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KELLEY-COPPEDGE V. HIGHLAND INSURANCE

WIELINSKI: Kelley-Coppedge is here today to ask this court to reverse the judgment of the CA in that the CA incorrectly applied an exclusion in the Highland's policy to deny coverage for Kelley-Coppedge.

Kelley-Coppedge is an oil and gas pipeline contractor, or they were an oil and gas pipeline contractor for 63 years. They recently went out of business. As this court may be aware, this is an important case. It's important for all contractors in the construction and oil and gas field. Numerous parties have filed amicus briefs, including the AGC (Associates General Contractors) of Texas, Associated Builders and Contractors, and insurance organizations, such as the Texas Association of Insurance Agents and the Office Public Insurance Council.

The reason this case is important is because the CA's decision deprived contractors, such as Kelley-Coppedge with coverage they thought they had, with coverage the insurance industry thought they had. And that coverage is for off-premises discharges of pollutants from a job site where a contractor is performing operations.

The facts of this claim are: Kelley-Coppedge was laying a pipeline along an easement pursuant to a contract with Natural Gas Pipeline Co. In August 1994, they were laying pipelines in Wise County on property owned by A.L. Peterson and pursuant to an easement held by Natural Gas Pipeline. Their ditching machine which basically cuts the trench in which to lay the pipeline encountered a Mobile crude oil pipeline, a different pipeline that was mislocated, and Kelley-Coppedge was not aware it was there. An accident occurred. Approximately 1,600 gallons of crude oil was spilled. Kelley-Coppedge undertook to clean up immediately with not so much as a request from any other party.

HECHT: If there had been a request would there be no coverage?

WIELINSKI: Under the terms of the pollution exclusion there may not be coverage except for the fact that Highland's waived reliance on that exclusion in the TC - never argued it.

HECHT: So we're arguing about coverage in a circumstance where isn't there almost always going to be a request, demand or order for cleanup?

WIELINSKI: I would say in the vast majority of cases there would be. And a paradigm example would be of when say there's a leaking underground storage tank that the insured may not be aware of, the insured may be concealing.

HECHT: And if there's no coverage, we're just arguing about very few cases under

F(1)(a), I take it?

WIELINSKI: Under the facts of this case this may be a limited factual scenario. But under a situation, such as this where you have a potentially catastrophic situation, the contractor severed a pipeline, crude oil spewing on the countryside...

HECHT: And he's got to go beg the owner, "Look don't make a request, an order, or a demand on me to clean this up, because otherwise the insurance is not going to pay for it."

WIELINSKI: I beg to disagree. I think what happened in this case, the contractor came right out on the site, created ditches, draws to drain off the oil to contain it without the necessity of a request. They did what they need to do.

HECHT: But if the owner had come on the property and said, "Please clean this up," no coverage?

WIELINSKI: I'm not sure in that situation that even that exclusion would apply here, because we still have a classic accident here. It's a situation where there's no government-ordered mandate to clean up. That's where this provision has its genesis.

HECHT: If they said, "I request you clean this up," you say there would still be coverage?

WIELINSKI: Under situations where the contractor is out there doing the cleanup, I believe there would be. But that's not this situation.

HECHT: Well I'm trying to get a feel for how much we're arguing about under (f)(1). You say well all these amicus people have said, "Oh, no coverage all over the world depends on this." But it looks to me like you basically concede that if (f)(2) had been raised and a request had been made there wouldn't be coverage?

WIELINSKI: It's a carefully drafted exclusion. And, yes, we are talking about the applicability of F(1) in this case, because F(2) did not apply. I cannot stand here and say there's going to be a 1,000 other cases where F(2) would not apply. But, nevertheless, it didn't apply in this case, and there's got to be other situations where it would not apply, otherwise, we would not have the amicus and the construction industry interest in this case.

HECHT: My suspicion is that they are hoping that neither will F(2) apply. But you are not making that argument, and they don't seem to either.

