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United States Court of Appeals, Fifth Circuit.

EASTERN CONCRETE MATERIALS, INC.,
Plaintiff-Counter Claimant – Appellant
v.
ACE AMERICAN INSURANCE COMPANY, Defendant
v.
Great American Insurance Company,
Counter Defendant – Appellee

No. 18-11043
|
FILED January 17, 2020

Synopsis

Background: Insurer brought action against nonresident insured concrete company, seeking declaratory judgment that it did not have duty to defend or indemnify company under commercial umbrella insurance policy in underlying New Jersey pollution case that arose from insured's accidental discharge of waste material into stream from its rock-crushing activities. The United States District Court for the Northern District of Texas, John H. McBryde, Senior District Judge, 2018 WL 1916567, denied motion to dismiss for lack of personal jurisdiction, and granted summary judgment for insurer, 325 F.Supp.3d 719. Insured appealed.

Holdings: The Court of Appeals, Jones, Circuit Judge, held that:

[1] insurer sufficiently stated that insured nonresident subsidiary purposely availed itself of benefits of Texas forum through its parent corporation;

[2] review of issue of whether federal court in Texas could assert specific personal jurisdiction over insured in manner consistent with Due Process was confined to existence of insurer's prima facie case;

[3] subsidiary purposely directed its activities toward Texas or purposefully availed itself of privileges of conducting activities there, as required to have minimum contacts with Texas;

[4] exercise of specific personal jurisdiction over nonresident insured subsidiary was not unfair or unreasonable;

[5] Texas had most significant relationship over issue of whether Texas or New Jersey law should apply to insurer's claim; and

[6] rock fines qualified as "contaminants" under absolute pollution exclusion.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss for Lack of Personal Jurisdiction; Motion for Summary Judgment.

West Headnotes (27)

[1] **Federal Courts**
Personal jurisdiction

Whether personal jurisdiction can be exercised over a defendant is a question of law and subject to de novo review.

[2] **Federal Courts**
Presumptions and burden of proof

On review of the denial of a motion to dismiss for a lack of personal jurisdiction, the Court of Appeals must accept the plaintiff's uncontroverted allegations, and resolve in its favor all conflicts between the facts contained in the parties' affidavits and other documentation.

[3] **Federal Courts**
Summary judgment

Federal Courts
Summary judgment

The Court of Appeals reviews a district court's grant of summary judgment de novo, viewing

all facts in the light most favorable to the nonmoving party, and affirming only if the evidence shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

[4] **Federal Courts**
What law governs and choice of law in general

Where relevant, the Court of Appeals reviews a district court's choice-of-law determinations de novo, applying the choice of law rules of the forum state.

[5] **Constitutional Law**
Non-residents in general

Federal Courts
Actions by or Against Nonresidents; "Long-Arm" Jurisdiction

A federal court may exercise personal jurisdiction over a nonresident defendant if (1) the forum state's long-arm statute confers personal jurisdiction over that defendant; and (2) the exercise of personal jurisdiction comports with the Due Process Clause of the Fourteenth Amendment. U.S. Const. Amend. 14.

[6] **Constitutional Law**
Non-residents in general

Federal court jurisdiction satisfies Due Process if two conditions are met: (1) the nonresident must have minimum contacts with the forum state, and (2) subjecting the nonresident to jurisdiction must be consistent with traditional notions of fair play and substantial justice. U.S. Const. Amend. 14.

[7] **Constitutional Law**
Non-residents in general

A nonresident defendant's Due Process "minimum contacts" may give rise to general or specific jurisdiction. U.S. Const. Amend. 14.

[8] **Constitutional Law**
Non-residents in general

Specific personal jurisdiction can be exercised over a nonresident defendant when a defendant's Due Process minimum contacts with a forum state are related to the pending lawsuit. U.S. Const. Amend. 14.

[9] **Constitutional Law**
Non-residents in general

Federal Courts
Related contacts and activities; specific jurisdiction

A specific personal jurisdiction inquiry considers: (1) whether the defendant has Due Process minimum contacts with the forum state, i.e., whether it purposely directed its activities toward the forum state or purposefully availed itself of the privileges of conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable. U.S. Const. Amend. 14.

[10] **Constitutional Law**
Due process

Federal Courts
Presumptions and burden of proof

If a plaintiff establishes the first two prongs of the three-step analysis for the specific personal jurisdiction inquiry, the burden shifts to the defendant to show that the exercise of personal jurisdiction would be unfair or unreasonable under the Due Process Clause. U.S. Const. Amend. 14.

[11] **Federal Courts**
Insurers and insurance

Federal Courts
Related or affiliated entities; parent and subsidiary

Insurer sufficiently stated that insured nonresident subsidiary purposely availed itself of benefits of Texas forum through its parent corporation, as required for insured to have minimum contacts with Texas so that federal court in Texas could exercise specific personal jurisdiction over it, on allegations that parent procured commercial umbrella insurance policy for it through officers who had dual roles with both corporations and through Texas-based insurance broker.

