same sort of hallmark characteristics as lawsuits, so as to effectively segregate those actions into their own category substituting for traditional lawsuits and different from other forms of administrative proceeding.

3. Consideration of Majority and Dissent on "suit"—Commentary

The majority and dissent seem to be talking past each other, with neither grappling effectively with the other's point of view. To an extent, the majority seems to recognize this with an attempt to address by footnote what they believe is the dissent's misunderstanding of their position. A lengthy quotation is helpful, as this seems to be at the heart of the divergence:

> The dissent argues that we are rewriting McGinnes's policies under the assumption

> that, had it and the insurers anticipated CERCLA, they would have agreed that the insurers would have the right and duty to defend those proceedings. We assume no such thing. The parties used the word "suit" to refer to the kinds of proceedings the insurers had the right and duty to defend. When the policies issued, before CERCLA, the duty to defend would have covered cleanup enforcement proceedings in the only place they could be brought—in court. We hold that the parties' intention should not be defeated by a subsequent federal regulatory statute that authorizes the EPA to conduct those same proceedings itself before going to court. The dissent argues that the real meaning of "suit"—the proceedings and costs it actually entails—and thus the parties' bargain can be changed over time by a federal regulatory statute like CERCLA. We disagree, not despite our duty to interpret the policies as the parties intended in the text, but because of it.[23]

In response, the dissent challenges whether EPA actions really did substitute for court proceedings, and in all events declines the opportunity to "rewrite" the policy to achieve those ends even if it did. But the bottom line seems to be that the dissent is simply unpersuaded by the majority's approach, and finds it inconsistent with precedent that prescribes text-based tools for determining contractual intent.[24]

Perhaps the problem is that the dissent misapprehends that the majority are equally committed to text-based interpretation. Had the majority been inclined, they could simply have advocated the alternative definition McGinnes proposed and determined that the policy was ambiguous—and therefore must be interpreted in McGinnes's favor—because dictionaries define "suit" to mean an "effort to gain an end by legal process," which includes administrative proceedings. That was the argument McGinnes advocated, and which other high courts have adopted, as the majority acknowledged.[25] It is remarkable that the majority declined this opportunity and held for McGinnes, despite essentially finding that the plain meaning of "suit" refers to strict court proceedings. Indeed, the majority appear to actively avoid finding the term ambiguous.

On closer view, the majority opinion seems to be employing an analysis based on a broad investigation of the "circumstances of contracting" that existed at the time of the policy issuance. The point the majority is making seems based more on the "function" that the insurance was supposed to play at the time it was issued, than on the words chosen to implement that purpose. So, for the majority, the core question is whether the CGL coverage of the time functioned to provide coverage for pollution costs and damages; having found that it did for formal court proceedings, the majority then concludes that the same functional expectation has simply been transferred to EPA proceedings, and should be honored.

Had the dissent perceived that this sort of "functional" test is at the heart of the majority's analysis, they likely would have responded by citing the myriad Texas precedents decrying any dependence on extrinsic evidence where used to interpret plain and ordinary contract wording contrary to its obvious textual intent.[26] The lack of any such argument may indicate that the dissent does not appreciate the "functional" approach apparently being taken by the majority.

A similar dichotomy distinguishes the approaches by majority and dissent in *RSUI Indemnity Co. v. The Lynd Co.*,[27] decided a month prior to *McGinnes*. Justice Boyd wrote for the majority, utilizing a detailed textual analysis of the insurance policy in an attempt to harmonize various provisions before declaring it ambiguous and ruling in favor of the policyholder. Chief Justice Hecht wrote for the dissent (including Justices Green and Brown, who join in the *McGinnes* majority), decrying the majority's overemphasis on every "jot and tittle" of the text while giving "no consideration to whether an unrealistic interpretation is reasonable" and characterizing that interpretive exercise as one of "linguistic ingenuity and absorption with minutiae" untroubled by realities and consequences.

While not so plainly as in *McGinnes*, perhaps, the divergence of approaches in *Lynd* similarly seems based on whether the court should give full weight to "text" as the primary or even exclusive interpretive tool, or whether consideration of "function" should be an equivalent factor in determining the intent and purpose of the contractual wording.[28] Because that issue was not clearly joined and debated on those terms as between the *McGinnes* majority and dissent, the case does not provide particular guidance on debates within the court or how its jurisprudence may be trending. But especially when combined with *Lynd*, these apparent differences in approach raise questions warranting further observation by alert practitioners.