WIELINSKI: We are in the position of arguing that, "No, we're not making that argument. It just factually didn't apply here." This isn't an (f)(2) case in other words. You're correct. It's not

an (f)(2) case.

OWEN: Well we don't know that do we? I mean there's no evidence one way or the other and the summary judgment record just hasn't been addressed.

WIELINSKI: What the summary judgment record says is that Kelley-Coppedge cleaned up to mitigate damages, and that it entered into agreements, although those agreements are not in evidence. But the facts of the matter are that Kelley-Coppedge came in, started the cleanup, and then worried about the agreements later.

OWEN: Is there affirmative evidence that no request or demand was made?

WIELINSKI: We have the terms of the agreements, and we have the adjuster's notes. None of these are in evidence in this case. This case was tried on a stipulated set of facts.

OWEN: But my point is there is nothing in the summary judgment record that says affirmatively that no request or demand was made that Kelley-Coppedge clean up?

WIELINSKI: That's true. The record states that agreements were entered into with Mobile and the neighboring landowner, and that Kelley-Coppedge cleaned up the damages and sought coverage from Highland.

SPECTOR: How much of the damage did the insurance company agree to pay?

WIELINSKI: The insurance company paid for the damage to the Mobil pipeline, which was the primary other item of damage. That itself was covered. Highlands took the position that the cleanup costs were not covered based on the pollution exclusion.

ENOCH: Through any of this process has the insurance company indicated that it will indemnify anyone for any pollution damage at all? Have they ever said that there are circumstances where damages are caused by pollution that there is indemnification for, or is their position strictly that there is no indemnification for any damages caused by pollution, period?

WIELINSKI: I believe their position is that there are circumstances under which there would be coverage for an insured under the pollution exclusion, but this isn't one of them.

ENOCH: So there's no question in this case that Kelly-Coppedge paid a premium that included coverage for damages arising from pollution as a result of some accident of some point. You're just arguing that not for this type of circumstance?

WIELINSKI: You're right that's a fair statement. In fact, these are the situations under exclusion (f), which is the exclusion, and I have hard copies in front of each of you. It sets out

specific situations in which coverage is not provided. It doesn't start out with an overall "There's no coverage for any damage from pollution," as was the case in *National Union v. CVI*. There they said, "There is no coverage for pollution anywhere at any point and at anytime which occurs. Rather there are carefully circumscribed situations, albeit they are broad and they do take in many and most of the situations where you would have pollution."

ENOCH: What example does the insurance company give if they have of when they would indemnify an insured for damages caused by pollution? Have they given an example?

WIELINSKI: The one example that comes to mind is where a general contractor has contracted out to perform the work, and has subcontracted all of the work to subcontractors. And they say under that situation subsection (d) would not apply if those subcontractors encountered pollutants at the job site. And subsection (d) I think is the heart here.

ENOCH: Is that the one that deals with the occupied premises?

WIELINSKI: No, that's (a) And they would say their position is that (a) would not apply because the general contractor isn't present on the site.

ENOCH: Except agents of course could occupy as well as principals?

WIELINSKI: I think that's the rejoinder to that.

ENOCH: But that's the only example that you are aware of?

WIELINSKI: That's the only one that comes to mind here before you today. Counsel for Highlands may have some others.

But in contrast what Highlands is saying is that exclusion F(1)(a) that applies here, that excludes coverage for pollution, which is discharged at or from any premises at any time owned or occupied or rented or loaned to any insurer.

They take the position that a contractor occupies the site, and that mere physical presence of that contractor is sufficient to trigger the exclusion. Kelly-Coppedge's position is, no a contractor does not occupy a site. If coverage is denied under (a) on that basis, then the coverage which is basically preserved under (d) is lost. And what is preserved under (d) is that where there is a pollution discharge from premises on which an insured or contractor is working and the contractor didn't bring those pollutants onto the site, the exclusion doesn't apply. That's what happened here. Kelley-Coppedge's ditcher was moving along the easement, it came across a pipeline that was already there (Kelley-Coppedge didn't bring the 1,600 gallons of crude oil onto the site, it was in the pipeline).