[12] **Constitutional Law**
Due process

Federal Courts
Weight and sufficiency

The plaintiff has the burden to make a prima facie showing that the exercise of personal jurisdiction over a nonresident defendant is proper under the Due Process Clause if the district court rules on the issue without an evidentiary hearing. U.S. Const. Amend. 14.

[13] **Federal Courts**
Personal jurisdiction

Inaction by nonresident insured either foreclosed its right to invoke higher burden of proof otherwise applicable to jurisdictional facts or waived objection entirely, and therefore appellate review of issue of whether federal court in Texas could assert specific personal jurisdiction over insured in manner consistent with Due Process was confined to existence of insurer's prima facie case in duty-to-defend action, since insured did not continue to contest facts underlying specific jurisdiction by renewing issue at summary judgment or otherwise before judgment was entered. U.S. Const. Amend. 14; Fed. R. Civ. P. 56.

[14] **Federal Courts**
Insurers and insurance

Federal Courts
Related or affiliated entities; parent and subsidiary

Insured nonresident wholly-owned subsidiary purposely directed its activities toward Texas, as forum state, or purposefully availed itself of privileges of conducting activities there, as required to have minimum contacts with Texas so that federal court in Texas could exercise specific personal jurisdiction over nonresident; although claim arose due to subsidiary's discharge of rock fines in New Jersey, subsidiary's Texas corporate parent procured commercial umbrella insurance policy through Texas-based insurance broker for itself and subsidiary to benefit subsidiary and through officers who had dual roles with both corporations.

[15] **Constitutional Law**
Insurers and insurance

Federal Courts
Insurers and insurance

Federal Courts
Related or affiliated entities; parent and subsidiary

Exercise of specific personal jurisdiction over insured nonresident subsidiary by federal court in Texas in action over environmental claim in New Jersey was not unfair or unreasonable, and therefore Due Process Clause was not violated, since two of subsidiary's most senior officers lived and worked only short drive from courthouse, one of them was person with unlimited authority over insurance issues in dispute, lawsuit concerned interpretation of commercial umbrella policy, environmental damage already had been remedied, and policy

had been negotiated, brokered, and issued in Texas. U.S. Const. Amend. 14.

[16] **Constitutional Law**
Non-residents in general

When considering whether the exercise of personal jurisdiction over a nonresident defendant is unfair or unreasonable under the Due Process Clause, a court's assessment balances: (1) the burden on the nonresident defendant, (2) the forum state's interests, (3) the plaintiff's interest in securing relief, (4) the interest of the interstate judicial system in the efficient administration of justice, and (5) the shared interest of the several states in furthering fundamental social policies. U.S. Const. Amend. 14.

[17] **Contracts**
What law governs

When a contract contains no choice-of-law provision and no statute indicates which law to apply, Texas courts apply the law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties.

[18] **Contracts**
What law governs

The factors to be taken into account in determining whether there is a "significant relationship" under the test used in Texas for resolving choice of law issues arising from contract claims are: (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability, and uniformity of result; and (7) ease in the determination and application of the law to be applied. Restatement (Second) of Conflicts § 6.

[19] **Contracts**
What law governs

When resolving a choice of law issue arising from a contract claim, a court in Texas will consider the place of contracting, place of contract-negotiation, place of performance, the location and subject matter of the contract, and the parties' domicile, residence, nationality, place of incorporation, and place of business.

[20] **Insurance**
Environmental coverages or exclusions

Texas had most significant relationship in duty-to-defend case over issue of whether Texas or New Jersey law should apply to insurer's claim that absolute pollution exclusion precluded coverage for nonresident insured subsidiary under commercial umbrella insurance policy from occurrence that gave rise to underlying New Jersey pollution case, and therefore Texas law applied to claim, since policy had been negotiated, brokered, and issued in Texas, Texas court would not give weight to location of insured risk because policy was national in scope, Texas parent corporation's justified expectations, as purchaser, would be met by application of Texas law, and New Jersey's interest was small because cleanup already had taken place.

[21] **Insurance**
Choice of Law Rules

Insurance
Place of contracting or performance

The place of contracting, not the place of the underlying incident, is the dominant consideration for choice of law in an insurance-coverage dispute in Texas; giving controlling weight to the location of the insured risk

would potentially subject an insurer, through one contract, to the laws of numerous states on issues that are more appropriately determined by the state's law that promulgated the policy form at issue.