B. Are pollution clean-up costs "damages" under the CGL?

1. Pollution costs as "damages"—Majority View

Upon determining that an EPA proceeding substitutes for judicial proceedings existing at the time of policy issuance—and therefore should be considered a "suit" triggering the duty to defend—the majority considered whether pollution costs sought by the EPA under CERCLA are "damages" covered by the form CGL policies.

Textually, the duty to defend applies only to "suits" seeking

property damages for which the insurers have to pay. But the majority nowhere indicates that they examined the issue for the purpose of textual completeness. Rather, the majority proposed that if the insurer ultimately is required to pay damages, it creates perverse incentives for both parties if the insurer does not also have a concomitant duty to defend the action seeking those damages.[29]

On the one hand, McGinnes could ignore the EPA action, decline to defend at its own cost, and then impose any ultimate award of damages upon the insurers who had not themselves defended. On the other hand, insurers likely would accuse McGinnes of failing in its obligations to cooperate to avoid damages. The majority seems less concerned with whether these are likely scenarios, as much as pointing out the problem with a duty to indemnify having no accompanying duty or right to defend.

The majority does not actually decide affirmatively that such damages are indeed covered under CGL policies. The issue was not before the court. But the majority noted that insurers did not dispute that pollution costs were damages (although they objected that the damages did not result from an accident or occurrence). And the majority noted with approval a number of Fifth Circuit and other federal cases so holding.

2. Pollution costs as "damages"—Dissenting View

The dissent objected to ruling on a question that the court has never decided and that is not presented in this case, and noted that not all courts have agreed that CERCLA cleanup costs are "damages" under a CGL policy. Since the issue was not properly before the court, the dissent's view was the court need not—and indeed could not—rule on it.

Second, the dissent noted that Texas draws a sharp distinction between the separate duties to defend and indemnify.[30] Regardless whether the court's approach represents better policy and better alignment of the parties' interests and incentives, the distinction must be respected and not collapsed.

Finally, the dissent did not recognize particularly skewed incentives if the duty to defend did not accompany a duty to pay. In that circumstance, the insurers nonetheless retain an incentive to join negotiations and take measures to minimize their own risk of paying an untoward judgment. Moreover, under the policies' wording there is no question but that insurers are entitled to investigate and participate in negotiations for settlement of any "claim or suit" that would encompass the EPA "claim" for pollution costs, whereas the question before the court is different and strictly addresses whether a duty to defend is owed solely for a "suit." For the dissent, answering whether pollution costs are "damages" does not resolve whether an EPA proceeding is a "suit."

3. Pollution costs as "damages"—Commentary

It is not entirely clear what the majority hopes to accomplish by its quasi determination on "damages" coverage for pollution costs under the CGL wording. The discussion does not advance the question before the court to determine whether an EPA proceeding is a "suit" as a matter of textual analysis. And it is rather extraordinary for the court to rely on conclusions that are "relatively well settled" and even cite with approval the conclusions reached by other courts, while nonetheless not ruling definitely itself on an issue not actually before it.

This approach makes more sense, however, if appreciated as another example of the hypothesis that the majority is employing a "functional purpose" rubric. While the majority's discussion may not advance an interpretation based on textual analysis, it does add to a perspective based on achieving a common sense purpose underlying the contractual agreement and relationship between insurer and policyholder. From that larger perspective, the court's observations provide another reason why the duty to defend should be conjoined with the apparent obligations to pay for ultimate damages, as a means of advancing the overall purpose and structure of the parties' respective obligations. Again, though, this approach seems rather far afield from the court's typically rigorous text-based interpretive principles.

C. Promoting uniformity for interpretation of standard insurance provisions

1. Promoting uniformity with non-Texas decisions—Majority View

The majority counts thirteen of sixteen high courts of other states adopting *McGinnes*'s view and rejecting the insurers' restriction of "suit" to court proceedings, only. And the majority notes the trend is strongly in that direction among federal and lower courts, as well as more modern ones, with the remaining courts relegated to older precedents.[31]

While complete unity was impossible, the majority recognized and stressed the importance of uniformity when identical insurance provisions will necessarily be interpreted in various jurisdictions, and so determined that insureds in Texas should not be deprived of the coverage insureds have in thirteen other states.[32] Thus, the majority asserted that Texas should join with the majority in holding that an EPA proceeding constitutes a "suit" under standard CGL wording.