HECHT: It would be an occupier of premises under *Hernandez*?

WIELINSKI: Under *Tri Counties* reading of *Hernandez*, I think that the *Hernandez* case said that a contractor is really an invitee in most cases unless they have control and can exclude other parties from the site. And basically in *Hernandez* they held that that contractor was not. Here I think that Highlands is going even further by just saying that the fact the contractor is there means that they are occupying it.

HECHT: But you'd say even if they had control of the premises they still wouldn't be an occupier?

WIELINSKI: In order to occupy, and this is our position, this is Kelly-Coppedge's position, there has to be more than just being there. I would term it as a quasi possessory interest. There has to be an element of intent to possess those premises.

HECHT: Could it be less than a legal of beneficial interest?

WIELINSKI: In certain circumstances it probably could.

HECHT: Like what?

WIELINSKI: How about in this situation and this is not the Kelley-Coppedge's situation. Assume there's a contractor on a job site. Say it's a 5-year project. They are erecting a skyscraper. They have a job shack there, a permanent job shack, and there's an accident within that job shack. They occupy that part of the premises but they don't occupy or control the entire premises. Another situation may be a maintenance contractor, which is under contract to maintain a chemical plant. They maintain their job shack also, but if they are on the other side of the plant, I don't think it can be argued that they occupy that other part of the plant.

OWEN: Under your example, the general contractor that does have control of the whole site, aren't they an occupier?

WIELINSKI: No, because I think that again there has to be an intent _____ possessory interest. If you look at the manner in which "occupy" is used under property damage coverage in CGL policies, occupation is not applied to contractors. Coverage for contractors gives the insurance industry fits. There's no question about it. But it's a carefully crafted and circumscribed type exposure. The nature of contracting isn't to occupy. The nature of the contracting is to go on to somebody else's site, build the building and get out of there as quick as you can to go build the next building.

HECHT: You've responded to the insurance environmental litigation association amicus brief, but you didn't respond to their claim that at least 33 jurisdictions go against you. I take

it, you disagree with that?

WIELINSKI: Yes. That statement made, I believe they said 33 jurisdictions have held that the absolute pollution exclusion, exclusion (f) is unambiguous. I have no quarrel with that. The question is, when you apply that exclusion to this set of facts does it apply or not? You cannot the use the label "absolute pollution exclusion" and say it's unambiguous and carte blanche and say, "Well that's what happened here. There is absolute pollution exclusion, no coverage." If you go through and albeit painstakingly apply the provisions (f)(1)(a) and (d), you will see that in this situation there should be coverage. And that's what we're asking this court to do.

ENOCH: According to your brief they were laying about 1,000 feet of pipe a day and this was along an easement, so this wasn't one piece of property where they were sitting. This was a machine that's actually traveling down the easement, and it happens to cross as it's digging the trench somebody else's easement and hits a pipeline. The argument from the insurance company is they have actually occupied a premise some place?

WIELINSKI: That's right. Consider this scenario where Kelley-Coppedge is bringing its ditching machine across another field, not subject to the easement where they are going to work, but say there is an above ground pipeline and the employee isn't looking and hits and it causes the same spill. Under Highland's theory, I guess that would by occupying although they are just passing across that piece of property. And that just doesn't hold water. There has to be some sort of intent to maintain some sort of possessory presence or interest in those premises.

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RESPONDENT

SCHULTZ: I want to make three points in my argument today. Number 1, the rule of strict construction, that normally would apply if raised by the policyholder in an insurance coverage case doesn't apply to this case. Because it never was raised by Kelley-Coppedge in the TC in their motion for summary judgment. And this was not a trial on stipulated facts. These were counter motions for summary judgment. There were stipulated facts, but it was not a 263 case. The Ft. Worth CA said that, but it's not. It was decided on cross motions or counter motions.