[22] **Insurance**
Liability Insurance
Insurance
Environmental coverages or exclusions

When considering choice of law in a liability insurance coverage dispute in Texas, a state has little interest in whether any settlements or judgments are paid by the insured, or instead, by its insurers, or in regulating the scope of a pollution exclusion clause contained in an insurance policy issued in a different state, especially where the harms have been remedied.

[23] **Insurance**
Application of rules of contract construction

Under Texas law, insurance policies are governed by the rules of interpretation and construction which are applicable to contracts generally.

[24] **Contracts**
Language of contract

The primary concern of a court in construing a written contract under Texas law is to ascertain the true intent of the parties as expressed in the instrument.

[25] **Insurance**
Plain, ordinary or popular sense of language

Under Texas law, the terms used in an insurance policy are given their plain, ordinary meaning unless the policy itself shows that the parties intended the terms to have a different, technical meaning.

[26] **Insurance**
Definitions in policies

When terms are defined in an insurance policy, those definitions control the interpretation of the policy under Texas law.

[27] **Insurance**
Pollution

Rock fines generated by insured's rock-crushing activities that were accidentally discharged into New Jersey stream qualified as "contaminants" under absolute pollution exclusion in commercial umbrella insurance policy under Texas law, since those fines changed flow and contours of stream, including areas used for trout spawning, and physically covered micro and macro invertebrates that served as food source for fish and other species. N.J. Stat. Ann. § 58:10A-3(n).

Appeal from the United States District Court for the Northern District of Texas, John H. McBryde, U.S. District Judge

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Before OWEN, Chief Judge, and JONES and STEWART, Circuit Judges.

Opinion

EDITH H. JONES, Circuit Judge:

***1** The issue raised here is whether an unplanned discharge of "rock fines," pellets produced during the course of quarry operations, is covered by a company's umbrella insurance policy or excluded by a pollution exclusion. Great American Insurance Company ("GAIC") sought a declaratory judgment that it is not required to defend or indemnify Eastern Concrete Materials, Inc. ("Eastern Concrete") because of a pollution exclusion in its insurance policy. The federal district court denied Eastern Concrete's motion to dismiss for lack of personal jurisdiction and granted GAIC's motion for summary judgment. Eastern Concrete timely appealed. After careful review, we AFFIRM that federal jurisdiction exists and AFFIRM the district court's grant of summary judgment.

BACKGROUND

Eastern Concrete is a New Jersey corporation that operates rock quarries in New Jersey. It is a wholly-owned subsidiary of U.S. Concrete, a Delaware corporation with its principal place of business in Euless, Texas. Given the overlapping leadership between Eastern Concrete and U.S. Concrete, at least two of Eastern Concrete's officers—its president and secretary—live in Texas, where they also serve as officers for U.S. Concrete.

U.S. Concrete purchased a commercial umbrella insurance policy ("GAIC Policy") for itself and more than sixty subsidiaries, including Eastern Concrete, from GAIC, an Ohio Corporation. The GAIC Policy, which provides nationwide coverage to the named insureds, was negotiated, brokered, and issued in Texas. U.S. Concrete does not typically maintain insurance to cover environmental liabilities. True to form, the GAIC Policy includes an "absolute pollution exclusion:"

> This insurance does not apply to:
>
> ...
>
> Any liability, including, but not limited to settlements, judgments, costs, charges, expenses, costs of investigations, or the fees of attorneys, experts, or consultants arising out of or in any way related to:
>
> 1. The actual, alleged or threatened presence, discharge, dispersal, seepage, migration, release or escape of "pollutants," however caused.
>
> 2. Any request, demand, or order that any "Insured" or others test for, monitor, clean up, remove, contain, treat, detoxify, neutralize or in any way respond to or assess the effects of "pollutants." ...
>
> ...
>
> This exclusion will apply to any liability, costs, charges or expenses, or any judgments or settlements, arising directly or indirectly out of pollution ....
>
> As used in this exclusion "pollutants" means any *solid*, liquid, gaseous or thermal *irritant or contaminant*, *including*, but not limited to, smoke, vapor, soot, fumes, acids, alkalis, chemicals and *waste material. Waste material includes materials which are intended to be or have been recycled, reconditioned or reclaimed.* (Emphasis added).

The parties dispute whether this pollution exclusion applies to the following facts.

At its rock quarry in Glen Gardner, New Jersey, Eastern Concrete "drills and blasts large pieces of stone off of the face of [a] rock formation." The stones are crushed and screened "to produce different sizes or gradations of stone." The smallest particles are called "rock fines." Rock fines are often collected by being washed off larger stones and gathered into settling ponds, after which they are removed, dried, and stockpiled on site to be used at the quarry or sold.

