

Federal District Court Strictly Applies First-to-File Rule

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The United States District Court for the Southern District of Texas, applying federal law, has held that the first-to-file rule strictly applies in assessing proper venue as between two federal district courts considering competing coverage actions. *Twin City Ins. Co. v. Key Energy Servs., Inc.*, 2009 WL 1544255 (S.D. Tex. June 2, 2009).

After the policyholder settled multiple securities actions, it sought indemnification from its D&O liability insurers. The primary insurer tendered its entire limit, but the first excess insurer settled with the policyholder for less than its total limits. The policyholder then sought the balance of the settlement amounts, net of the full underlying limits, from the second excess insurer. That insurer denied coverage on the grounds that the first excess insurer had neither admitted liability nor paid the full limit of its policy, as required by the second excess policy. Pursuant to an ADR requirement incorporated in the second excess policy, the parties mediated their dispute. After mediation was unsuccessful, the parties agreed to shorten the required waiting period imposed by the ADR provision before filing suit from 120 days to 62 days. Both parties then filed coverage actions on the first possible day. The policyholder filed in state court at 12:03 a.m. and the second excess insurer filed in the United States District Court for the Southern District of Texas at 8:16 a.m. Subsequently, the policyholder filed a motion to dismiss or stay the second excess insurer's action. While that motion was before the court, the second excess insurer removed the policyholder's state court action to the United States District Court for the Western District of Texas.

In considering the motion to dismiss or stay the insurer's action, the United States District Court for the Southern District of Texas first noted that the "first-to-file" rule generally provides that "when related cases are pending before two federal courts, the court in which the case was last filed may refuse to hear it if the issues raised by the cases substantially overlap." The court then assessed the second excess insurer's arguments regarding why the first-to-file rule should not be applied to its later-filed action. First, the insurer argued that it only lost the race to the courthouse due to technical difficulties with the court's electronic filing system. The court responded that, according to an affidavit filed by the insurer, the insurer actually tried to file seven minutes after the policyholder successfully filed. The court held that even minimal differences in filing time does not justify departing from the first-to-file rule. Second, the insurer argued that the policyholder's suit was

filed in anticipation of being sued and that the policyholder engaged in improper forum shopping, which justified deviating from the rule. The court found this argument unpersuasive, as it observed that both parties filed anticipatory suits seeking their favored forum. Third, the insurer argued that the court should consider transfer of venue and forum non conveniens factors, which it asserted favored its action. The court likewise rejected this argument, stating that the Fifth Circuit precedent made clear that the first-to-file rule not only applied to determine which court would hear the merits of a dispute, but also which court would determine whether a suit would be transferred. Accordingly, the United States District Court for the Southern District of Texas granted the policyholder's motion and transferred the insurer's action to the United States District Court for the Western District of Texas.