ENOCH: If this ditching machine had simply been crossing the road going from one work site to another, and had somehow damaged an above ground pipeline, then they are covered, or are they not covered?

SCHULTZ: If it was crossing a road that was not a part of its work site, it was normally working on, it was just going from place to another - there likely would be coverage.

ENOCH: Let's suppose that they are traveling on a road that they are supposed to dig a ditch on. They are actually digging a sewer ditch on the road, and this road happens to cross an

underground easement and they break that pipeline, then they aren't covered?

SCHULTZ: Let me put it this way. If it's a part of their work site that they are purposefully there and working on, then I think there is not coverage.

ENOCH: So if it is a state highway and they have been asked to dig a drainage ditch along the side of the highway, and that highway just happens to cross an underground oil pipeline easement, and they cut that pipeline, they are occupying the highway for the purposes of the exclusion?

SCHULTZ: The only way I can answer that is to qualify in saying that that highway is a part of the premises upon which they've been charged to work and are physically present, then yes there is no coverage.

OWEN: I want to ask you about F(2). Did you put any affirmative evidence in the summary judgment record that there was a request made to clean up?

SCHULTZ: We did not represent Highlands in this case until after the summary judgment was granted, and we added that to a motion for new trial. That's when it came in.

OWEN: Well what's in the record?

SCHULTZ: There's been a lot said in this case that's completely outside of the record. There's been a lot in Mr. Wielinski's argument that's totally outside of the record. So with that as a preface, I will tell you that it was requested of counsel at trial by Highland specifically that they _____ to. Because there are requirements in the RR Commissions Rules and Regulations that deal with pipelines like this that if you cause a spill, you clean it up. But no, my firm did not enter this case until after the summary judgment. So, no, there is no affirmative summary judgment evidence.

SPECTOR: Going back to a question that Judge Enoch asked. If you're a contractor and you buy this policy, I understand the total pollution exclusion endorsement is not valid in Texas, is that correct?

SCHULTZ: The endorsement on this policy was not valid at that time.

SPECTOR: However, it was appended to the policy for some reason?

SCHULTZ: For other states where it has been approved.

SPECTOR: What coverage would a contractor be buying when they buy this policy? What does it cover having to do with polluting?

SCHULTZ: For polluting events very little.

SPECTOR: Would you give us examples?

SCHULTZ: Justice Enoch talked about if you were going from one site to another. Let's say that a tank truck was in an accident, it turned over, there was a spill. You would be required under the state law to clean it up. And there might be coverage for that.

SPECTOR: That would be (d) wouldn't it? It would be excluded under (d)?

SCHULTZ: Not necessarily.

HANKINSON: In the example that you just gave, if they were transporting the pollutant, then didn't they bring the pollutant onto the premises?

SCHULTZ: But my example is, if they were between work sites on a roadway or something like that. In all candor, I don't know. I will say this, I mean this with all respect, there is very, very little coverage here for pollutant events. But that's not your job to determine how much there should be.

HANKINSON: But in order to interpret the policy, we obviously have one endorsement that at this time Texas would not allow and that was a total pollution exclusion, correct? So that must mean that the exclusion we have must not exclude everything?

SCHULTZ: No, that does not necessarily mean that. All it means at that point in time, that snapshot in time back when this was done, was that that endorsement had not yet been approved in Texas. It doesn't mean anything in regard to how much coverage there might or might not be under this exclusion.

HANKINSON: Well is it your position then, that exclusion F on the left has the same effect as the exclusion on the right, that they mean the same thing?

SCHULTZ: No, not necessarily. There could be slight differences.

HANKINSON: What examples are there of what would be covered under the exclusion F included in this policy?