***2** In July 2017, Eastern Concrete, anticipating substantial rain, began to lower the water levels in its settling ponds by pumping water, pursuant to a valid permit, into the nearby Spruce Run Creek. Unfortunately, the quarry manager "accidentally failed to shut off the pumping before the stone fines from the bottom of the settlement ponds began to be pumped into Spruce Run." As a result, "substantial amounts of rock fines" (up to two feet in some places) were released into Spruce Run Creek, causing "physical damage to the stream and stream bed by changing the flow and contours of the stream." Upon discovering the damage, the New Jersey Department of Environmental Protection ("Department")

issued "Notices of Violation" to Eastern Concrete, requiring it to remove the rock fines and take preventive measures to stem their migration downstream. The Department also found Eastern Concrete liable for violating various state statutes, including the New Jersey Water Pollution Control Act.

Eastern Concrete undertook the prescribed remediation. It then notified GAIC of the incident through its Texas insurance broker and demanded reimbursement for the costs of removing the rock fines and of defending the claim.[1] In response, GAIC filed a declaratory judgment action in the Northern District of Texas seeking a declaration that the incident fell within the GAIC Policy's pollution exclusion, and thus it had no duty to defend or indemnify Eastern Concrete. One month later, Eastern Concrete filed a competing lawsuit in New Jersey Superior Court. The New Jersey court stayed its case pending resolution of the federal suit. The federal district court rejected Eastern Concrete's subsequent motion to dismiss for lack of personal jurisdiction and, after GAIC moved for summary judgment, confirmed that the absolute pollution exclusion applied. Eastern Concrete timely appealed these adverse judgments.

STANDARDS OF REVIEW

[1] **[2]** "[W]hether personal jurisdiction can be exercised over a defendant is a question of law and subject to *de novo* review." *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, 742 F.3d 576, 584 (5th Cir. 2014). "The plaintiff has the burden to make a *prima facie* showing that personal jurisdiction is proper." *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 431 (5th Cir. 2014) (emphasis added). "We must accept the plaintiff's uncontroverted allegations, and resolve in [its] favor all conflicts between the facts contained in the parties' affidavits and other documentation." *Id.* (quoting *Revell v. Lidov*, 317 F.3d 467, 469 (5th Cir. 2002)).

[3] **[4]** This court "review[s] a district court's grant of summary judgment *de novo*, ... view[ing] all facts in the light most favorable to the nonmoving party, and affirm[ing] only if the evidence shows that 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Estate of Bradley ex rel. Sample v. Royal Surplus Lines Ins. Co.*, 647 F.3d 524, 528 (5th Cir. 2011) (quoting FED. R. CIV. P. 56(a)). Where relevant, this court reviews a district court's choice-of-law determinations *de novo*, applying "the choice of law rules of the forum state, in this case Texas." *R.R. Mgmt. Co. v. CFS La. Midstream Co.*, 428 F.3d 214, 221–22 (5th Cir. 2005).

DISCUSSION

I. Personal Jurisdiction.

[5] **[6]** **[7]** A federal court "may exercise personal jurisdiction over a nonresident defendant if (1) the forum state's long-arm statute confers personal jurisdiction over that defendant; and (2) the exercise of personal jurisdiction comports with the Due Process Clause of the Fourteenth Amendment." *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 343 (5th Cir. 2004). "In this case, these two inquiries merge into one because the Texas long-arm statute permits the exercise of jurisdiction over a nonresident defendant to the fullest extent allowed by the United States Constitution." *Id.* Federal court jurisdiction satisfies Due Process if two conditions are met: "(1) the nonresident must have minimum contacts with the forum state, and (2) subjecting the nonresident to jurisdiction must be consistent with 'traditional notions of fair play and substantial justice.' " *Id.* (quoting *Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 786 (5th Cir. 1990)). A defendant's "minimum contacts" may give rise to general or specific jurisdiction. *See Luv N' care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 469 (5th Cir. 2006). Because we agree with the district court that specific jurisdiction exists, we need not address the parties' arguments about general jurisdiction.

***3** **[8]** **[9]** **[10]** Specific jurisdiction arises when a defendant's minimum contacts with a forum state are related to the pending lawsuit. *Id.* at 469.

> This circuit applies a three-step analysis for the specific jurisdiction inquiry: (1) whether the defendant has minimum contacts with the forum state, i.e., whether it purposely directed its activities toward the forum state or purposefully availed itself of

> the privileges of conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable.