2. Promoting uniformity with non-Texas decisions—Dissenting View

The dissent acknowledges that Texas strives for uniformity, but finds it does not exist among the diverse opinions in the non-Texas cases. Where unanimity cannot be achieved, Texas should not bend its "plain meaning" interpretive principles

in a futile effort to conform to other court's interpretations of common policy wording.[33] More importantly, the dissent appreciates that the minority opinions rely upon a text-based approach that is more congruent with Texas jurisprudence, in concluding that EPA proceedings do not constitute a "suit."[34]

3. Promoting uniformity with non-Texas decisions—Commentary

Both the majority and dissent assert traditional Texas treatment when considering non-Texas cases interpreting insurance policies. That is, both recognize that Texas strives for uniformity when a clear view emerges on the interpretation of standard wording used across the country. This affords both policyholders and insurers the heightened predictability of a body of interpretive case law.

But this approach is not relevant or persuasive where policy wording is non-standard but varies by insurer or policyholder, or where consensus would not be enhanced by Texas's acquiescence in a perceived majority view.[35] Adhering to a consensus also requires that a majority rule actually can be discerned in the non-Texas cases, and that upon close examination they actually address the wording and circumstances before the court.[36]

So while Texas joins in the conclusion reached by the majority of other courts, the unique basis for its decision hardly provides the sort of predictability intended by favoring uniformity.

Where a real consensus exists among non-Texas courts interpreting standard policy wording, Texas often will agree.[37] Here, the majority recognizes a clear majority of high courts approving defense coverage for EPA proceedings as a "suit" under standard CGL wording, with the recent trend likewise moving in that direction. Conversely, the dissent perceives divergences from the prevailing approach, with the minority opinions utilizing text-based interpretation more closely aligned with principles of contract construction in Texas.

Ironically, the core argument made by the majority—that an EPA proceeding should be considered a "suit" because it replaced the court proceeding under which such damages were available at the time the policies issued—seems to be a novel concept that is not asserted the same way by any of the other state high court. So while Texas joins in the conclusion reached by the majority of other courts, the unique basis for its decision hardly provides the sort of predictability intended by favoring uniformity.

4. Divergence of opinions as evidence of ambiguity—Commentary

Since neither the majority nor the dissent found the policy terms ambiguous, neither side asserts the standard disclaimer that a policy provision is ambiguous only if it is subject to more than one reasonable interpretation and not merely because the parties or other courts differ over its interpretation.[38]

In the course of oral argument in *McGinnes*, however, the question was directly posed to insurer's counsel: If ambiguity exists when an insurance policy provision is susceptible to two or more reasonable interpretations, how should the court deal with differing opinions by multiple courts interpreting the same provision? Must the court hold that opinions of other jurists are necessarily unreasonable, if they differ from the opinion held by the court's own majority?[39]

For insurance jurisprudence, the question holds a special significance. When ambiguity is found in other contracts, Texas courts allow development of extrinsic evidence to determine the parties' actual intent as a factual question.[40] But when an insurance policy is susceptible to competing reasonable interpretations of the contract, Texas courts must adopt the construction that favors the insured without any further fact-finding of intent.[41]

Despite identifying in oral argument the apparent ambiguity created by multiple differing court opinions, neither the majority nor the dissenting opinions in *McGinnes* dealt with the question in those terms.[42] Rather, the argument between the divergent opinions in *McGinnes* centered on implementing unanimity where possible to achieve consensus and predictability in national interpretation of standard policy provisions.

Aside from simply declaring that diversity of other opinions does not preclude a court from reaching its own conclusion, the court does not seem to have grappled with the problem in a particularly principled fashion. The default position is simply protective of the court's independence to reach its own conclusions of law based on its own interpretive analysis.[43]

In other words, the court reserves to itself the right to decide whether or not a particular interpretation is subject to "genuine uncertainty" or any other indices of ambiguity, and essentially relegates divergent judicial opinions to the level of arguments made by the parties which can be dismissed out of hand unless independently persuasive. Or, to put a finer point on it, the court reserves to itself—that is, to a simple majority in a given case—the sole role as arbiter of what is plain, unambiguous, and reasonable even in the face of multiple other courts that find the same wording has a different reasonable meaning in the same context.