SCHULTZ: The only ones that immediately come to mind is the one I just said. If you had a tank truck that was going from one construction site to another, unrelated construction site or a different construction site over here, there was a wreck on the highway. You're not doing work on those premises. Those are not premises that you are occupying in the sense of it being the site where under *Hernandez* you occupy the site where you are doing work.

HANKINSON: What's the effect of F(2) under those circumstances?

SCHULTZ: F(2) is a different provision altogether. At that point it could very well be that if there were a requirement that it be cleaned up and you had brought them to the premises where you doing operations that it might be excluded. But its operation is the key point there.

HECHT: It looks like F(2) eclipses F(1). Is that right or not right?

SCHULTZ: No, it doesn't. And this is the fallacy in their argument that F(1) somehow renders...well they say F(1)(a) and (d).

HECHT: But I'm talking about F(2). It looks like F(2) means that we only worry about F(1) in cases where somebody gratuitously cleaned something up. How often is that going to happen?

SCHULTZ: Nobody gratuitously cleans anything up is the bottom line. F(2) does exclude loss anytime there is a request, demand or order.

HECHT: Isn't that almost all the time?

SCHULTZ: Almost all the time. I mean the intent of this is to exclude almost every circumstance.

HECHT: I'm just curious why that wouldn't be raised in the TC if that's really what it means?

SCHULTZ: That is the $64,000 question. That's why we raised it immediately in the motion for new trial. Now I will say this however. These were summary judgments. And you must look at what Kelley-Coppedge said in their summary judgment. What they said is, "There is coverage but for (and this is the words) the scope of exclusion F." Not exclusion F(1)(a), F(1), but exclusion F.

OWEN: Why do we have all these amicus briefs is F(2) swallows F(1)(a)?

SCHULTZ: I'm not sure that it entirely swallows F(1)(a). But I will say this, that the intent I think clearly of exclusion (f), and I didn't draft it, is to exclude as much as possible coverage for polluting activities.

OWEN: F(2) is pretty broad. Why do we have all these amicus briefs? Because it seems to me F(2) is going to take care of most situations?

SCHULTZ: When it's properly raised I think it will most of the time, but there could be

times for whatever reason it doesn't.

ENOCH: If I was in a trucking business, and I don't truck any chemicals at all, and I just want a commercial general liability insurance policy, would I have these provisions in it?

SCHULTZ: You could have.

ENOCH: I would have to pay extra or pay less to get these provisions?

SCHULTZ: I don't think you can draw that type of specific relationship.

ENOCH: So F(2) was really to take care of the situation where somebody's in the business of cleaning up pollution spills, we want to make sure that we are not covering any of that kind of activity. I mean that's what F(2) could be for?

SCHULTZ: Yes sir.

ENOCH: But it could be designed to cover everybody who is in the business of cleaning up spills?

SCHULTZ: Well in the business of cleaning up spills. But a lot of people over these last decade or so have found themselves in the business of cleaning up spills even though that's not what they intended to do.

ENOCH: Whether they caused it or not, if they have been called upon to clean up the spills, you don't want to be insuring that kind of conduct that results from damages from cleaning up the spills?

SCHULTZ: That's right. And that's why Highland Ins. Company here paid for the broken pipeline, and paid for the lost oil. They just didn't pay to clean it up.

ENOCH: But it excludes paying damages caused by the cleanup. Isn't that what F(2) does?

SCHULTZ: In part.

HECHT: Why should occupy mean something different in F(1) than in J(1)?

SCHULTZ: I'm not sure it does. And to answer your question earlier of Mr. Wielinski, I mean the leading case in the country on this particular point was *Tri County,* and it was decided before this spill happened. It was decided in April 1994, and this spill happened in August 1994. And while it did clearly decide the *Tri County* case on F(1)(a) and F(1)(d), it held specifically that

under either of those exclusions that would not be covered, that *Tri County* factual situation would not be covered. So I think that occupy is used fairly consistently throughout the policy.