Monkton Ins. Servs., 768 F.3d at 433 (quoting *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 271 (5th Cir. 2006)). If a plaintiff establishes the first two prongs, the burden shifts to the defendant to show that the exercise of personal jurisdiction would be unfair or unreasonable. *Id.*

[11] Applying these principles, the district court concluded that it had specific jurisdiction over Eastern Concrete. It began by noting Eastern Concrete's contacts with Texas. First, GAIC "plausibly posit[ed] that the [GAIC Policy] was procured on behalf of Eastern Concrete by or through its president or secretary or both, acting in Texas." Next, the GAIC Policy contained many Texas-specific features: for instance, its "Forms and Endorsement Schedule" includes 46 endorsements, "every one of which lists Texas as the relevant state" and at least three of which are tailored to Texas; "no endorsement refers to any other state"; and the GAIC Policy directs insureds to contact the Texas Department of Insurance if they have complaints or need further information. Finally, Eastern Concrete contacted a Texas insurance broker for assistance in seeking coverage under the GAIC Policy for the Glen Gardner incident. Based on these contacts, the district court concluded that Texas was an appropriate forum for adjudicating GAIC's declaratory judgment action.

Pivotal to this jurisdictional holding was the district court's observation that "a corporation can purposely avail itself of the benefits of a forum through its agents" and its determination that GAIC "plausibly posit[ed] that the insurance was procured on behalf of Eastern Concrete by or through its president or secretary or both." Eastern Concrete takes issue with this conclusion. It contends that it never authorized U.S. Concrete to act as its agent to procure the GAIC Policy. And to the extent its officers living in Texas were involved, Eastern Concrete insists that when in Texas, they were acting solely in their capacity as officers of U.S. Concrete. By this logic, only one of the contacts discussed by the district court should have been attributed to Eastern Concrete. *See* *Walden v. Fiore*, 571 U.S. 277, 284, 134 S. Ct. 1115, 1122, 188 L.Ed.2d 12 (2014) (stating that specific jurisdiction "must arise out of contacts that the 'defendant [itself]' creates with the forum State"). And this single contact—"communicat[ing] with a Texas insurance broker 'for assistance in seeking coverage' "—is insufficiently purposeful action within the jurisdiction, according to Eastern Concrete.

***4 [12]** Eastern Concrete's arguments fail to account for the procedural posture in which we review jurisdiction here. It is established that a plaintiff need only make a *prima facie* showing of personal jurisdiction if the district court rules on the issue without an evidentiary hearing. *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 399 (5th Cir. 2009). Further, at that stage, courts are required to credit the plaintiff's uncontroverted allegations. *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000). The district court accordingly credited GAIC's allegations that "[i]n or before 2016, Eastern Concrete engaged, or authorized its Texas-based parent company to engage on its behalf, ... an insurance agency licensed by and operating within the State of Texas, to advise on and/or procure insurance coverage for Eastern Concrete's business operations." According to GAIC, the insurance agency then "negotiated and procured the [GAIC] Policy on behalf of U.S. Concrete and Eastern Concrete within the State of Texas."

For two reasons, Eastern Concrete's objection to the court's order resting on these allegations is ill-founded. First, although Eastern Concrete maintains that neither it nor its officers played a role in procuring the GAIC Policy, the company's affidavits proffered in support of this assertion fail to controvert GAIC's allegations. Affidavits from Eastern Concrete's officers stated that they do most of their work for Eastern Concrete from New Jersey. But the affidavits do not foreclose the possibility that Eastern Concrete's officers played a role in the procurement of the GAIC Policy in Texas. Nor do they state that U.S. Concrete acted alone in requesting a Texas-based insurance broker to obtain the GAIC Policy, much less that Eastern Concrete failed to authorize or approve its parent's obtaining that policy. The affidavits do not controvert the *prima facie* case.

[13] Second, because Eastern Concrete did not continue to contest the facts underlying specific jurisdiction by renewing the issue at summary judgment or otherwise before judgment was entered, such inaction either "foreclose[d] the defendant's right to invoke the higher burden or proof otherwise applicable to jurisdictional facts ..., or waive[d] the objection entirely." *Mullins,* 564 F.3d at 399. This court's appellate review is therefore confined to the existence of the *prima facie* case. *Id.*

[14] Because GAIC sufficiently alleged, without contradiction, that Eastern Concrete procured, or authorized U.S. Concrete to procure, the GAIC Policy, we move on to consider the elements of specific jurisdiction. Initially, as to whether Eastern Concrete "purposely directed its activities toward [Texas] or purposefully availed itself of the privileges of conducting activities there," *Monkton Ins. Servs.*, 768 F.3d at 433 (quoting *Seiferth*, 472 F.3d at 271), Eastern Concrete contends that the sole act of procuring the GAIC policy, if properly attributed to it, would be insufficient to show purposeful availment. Under the specific facts of this case, however, we agree with the district court: Eastern Concrete could have "reasonably anticipate[d] being haled into court" in Texas to litigate coverage under the GAIC policy. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L.Ed.2d 490 (1980).[2] As the district court observed, GAIC plausibly posited that Eastern Concrete engaged, or authorized U.S. Concrete to engage, a Texas insurance broker to procure the GAIC Policy.[3] The policy was purchased in Texas to benefit Eastern Concrete, and Eastern Concrete's coverage claim was later pursued by the same Texas broker that secured the GAIC Policy. Moreover, the GAIC Policy was distinctively Texan. Since any dispute between U.S. Concrete and GAIC over the policy would have compelling ties to Texas, it stands to reason that the subsidiary's ties mirror those of the parent. It cannot be said that Eastern Concrete's contacts with Texas were "random, fortuitous, or attenuated." *See In re Chinese Manufactured Drywall Prod. Liab. Litig.*, 742 F.3d at 588 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2183, 85 L.Ed.2d 528 (1985)).

