

# Duty to Defend, Outside Business Exclusion Coverage Update

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*The e-POST*

## Duty to Defend – Fifth Circuit (Texas Law)

***Aggreko, L.L.C. v. Chartis Specialty Ins. Co.***

--- F.3d ---, 2019 WL 5866880 (5th Cir. Nov. 11, 2019)

The U.S. Court of Appeals for the Fifth Circuit ruled that under Texas law, an insurer's payment agreement with an insured is considered a settlement for purposes of satisfying the insurance policy. The underlying case arose when an employee of Louisiana-based Guichard Operating Company, L.L.C. (Guichard) was fatally electrocuted while using a generator on the job in Texas. The employee's parents (the Breneks) brought a wrongful death suit against Aggreko, L.L.C. (Aggreko), the power equipment supplier that had leased Guichard the generator. Guichard was insured under a commercial liability policy issued by The Gray Insurance Company (Gray), which also included Aggreko as an insured.

Guichard initially agreed to defend Aggreko in the wrongful death suit, but halted its defense after reaching two agreements with the Breneks. In the agreement at issue, a Covenant Not to Execute, Gray agreed to pay the Breneks \$950,000 on behalf of Aggreko in exchange for the Breneks' agreement that if they were to seek further judgment, they could only do so against Aggreko's insurer, Indian Harbor Insurance Company (Indian Harbor). Gray contended that this agreement constituted a "settlement" for purposes of satisfying its insurance policy and its obligation to defend Aggreko. Indian Harbor, on the other hand, argued that the Covenant Not to Execute was not a "settlement" under Texas law.

After deciding that Texas law applied, the appellate court looked to the definition of "settlement," which was defined under Texas law as "the conclusion of a disputed or unliquidated claim, and attendant differences between the parties, through a contract in which they agree to mutual concessions in order to avoid resolving their controversy through a course of litigation." Armed with this definition and relevant case law, the appellate court concluded that a settlement had been reached because the Covenant Not to Execute was a binding contract in which mutual concessions were made by both parties.

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## **Outside Business Exclusion – Third Circuit (Pennsylvania Law)**

### ***Westport Ins. Corp. v. Hippo Fleming & Pertile Law Offices***

--- Fed. Appx. ---, 2019 WL 5855792 (3d Cir. Nov. 8, 2019)

The U.S. Court of Appeals for the Third Circuit held that an insurer was not required to provide coverage for a legal malpractice action against a lawyer and his law firm. The malpractice action at issue alleged that the lawyer, Charles Wayne Hippo (Hippo), was disloyal to his clients, Gregory Morris and Morris Management, Inc. (collectively Morris), and that Hippo prioritized the interests of his own private businesses, Templar Development, LLC and Templar Elmerton, LLC (collectively Templar), to the detriment of Morris. Hippo's malpractice insurer, Westport Insurance Corporation (Westport), refused to defend Hippo in the malpractice action and filed a declaratory judgment action. Westport argued that the "Outside Business Exclusion" in Hippo's professional liability policy applied to preclude coverage.

The "Outside Business Exclusion" excludes coverage for any "claim based upon, arising out of, attributable to or directly or indirectly resulting from [ ] any Insured's activities" arising from involvement with a company "other than the Named Insured." The trial court found in favor of Westport and held that "Outside Business Exclusion" applied to preclude coverage. The appellate court noted that "[p] aragraph after paragraph [in the complaint] contain factual allegations that Hippo took various actions, intended to benefit Templar at Morris's expense." Therefore, the appellate court affirmed the judgment of the trial court and held that the "Outside Business Exclusion" applied to preclude coverage for Hippo in the malpractice action.

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