Now you've got to take it in context. This is my second point, is that you must take it in context. And in this context, the terms that are used under *Beaston* and *CBI* and all the cases that talk about insurance coverage, and again the rules of strict construction do not apply here. Because Kelley-Coppedge never stated in their motion for summary judgment that this term was ambiguous. They said it doesn't apply. And they say because of the way you construe F(1)(a) it subsumes F(1)(d), which it does not.

HECHT: Almost does?

SCHULTZ: Well no it doesn't, and here's why. Under F(1)(d) if you are an owner of property, and you have hired a contractor to do something, whatever it is, and that contractor causes a spill, and the contractor can't or won't clean it up, and you're a disinterested owner and are vicariously liable, at least under F(1)(d) there might be coverage. Now there might not be under F(1)(a). But there are certain limited circumstances I think when F(1)(d) might apply to situations that F(1)(a) does not.

Again, the purpose of this clause, and I'm talking about F in its entirety, is to exclude coverage for as many types of pollutant events as there can possibly be. And the fact that there is overlap or the fact that they said we are going to do a belt and suspenders, we are going to do this, we are going to set it this way and this way, does not render it ambiguous. But my point is, that if you look closely at the summary judgment, Kelley-Coppedge said two things and they didn't say one thing. They didn't say that occupy was ambiguous. They did not proffer a meaning for occupied that's different than ours and say, therefore it's ambiguous. They simply say it's the interplay of the two that renders the entire clause ambiguous. And they said, and this is not a burden of proof at trial issue, this is a summary judgment issue, "We, are taking the position that there is coverage except for the scope of F, and we are going to show you that F doesn't apply." And so when they say we have the burden of proving that exclusion, that's true at trial. But this isn't trial. This is a summary judgment proceeding.

HECHT: Why do so many participants in the industry think this is covered? I know you argue, well those aren't legal authorities. But they are somewhat persuasive that people selling these policies, buying these policies think they are covered.

SCHULTZ: Let's look back at *Tri County* *Tri County* is decided in April 1994, and this happens in August 1994. *Tri County* was handled on summary judgment. It goes to the San Antonio CA, and the SA CA says, "You as a contractor occupies sites that you work on," and so F(1)(a) applies. In that case the subcontractor actually brought the oil they sprayed on the parking lot so they said, also F(1)(d) applies. But it is crystal clear especially in the last paragraph of that opinion that they said both apply, and both are independent grounds for this ruling. *Tri County* sought a writ of

error to this court in 1994. And one would think since that was watched very carefully and that's the leading case in the country that they would have seen the doomsday then that they see now. But there wasn't a single amicus brief filed on behalf of *Tri County's* position in the SA CA or here. Not a one. Now we are inundated by amicus briefs in this case. And they have tried to put in matters that are outside the record that have been filed by out-of-state counsel. And they say, "No, this is the end of the insurance world." No, it's not. *Tri County* has been the law up until today in this state since 1994. Run *Tri County* through West law, run it through any other data base, try to find the articles written about it before these amicus briefs were filed saying that it's just doomsday, it's the end of the world for us. It isn't there.

HANKINSON: With all due respect, can you answer Judge Hecht's question. I haven't heard the answer yet. Some of the materials that are before us are not a question of just amicus briefs, but also a question of industry publications, including insurance industry publications as well as the contracting industry. So in addition to actual briefing we've been cited to secondary materials that seem to take the position contrary to yours. And I understand that you seek to discredit those secondary materials except from what the record looks like. In this case in terms of the briefing it seems to be that the view is pervasive against your position?

SCHULTZ: I don't think the view is pervasive with respect against our position. Because the *Tri County* case is exactly on line with our position. Absolutely. Now you may overrule it, but it is exactly on line with our position. The insurance agent's publication skirts around the issue, talks about it a bit, but there might be some coverage for some off site discharges. That's all it says. In one of the amicus briefs filed by the old Anderson _____ farm there is one point where they cite to their own publication, their own book about insurance coverage. If you look in the index of that book, *Tri County* is not even discussed. It's not even mentioned.