***5** For similar reasons, this lawsuit "arises out of or results from" Eastern Concrete's "forum-related contacts." *See Monkton Ins. Servs.*, 768 F.3d at 433 (quoting *Seiferth*, 472 F.3d at 271). Eastern Concrete argues that its contacts with Texas are not related to the core issue in this case, the discharge of rock fines in New Jersey. That is incorrect. This is an insurance coverage dispute. To the extent that Eastern Concrete's contacts with Texas are linked to the procurement and enforcement of the GAIC Policy, this lawsuit concerning the GAIC Policy "arises out of or results from" those contacts.

[15] **[16]** At the final step, Eastern Concrete must show that the exercise of personal jurisdiction is unfair or unreasonable. *Monkton Ins. Servs.*, 768 F.3d at 433. The court's assessment balances: "(1) the burden on the nonresident defendant, (2) the forum state's interests, (3) the plaintiff's interest in securing relief, (4) the interest of the interstate judicial system in the efficient administration of justice, and (5) the shared interest of the several states in furthering fundamental social policies." *Luv N' care*, 438 F.3d at 473.

Eastern Concrete presents several arguments why the exercise of personal jurisdiction in Texas was unfair and unreasonable.[4] These arguments are unpersuasive. As GAIC points out, the most important factor is the burden on the defendant, *see Bristol-Myers Squibb Co. v. Superior Court of Cal.*, — U.S. —, 137 S. Ct. 1773, 1780, 198 L.Ed.2d 395 (2017) (noting that the "primary concern" is "the burden on the defendant"). The burden here is minimal because Eastern Concrete's "two most senior officers live and work a short drive from the courthouse, and one of them, Mr. Jolas, is by Eastern Concrete's own designation a person with 'unlimited' authority over the insurance issues in dispute." In addition, because the damage from the rock fines has already been remedied, New Jersey's interest in the dispute is relatively small, as indicated by the New Jersey court's willingness to stay its action pending resolution of this case. Thus, it is both fair and reasonable for Texas, the state where the GAIC Policy was "negotiated, brokered, and issued," to be the forum for a lawsuit that "concerns interpretation of that policy." The district court properly exercised personal jurisdiction.

II. Summary Judgment.

Applying Texas law, the district court held that the GAIC Policy's pollution exclusion barred coverage in this case. On appeal, Eastern Concrete challenges both the choice of law and the court's interpretation of the pollution exclusion. Each contention will be addressed in turn.

1. Texas Law Governs this Dispute.

[17] **[18]** **[19]** When a contract contains no choice-of-law provision and no statute indicates which law to apply, Texas courts apply the "law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties." *Maxus Expl. Co. v. Moran Bros., Inc.*, 817 S.W.2d 50, 53 (Tex. 1991) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (AM. LAW INST. 1971)). To decide which state has "the most significant relationship," Texas courts consider the following factors:

***6** • The needs of the interstate and international systems;

• The relevant policies of the forum;

• The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;

• The protection of justified expectations;

• The basic policies underlying the particular field of law;

• Certainty, predictability, and uniformity of result; and

• Ease in the determination and application of the law to be applied.

Id. at 54 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6). Courts will also consider the place of contracting; place of contract-negotiation; place of performance; the location and subject matter of the contract; and the parties' domicile, residence, nationality, place of incorporation, and place of business. *Id.* at 53 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2)).

[20] Citing these principles, the district court held that "Texas has the most significant relationship to the substantive issue to be resolved, that is, whether the absolute pollution exclusion precludes insurance coverage." In support, the court observed that: the GAIC Policy "was negotiated, brokered, and issued in Texas"; "Texas courts would not give weight to the location of the insured risk" because the policy is national in scope; U.S. Concrete's "justified expectations," as purchaser, "would be met by application of Texas law"; and New Jersey's interest is small because "the cleanup has already taken place." We agree with the district court.

In support of its argument that New Jersey law should apply, Eastern Concrete highlights only two of the relevant factors. According to Eastern Concrete, "New Jersey ... has an interest in assuring a New Jersey policyholder is not wrongly denied funds to repair the State's property." Moreover, because it is not a Texas corporation, Eastern Concrete asserts that "Texas's interest in protecting Eastern Concrete, if any, is slight." Eastern Concrete also insists that it expected to litigate any insurance-related disputes in New Jersey, and that application of Texas law thwarts its justified expectation.