So, for example, it has rather breezily been proposed that: "It is inevitable in human affairs that reasonable people sometimes disagree; thus, it is also inevitable that they will sometimes disagree about what reasonable people can disagree

about."[44] The ultimate source of this quote, *City of Keller v. Wilson*, is not from an insurance or contract interpretation case, but involves the test of legal sufficiency for directed verdict, dependent upon the jurist's determination whether evidence at trial would enable reasonable and fair-minded people to reach the verdict under review.[45]

The point being made in *City of Keller* has nothing to do with ignoring diversity of opinion among courts regarding standard policy wording, but simply emphasizes the cogent point that the duty remains with the judge to make hard decisions, as the court illustrates with an extensive quotations from former Chief Justice Calvert:

> But since questions of negligence are questions of degree, often very nice differences of degree, judges of competence and conscience have in the past, and will in the future, disagree whether proof in a case is sufficient to demand submission to the jury. The fact that [one] thinks there was enough to leave the case to the jury does not indicate that the other [is] unmindful of the jury's function. The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge.[46]

The purpose of insisting on judicial independence, then, is not to foster undue hubris in the judiciary, but to encourage making hard decision.

Clearly, the court is justifiably concerned about preserving its judicial independence to determine cases, including insurance wording, without having the court's role wholly preempted by other courts that have prejudged the wording differently. This concern is not necessarily undermined, however, by recognizing that ambiguity is more likely than not present whenever serious judicial reasoning of different courts have reached different conclusions about the same insurance wording in similar circumstances. In any event, conserving its own judicial independence does not necessarily or automatically mean that the court should simply ignore the existence of contrary and divergent jurisprudence in the course of its project to determine whether a clause has plain meaning or is ambiguous.

What could the court do differently if it took seriously the problem posed by Justice Boyd at oral argument, and acknowledged that divergence among precedents is itself powerful evidence of ambiguity? One option could be for the court to determine plain meaning and reject ambiguity in the face of differing judicial opinions, only after honestly concluding that the court's own interpretation not only is more correct, but is singularly unambiguous in differentiation from other precedent.[47] Perhaps the court could even impose a heightened standard of persuasion where insurance policy wording has generated multiple differing interpretations, akin to that imposed on contractual indemnities against one's own negligence.[48]

More commonly, however, the court's jurisprudence does not demonstrate any such deep regard for the problem that divergent judicial opinions are strongly suggestive of ambiguity. Rather, the court has seemed solely interested in protection of its own unfettered independence, and largely has been content to reach its own conclusions about ambiguity of particular wording in the face of divergent judicial reasoning without taking seriously that such divergence—in and of itself—must illustrate that alternative reasonable interpretations more likely than not must exist.

The few lower Texas courts that have addressed the problem have, at least, grappled more directly with the implications of divergent precedent when determining whether insurance wording is ambiguous and therefore must be interpreted strictly in favor of the policyholder. For example, the Houston appellate court has looked to decisions from other states interpreting the subject wording excluding activities "in connection with" certain premises, in the absence of Texas precedent.[49] Noting that those cases reached differing results—some favoring the insurer and some agreeing with the policyholder's interpretation—the court concluded that the policy wording was susceptible of two reasonable constructions. Thus, the court felt compelled to construe the exclusionary clause in favor of the policyholder and against the insurer.

Similarly, the same appellate court recognized that an insurance policy is not ambiguous as a matter of course just because two parties disagree over the proper construction, but that the problem is more serious when courts from several jurisdictions interpret similar policy provisions and reach different results.[50] The court reviewed precedent from other states in the absence of Texas precedent on "sudden and accidental" wording in a case involving leakage caused by pipe corrosion. The court's own reading of the policy was consistent with an interpretation favoring the policyholder, but even if that had not been the case the court was persuaded that differing interpretations by various other courts demonstrated ambiguity in the wording that required a holding against the insurer.

These opinions do not seem entirely consistent, however, with a prior approach taken by that same court rejecting policyholder's argument that a "business risk" exclusion was necessarily ambiguous as a matter of law because courts that have dealt with the same issue have interpreted it differently.[51] After reviewing existing Texas precedent that supported the insurer's contrary interpretation, that panel

of the court noted that opinions from other jurisdictions likewise supported the insurer, and distinguished the remaining cases cited by the policyholder. Agreeing with the interpretation of the clause in prior Texas Supreme Court precedent, the court found the exclusion to be clear and unambiguous, and denied coverage.