HECHT: You can buy coverage for this sort of thing, I suppose?

SCHULTZ: There are various kinds of environmental pact liability coverage, yes. They are available on the marketplace. No doubt about it.

The only other thing I would like to do just to show you, because again you must take these in context. I mean Kelley-Coppedge says, "well if F(1)(a) and F(1)(d) are read the way they think they are read, then you're out because F(1)(d) is meaningless. And yet, they hinge on the word "occupy" without looking at the way it's stated not only in F(1)(a) but in other provisions and that's the med pay provision that's before you. And what the med pay provision in the policy says is, "We will pay for medical expenses in regard to accidents on property that you own or rent (not own, rent or occupy - own or rent)." And it says, "Except that we won't pay for medical expenses in regard to accidents that occur to someone if they are in the place that they normally occupy. Now that's used in the med pay provision, coverage C of this same policy. So if occupy means in and of itself as used in this policy some sort of a long-term almost possessory interest, then why in another part of the policy does the policy say, "We will pay medical expenses for accidents

to individuals on property you own or rent unless it occurs in a place that they normally occupy." Why say normally occupies if occupy means physical presence? It's the only reasonable meaning.

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REBUTTAL

WIELINSKI: Mr. Schultz's last point on the medical payments provision of the policy, Kelley-Coppedge submits respectively that that is like comparing apples to oranges. Medical payments are simply in essence first aid coverage and it's basically designed for owners and landlords that if their tenants get hurt on the property in the portions that they occupy, they will pay up to $5,000 of medical coverage. And that's it. The exclusion for a person on the portion of the premises where it normally occupies, i.e., a tenant in his apartment or whatever, that is excluded because there is usually a waiver of liability. There is a limitation of liability even a hold harmless in the lease in which the owner will not ultimately be liable, so they don't need the coverage.

OWEN: Mr. Schultz's entire argument relies on *Tri County* and the way *Tri County* dealt with occupy. He says *Tri County* that's it.

WIELINSKI: I beg to disagree with Mr. Schultz. *Tri County* is far from the leading case in the country. There are at least ½ dozen other cases that take the position that Kelley-Coppedge is taking. There is one that explicitly says *Tri County* is wrong. And that's the *USFG v. B&B Oil Well Service* case. These are all discussed in our brief.

GONZALEZ: That's a federal district court case?

WIELINSKI: Yes out of Mississippi. There is also another case *Employer's Casualty v. St. Paul Fire & Marine* out of California curiously involving CB a Dallas contractor.

ENOCH: Do we have to hold that *Tri County* is wrong to hold for Kelley-Coppedge?

WIELINSKI: No. You can factually distinguish it. And the way you can distinguish it is that in that case the contractor brought a _____ oil onto the premises. So it is really subsection (1)(d)(1) that applies. That's the provision in our case which basically preserves coverage because Kelley-Coppedge didn't bring the waste onto the job site.

GONZALEZ: The CA does say that f(1)(a) does apply, so we would have to disapprove of that portion of the opinion?

WIELINSKI: I think that you have to reconcile those two portions of the opinion and it could be distinguished in that the pollutants were not brought onto the site. Now the occupy analysis has been criticized by other courts. Curiously *Tri County's* reliance on (1)(d)(1) to deny coverage has been cited favorably at least in another court in California. So *Tri County* is far from being the

leading case in the country.

As far as the example of where a contractor has coverage various of your honor's asked questions about the secondary materials, the other insurance materials, even the testimony in front of the regulators, what is the example that's given? It is this case. It is where a contractor is on third-party premises performing operations, encounters a pipeline, causes a spill. That's the property damage for which there is coverage under exclusion F(1)(d)(1).

As far as overlap with F(2), F(1) applies to bodily injury and property damage. F(2) applies to cleanup cost. There may be a difference between the two in some cases.