[21] **[22]** Contrary to Eastern Concrete's assertions, the place of contracting, not the place of the underlying incident, is the dominant consideration for choice of law in an insurance-coverage dispute. *See* *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 205 (5th Cir. 1996) ("[W]hen the issues of a case require the construction and application of insurance policies ... the relevant inquiry is what contacts the state has with the insurance dispute, and not with an underlying lawsuit."); *Reddy Ice Corp. v. Travelers Lloyds Ins. Co.*, 145 S.W.3d 337, 344–46 (Tex. App. —Houston [14th Dist.] 2004, pet. denied) (similar). As GAIC points out, "giving [controlling] weight to the location of the insured risk would potentially subject an insurer, through one contract, to the laws of numerous states on issues that are more appropriately determined by the state's law that promulgated the policy form at issue." *Reddy Ice Corp.*, 145 S.W.3d at 345. In addition, especially where the harms have been remedied, a state "has little interest in whether any settlements or judgments are paid by [the insured], or instead, by its insurers, or in regulating the scope of a pollution exclusion clause contained in an insurance policy issued in [a different state]." *Id.* at 346. In sum, the district court correctly applied Texas law.

2. The Pollution Exclusion

*7 [23] [24] [25] [26] Under Texas law, insurance policies are governed "by [the] rules of interpretation and construction which are applicable to contracts generally." *Nat'l Union Fire Ins. Co. of Pittsburgh v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995). "The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument." *Id.* "The terms used in the policy are given their plain, ordinary meaning unless the policy itself shows that the parties intended the terms to have a different, technical meaning." *Am. Nat'l Gen. Ins. Co. v. Ryan*, 274 F.3d 319, 323 (5th Cir. 2001). "When terms are defined in an insurance policy, those definitions control the interpretation of the policy." *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 219 (Tex. 2003). Neither party contends that the relevant policy terms are ambiguous.

[27] Applying these principles, the district court concluded that rock fines are pollutants under the GAIC Policy and, thus, that GAIC had no duty to defend or indemnify Eastern Concrete. By way of reminder, the GAIC Policy's pollution exclusion bars coverage for liability "arising out of or in any way related to ... discharge, dispersal, seepage, migration, release or escape of 'pollutants.' " "Pollutants," in turn, is defined as "any solid, liquid ... irritant or contaminant, including, but not limited to ... waste material," which "includes materials which are intended to be or have been recycled, reconditioned or reclaimed." After explaining how rock fines are generated, the district court determined that rock fines are "waste material generated in the rock crushing process" because they are "materials intended to be reclaimed." Moreover, the rock fines "became irritants or contaminants when they were discharged and dispersed where they did not belong." If this were not so, the district court reasoned, "New Jersey would not have required remediation," and Eastern Concrete would not have been sanctioned for violating New Jersey's Water Pollution Control Act. (citing N.J. STAT. ANN. § 58:10A-3(n), which lists "rock, sand, [and] cellar dirt" as "pollutants").

Eastern Concrete challenges this result on appeal, contending that "[t]o fall within the definition of 'pollutants' under the exclusion, the rock fines must be *either* (1) a 'waste material' and an 'irritant or contaminant' *or* (2) otherwise qualify as an 'irritant or contaminant.' Rock fines are neither." (Emphasis in original). We take on the question of whether rock fines are "contaminants" because, as Eastern Concrete concedes, concluding that they are ends our analysis. [5]

Eastern Concrete contends that "[r]ock fines are simply 'small particles of rock,' " and thus "are not dangerous" and "do not ... contaminate." To hold otherwise, Eastern Concrete cautions, would be to adopt the district court's reasoning that rock fines became "contaminants when they were discharged and dispersed where they did not belong," a theory Eastern Concrete casts as dangerously overbroad because it allows anything (even water or bricks) to become contaminants if left in an inappropriate place. GAIC responds by accusing Eastern Concrete of inventing a "hazardousness" requirement: "[N]othing in the ordinary sense of the word 'contaminant' or in the caselaw imposes such a restriction," GAIC insists, and "[n]umerous cases hold that rock and similar materials are contaminants for purposes of the absolute pollution exclusion." In support, GAIC cites *Cleere Drilling Co.*, where this court determined that "salt water, sand, and drilling mud" were contaminants under a contractual pollution exclusion even assuming they "did not or could not cause environmental damage." *Cleere Drilling Co. v. Dominion Expl. & Prod., Inc.*, 351 F.3d 642, 651 (5th Cir. 2003).