More interestingly, the court queried how a rule would be applied that found ambiguity on the basis of divergent judicial opinions. So, the court wondered:

> [E]ven in those cases where legitimate, differing interpretations of the same language result, at what point the language becomes ambiguous as a matter of law. Is that point reached when the jurisdictions are split evenly, when there is a 40%, 30% or 20% minority; or can a court no longer consider the issue for itself when only one other court reaches an opposite conclusion? This court prefers the alternative which allows each court to decide the issue in light of the policy terms and the facts before it.[52]

Another opinion from Houston's Fourteenth District noted with some sympathy the insurer's argument that if judicial disagreement established policy wording as ambiguous, then insurance law jurisprudence would be established by the "lowest common denominator" favoring policyholders on a given coverage issue, so that even a small number of decisions would render moot any need for analysis by any other court.[53] The court found the point well-taken, but believed it was bound with respect to the particular interpretive question by Texas Supreme Court precedent.

Ultimately, the Fourteenth District reached a definitive approach to the problem en banc, rejecting the argument that differing opinions interpreting contract provisions necessarily render them ambiguous.[54] Once again, the policyholder had argued that its interpretation was necessarily a reasonable one because at least one court from another jurisdiction has adopted it.

Relying simply on a citation to *McKee*, the en banc court held that insurance policy provisions are not susceptible to more than one reasonable interpretation, and thus ambiguous, "merely" because other jurisdictions have reached differing conclusions about similar provisions. Rather, although the reasoning of such other courts might be persuasive, ambiguity should be decided independently. As further rationale, the court argued that core principles of judicial independence otherwise would be compromised:

> If the interpretation of a policy provision by another jurisdiction automatically rendered that interpretation reasonable, then . . . Texas courts would always be bound by the decision of whatever other jurisdiction has interpreted a given provision most favorably for the insured. On the contrary, while Texas courts may certainly draw upon the precedents of any other federal or state court, they are obligated to follow only higher Texas courts and the United States Supreme Court.[55]

The en banc majority reviewed and noted that two precedents from other jurisdictions had sided with the insurer, distinguished all but one precedent, and simply disagreed with the rationale of the sole remaining case cited by the policyholder. The majority further found there was a reasonable basis for the insurer to impose the exception at issue, thus undermining the precedential effect of that case. Thus having satisfied itself that the exclusion/exception were clear and unambiguous and should be applied as written, the court denied coverage.

Where does Texas law stand at the end of this discussion? Based on *McKee* and the en banc decision of the Fourteenth Court of Appeals in *Betco*, it seems the most that can be said with some certainty is that Texas courts are not compelled to determine an insurance clause ambiguous simply because other courts or judges have held divergent opinions. Certainly, nobody on the court in *McGinnes* even hinted that the divergence of opinion by other jurisdictions on the issue, of itself rendered the term "suit" ambiguous.

This is not nearly the same, however, as saying that differing judicial opinions should have no greater weight than the differing opinions of the parties with their acknowledged interests in the outcome, one would think. The current jurisprudence seems to leave some latitude for a policyholder to argue that divergent opinions should at least be taken by Texas courts as weighty evidence that a particular policy interpretation is ambiguous, even if the fact of such divergence is not in and of itself determinant of the issue of ambiguity.

Neither McGinnes nor insurers asserted this argument in their briefing, and so the court was not prepared to address it directly notwithstanding Justice Boyd's question at oral argument. Perhaps on another occasion an advocate will urge the court to grapple with the issue more seriously, to strike a proper balance that honors the court's independence of judgment while also acknowledging that ambiguity is deeply implicated where a question of interpretation engenders a multiplicity of differing judicial opinions.

1 477 S.W.3d 786 (2016).

2 *See id.* at 790 for specific policy language.

3 *Id.* at 794.

4 *McGinnes Indus. Maint. Corp. v. Phoenix Ins. Co.*, 571 F. App'x 329, 335 (5th Cir. 2014).

5 *Id.* at 330.

6 *Id.*

7 *Id.* at 330–31.

8 *Id.* at 331. The EPA letter was addressed to McGinnes's indirect parent, Waste Management, but reference will be made simply to McGinnes throughout.

9 *Id.*

10 *Id.* at 332.

11 *Id.*

12 The circuit cited only a single district court case, which held that "suit" in CGL policies was sufficiently broad to include PRP letters in CERCLA-type proceedings. *Gulf Metals Indus. Inc. v. Chi. Ins. Co.*, No. 96–04673, slip op. at 13 (126th Jud. Dist. Ct. Mar. 13, 1998), aff'd on other grounds, 993 S.W.2d 800 (Tex. App.—Austin 1999, pet. denied).