*8 We agree that *Cleere Drilling Co.* is instructive. The definitions of "contaminant" this court adopted in that case are particularly helpful. The court noted that "*Black's Law Dictionary* defines contamination as a '[c]ondition of impurity resulting from mixture or contact with foreign substance.' " *Id.* (alteration in original) (quoting BLACK'S LAW DICTIONARY 318 (6th ed. 1990)). The court also cited *Webster's Third New International Dictionary*, which "defines the verb, 'to contaminate' as 'to soil, stain, corrupt, or infect by contact or association ... to render unfit for use by the introduction of unwholesome or undesirable elements.' " *Id.* (alteration in original) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 491 (1986)).

Rock fines do not fit either definition when we ask whether they affected the quality of the water in Spruce Run Creek. Perhaps rock fines were "undesirable elements" when discharged into the creek. But they did not "mix" with the

creek in a way that made it "impure." Nor did they "soil, stain, corrupt, or infect" the creek or "render [it] unfit for use." To the contrary, according to a notice issued by the Department shortly after the incident, the rock fines posed "no threat to drinking water, nor to anyone who would use the area for fishing nor to the fish that they might catch."

But when we look at the effects on the overall ecosystem, rock fines are contaminants. Eastern Concrete's own counsel described the incident as pumping "a deleterious substance resulting in a negative impact to a trout producing stream and a documented habitat for threatened or endangered species." And Eastern Concrete's expert explained that the incident "chang[e]d the flow and contours of the stream, including areas used for trout spawning" and "physically cover[e]d the micro and macro invertebrates that serve as a food source for fish and other species." The rock fines, in short, "render[e]d [the creek] unfit for use" as a habitat for trout and other species. This explains why Eastern Concrete was required to remove the rock fines from Spruce Run Creek. [6]

We thus conclude that rock fines qualify as "contaminants" under the GAIC Policy. Summary judgment was therefore appropriate.

CONCLUSION

The district court correctly exercised jurisdiction over Eastern Concrete and properly granted summary judgment. We accordingly **AFFIRM**.

All Citations

--- F.3d ----, 2020 WL 254822

Footnotes

1 Eastern Concrete also notified its primary insurer, ACE American Insurance Company ("ACE"), of the same claims. ACE concluded there was coverage under its policy. However, the Glen Gardner incident cost Eastern Concrete over $2 million, exhausting its $1 million policy with ACE.

2 *But cf.*, *Am. Eagle Ins. Co. v. Teague-Strebeck Motors, Inc.*, No. CIV. A. 3:96CV-2902P, 1997 WL 452948, at *5 (N.D. Tex. Aug. 5, 1997) ("One who merely purchases insurance from an insurer residing in the forum state does not, by the purchase through an intermediary, subject himself to the jurisdiction of the courts of the insurer's state.").

3 The parties dispute the significance of U.S. Concrete's contacts with Texas. Eastern Concrete argues, *inter alia,* that even assuming U.S. Concrete was acting as Eastern Concrete's agent, U.S. Concrete's conduct is of no jurisdictional significance because jurisdiction-by-agency theories are dubious in the wake of *Daimler AG v. Bauman*, 571 U.S. 117, 134 S. Ct. 746, 187 L.Ed.2d 624 (2014). Not so. *Bauman* only analyzed general jurisdiction—and *Bauman* itself acknowledged that "[a]gency relationships ... may be relevant to the existence of *specific* jurisdiction" and that "a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there." 571 U.S. at 135 n.13, 134 S. Ct. at 759 n.13 (emphasis in original); *cf.* *Walker Ins. Servs. v. Bottle Rock Power Corp.*, 108 S.W.3d 538, 549 n.4 (Tex. App. 2003) ("For purposes of personal jurisdiction, the actions of an agent may be attributed to the principal.").

4 According to Eastern Concrete, "Texas has virtually no interest in resolving an insurance dispute between two out-of-state parties based on conduct and damage occurring in New Jersey; GAIC's interest in the application of Texas law is minimal, as evidenced by its failure to include a choice-of-law clause in its insurance policy; the interstate judicial system is best served by the resolution of this dispute in New Jersey, where a state court proceeding...is currently stayed pending this appeal; and the two states share an interest...in furthering the reasonable expectations of policyholders who file claims based on injuries sustained in their home states."

5 GAIC does not argue that the rock fines are "irritants." Consequently, we do not consider that term of the policy. *See* *United States v. Charles*, 469 F.3d 402, 408 (5th Cir. 2006) ("Inadequately briefed issues are deemed abandoned.").

6 *Cf. Cleere Drilling Co.*, 351 F.3d at 651–52 ("It is equally indisputable that these substances were 'undesirable elements' that rendered the surface area soiled, stained, impure, and almost certainly unfit for its intended use. If this were not true,

we ask rhetorically, why would Dominion have spent hundreds of thousands of dollars on the expedited removal of those substances, and in addition, have paid the landowner a cash settlement for surface damages?").

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