13 This article assumes that the reader is familiar with the standard litany of Texas's interpretive rules governing examination of insurance policies. For a thoughtful, detailed and recent treatment of these issues, *see* Lyndon F. Bittle, *Interpreting Insurance Policies in Texas: It's Not That Hard*, 72 The Advoc. (Texas) 62 (2015), responding to R. Brent Cooper, *Principles for Interpreting Insurance Policies*, 71 The Advoc. (Texas) 34 (2015).

14 The policy wording provides the insurer has the right and duty to defend any "suit" but may in its discretion investigate or settle any "claim or suit."

15 Majority opinion authored by Hecht, CJ joined by Justices Green, Willett, Devine, and

Brown.

16 Dissenting opinion authored by Justice Boyd, joined by Justices Johnson, Guzman, and Lehrmann.

17 "We agree with the Insurers that 'suit' commonly refers to a proceeding in court. Although the word is sometimes defined more generally as 'the attempt to gain an end by legal process,' the more specific connotation is an attempt through process in court." *McGinnes*, 477 S.W.3d at 791 (citations omitted).

18 *Id.*

19 *Id.* at 792.

20 *Id.*

21 *Id.* at 794–97.

22 *Id.* at 797–02.

23 *Id.* at 791 n.29.

24 *See Id.* at 800 ("None [of the majority's arguments] convinces me, but more importantly, our well-established rules of construction do not recognize any of the court's reasons as a legitimate basis for ignoring or rewriting the unambiguous language of an insurance policy.").

25 *See, e.g.*, *Travelers Cas. & Sur. Co. v. Alabama Gas Corp.*, 117 So. 3d 695, 708–09 (Ala. 2012); *R.T. Vanderbilt Co. v. Cont'l Cas. Co.*, 273 Conn. 448, 464–65, 870 A.2d 1048, 1059–60 (2005); *A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 627–28 (Iowa 1991); *Aetna Cas. & Sur. Co. v. Kentucky*, 179 S.W.3d 830, 837 (Ky. 2005), as modified on reh'g (Jan. 19, 2006); *C.D. Spangler Const. Co. v. Indus. Crankshaft & Eng'g Co.*, 326 N.C. 133, 153–55, 388 S.E.2d 557, 569–70 (1990).

26 While beyond the scope of this article, the distinction is not always so clearcut between permissible evidence of circumstances to illuminate intent in the context of contracting, and impermissible extrinsic evidence to alter and render ambiguous an otherwise clear and explicable term. *See, e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus.*, 907 S.W.2d 517, 521 (Tex. 1995) ("extrinsic evidence is inadmissible to contradict or vary the meaning of the explicit language of the parties' written agreement" but "extrinsic evidence may ... be admissible to give the words of a contract a meaning consistent with that to which they are reasonably susceptible, i.e., to 'interpret' contractual terms"); *see also Houston Expl. Co. v. Wellington Uw. Agencies, Ltd.*, 352 S.W.3d 462 (Tex. 2011).

27 466 S.W.3d 113 (Tex. 2015).

28 A similar difference might be seen in the approaches taken and pointed remarks made by majority and dissent (joined by then-Justice Hecht) advocating text-based interpretation and functional purpose respectively, in *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. Aug 31, 2007).

29 *McGinnes* at 792.

30 *Id.* (citing *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002)). Inexplicably, no citation is made to the principal case more specifically on point, *D.R. Horton–Tex., Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 743–44 (Tex. 2009), distinguishing between the defense duty predicated solely on allegations alleged in pleadings as contrasted with duty to defend predicated on all facts presented for judgment.

31 *McGinnes* at 793.

32 *Id.* at 794 (citing *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 497 (Tex. 2008)).

33 *Id.* (citing *United States Fid. & Guar. Co. v. Goudeau*, 272 S.W.3d 603, 608 (Tex. 2008) (stating that where many different tests already in use by other courts render uniformity impossible, the court adheres to the law of Texas in applying the plain meaning of "occupying" in a standard automobile policy)).

34 *Id. at* 803–05.

35 *RSUI Indem. Co. v. Lynd Co.*, 466 S.W.3d 113, 138 (Tex. 2015), reh'g denied (Sept. 11, 2015).

36 *Lamar Homes, Inc. v. Mid–Continent Cas. Co.*, 242 S.W.3d 1, 14–15 (Tex. 2007).

37 *See, e.g.*, *U.S. Metals, Inc. v. Liberty Mut. Grp., Inc.*, 490 S.W.3d 20, 26–27 (Tex. 2015), reh'g denied (June 17, 2016) (agreeing with 10 of 12 state high courts that have interpreted the term "physical injury" in standard CGL to reject simple incorporation of defective work or product into a larger product or system, and counting several other state and federal courts that reach the same conclusion).

38 *U.S. Metals, Inc. v. Liberty Mut. Grp., Inc.*, 490 S.W.3d 20, 24 (Tex. 2015), reh'g denied (June 17, 2016) (citing *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 459 (Tex. 1997) ("We reject [policyholder's] position that the policy provisions are ambiguous and susceptible to more than one reasonable interpretation merely because other jurisdictions have reached differing conclusions about similar policy provisions. Opinions from other states about insurance policy interpretation can be persuasive, but ambiguity is for this court to decide.")).

39 Transcript of oral argument held January 15, 2016 at 14: "Justice Jeffrey S. Boyd: So 21— 'cause I do wanna get to my question—21 [decisions of other courts siding with policyholder's interpretation] and 7 on your side. And the ambiguity exists if a word is susceptible to two or more reasonable interpretations. And so, why doesn't your argument mean that we have to hold that 21 other courts are just simply not reasonable?" 2015 WL 457824 at *10; or see http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=63e65fb2-eb92-4a46-aa60-edf9ecc3bd0a&coa=cossup&DT=ORAL%20ARGUMENT&MediaID=05a6cde5-ede8-4aaf-b98b-07af-1da20a3b.

40 *R & P Enters. v. LaGuarta, Gavrel & Kirk Inc.*, 596 S.W.2d 517, 519 (Tex.1980). *See also Jhaver v. Zapata Off–Shore Co.*, 903 F.2d 381, 384–86 (5th Cir.1990).

41 *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991)

42 As discussed in greater detail above, the majority authored approached the issue as one of national uniformity and predictability, *McGinnes* at 793–04, while the dissent challenged that the interest in uniformity was misplaced where other courts varied in their interpretations and outcomes and could not overcome a textual interpretation, *McGinnes* at 804–05.

43 *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d at 459.

44 *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d at 24 n.18 (dissent).

45 *City of Keller v. Wilson*, 168 S.W.3d 802, 828 (Tex. 2005).

46 *Id.* (quoting Robert W. Calvert, "No Evidence" & "Insufficient Evidence" Points of Error, 38 Tex. L. Rev. 361, 364 n.12 (1960)).

47 For example, the court might recognize ambiguity in association with divergent precedent as illustrated by *State Farm Fire & Cas. Co. v. Reed*, 873 S.W.2d 698, 701 (Tex.1993), or might distinguish between outmoded rationales of a prior cultural period in favor of a more modern reality to reject the majority position and side with the minority of jurisdictions in reaching the "plain meaning" of policy terms, *Id. at* 703–04 (dissent).

48 *See Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 706–07 (Tex. 1987) (discussing comparative standard of "clear and unequivocal" test and concluding that indemnities against an actor's negligence demand more stringent express wording).

49 *Bonner v. United Servs. Auto. Ass'n*, 841 S.W.2d 504–07 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

50 *Pioneer Chlor Alkali Co., Inc. v. Royal Indem. Co.*, 879 S.W.2d 920, 935 (Tex. App.—Houston [14th Dist.] 1994, no writ).

51 *T.C. Bateson Const. Co. v. Lumbermens Mut. Cas. Co.*, 784 S.W.2d 692, 698 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

52 *Id.* at 698 (quoting *Stillwater Condominium Ass'n v. Am. Home Assurance Co.*, 508 F. Supp. 1075, 1080 (D. Mont. 1981)).

53 *Vaughan v. State Farm Lloyds*, 950 S.W.2d 205 (Tex. App.—Houston [14th Dist.] 1997), rev'd, *State Farm Fire & Cas. Co. v. Vaughan*, 968 S.W.2d 931 (Tex. 1998).

54 *Betco Scaffolds Co., Inc. v. Houston United Cas. Ins. Co.*, 29 S.W.3d 341, 344 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (en banc).

55 *Id.* at n.2.