TADC INSURANCE LAW UPDATE

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This newsletter is intended to summarize significant cases impacting the insurance practice since the Spring 2010 newsletter. It is not a comprehensive digest of every case involving insurance issues during this period or of every holding in the cases discussed. This newsletter was not compiled for the purpose of offering legal advice. Any opinions expressed herein are those of the authors and do not necessarily reflect the views of Beirne, Maynard & Parsons, L.L.P.

WORKERS' COMPENSATION EXCLUSION

AISLIC v. Rentech Steel, L.L.C., 620 F.3d 558 (5th Cir. 2010)

Exclusion for an "obligation" incurred under any workers' compensation law does not preclude coverage for negligence claim brought by employee against a non-subscriber.

Preston Teel was injured while working for Rentech Steel, a non-subscriber to the Texas workers' compensation insurance system. The Teels brought suit against Rentech Steel alleging negligence, gross negligence and negligence *per se*. AISLIC, Rentech Steel's umbrella carrier, defended the underlying suit under a reservation of rights. On the first day of trial, Rentech Steel filed for Chapter 7 bankruptcy, but the bankruptcy court lifted the stay on the condition that any recovery would be limited to proceeds from the AISLIC insurance policy. Trial of the underlying case resulted in a judgment against Rentech Steel for $10,570,000. Rentech Steel appealed and AISLIC continued to defend the appeal under a reservation of rights.

AISLIC filed a declaratory judgment action asserting that it had no obligation to defend or indemnify Rentech Steel because of the "Various Laws" exclusion, which read, in pertinent part as follows:

> This insurance does not apply to any obligation of the Insured under any of the following:
>
> 2. Any workers' compensation, disability benefits or unemployment compensation.

The Fifth Circuit characterized the issue as whether an employee's negligence action against an employer that does not subscribe to the Texas workers' compensation system is an obligation under the Texas Workers' Compensation Act ("TWCA") or under common law. The court predicted that the Texas Supreme Court would find that a negligence claim against a non-subscriber is a common law claim and that the TWCA imposes no obligation on a non-subscriber to pay a claim by its employee. Accordingly, the court held that the "Various Laws" exclusion did not preclude coverage for the Teels' claims or the judgment against Rentech Steel because the TWCA imposes no obligation on a non-subscribing employer to compensate an employee for injuries sustained due to the employer's own negligence.

The Fifth Circuit declined to follow *Robertson v. Home State County Mutual Insurance Co.*, 2010 WL 2813488 (Tex. App.—Fort Worth July 15, 2010, no pet.), stating that *Robertson* is inconsistent with Texas Supreme Court caselaw and the plain reading of Section 406.033 of the TWCA.

Robertson v. Home State County Mut. Ins. Co., 2010 WL 2813488 (Tex. App.—Fort Worth July 15, 2010, no pet.)

The Fort Worth Court of Appeals reached the opposite result, holding that workers' compensation exclusion precludes coverage for claim against non-subscriber.

Robertson, who was employed by Redi-Mix as a truck driver, was injured on the job and obtained a judgment against his employer. While Redi-Mix did not provide workers' compensation insurance to its employees, it was insured under a truckers' liability policy issued by Home State. The Home State policy contained a workers' compensation exclusion, which read:

Workers Compensation

> Any obligation for which the insured or the insured's insurer may be held liable under any workers' compensation, disability benefits or unemployment compensation law or any similar law.

Robertson sought a declaratory judgment that Home State had a duty to defend and indemnify Redi-Mix for his claims against Redi-Mix, and Home State counterclaimed. The trial court granted summary judgment in favor of Home State, and Robertson appealed.

Robertson contended that because Redi-Mix was a non-subscriber, his negligence claim against Redi-Mix sounded in common law and was not an "obligation" under the Texas Workers' Compensation Act ("TWCA"). The Court of Appeals stated that the issue before it was not whether Robertson's negligence action arose under the TWCA, noting that such an action existed at common law before the enactment of the TWCA. Rather, the court defined the issue as whether the damages recovered by Robertson for Red-Mix's negligence constitute an "obligation" for which Redi-Mix is liable "under any" workers' compensation law.

Significantly, the court found that in his responses to Home State's motions for summary judgment, Robertson failed to raise any argument addressing Home State's contention that his claim was excluded under the workers' compensation exclusion. Accordingly, Robertson was limited to challenging the sufficiency of the evidence and was procedurally barred from arguing that the workers' compensation exclusion was ambiguous.

The court then characterized the TWCA as a "comprehensive statutory scheme" that provides three categories of claims: (1) administrative claims by employees of subscribers; (2) negligence actions of employees of subscribers wherein common law defenses are available; and (3) negligence actions by employees of nonsubscribers in which common law defenses are not available. Thus, under this reasoning, the court concluded that the TWCA "governs" an employee's personal injury action against a nonsubscriber.

The Court of Appeals declined to follow the reasoning of the district court in *AISLIC v. Rentech Steel, L.L.C.* The court noted that the district court had determined that the exclusion was ambiguous, an issue the Court of Appeals declined to address. Thus, the court concluded that Robertson implicated the TWCA when he sued Redi-Mix for negligence because Section 406.033 required him to prove that Redi-Mix was negligent and dictated the limited defenses upon which Redi-Mix could rely. Therefore, the court concluded that the judgment that Robertson obtained against Redi-Mix was an "obligation" under the TWCA and the workers' compensation exclusion applied to bar coverage.

Amerisure Ins. Co. v. Navigators Ins. Co., 611 F.3d 299 (5th Cir. 2010)

A claim under the Jones Act is not excluded under the workers' compensation exclusion because the Jones Act is not "similar" to workers' compensation.

(This Fifth Circuit opinion is also discussed below in connection with its limitation of *Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co.*, 236 S.W.3d 765 (Tex. 2007). The potential application of several exclusions was also analyzed by the Fifth Circuit in detail. However, the only exclusion discussed in this summary is the potential application of a standard workers' compensation exclusion to a Jones Act claim.)

Two employees of Texas Crewboats, Clanton and Satterfield, were injured in an automobile accident while they were being driven from Freeport to Morgan City, Louisiana, where they were to board one of Texas Crewboats' vessels. Sylvester, who was driving Texas Crewboats' vehicle at the time of the accident, fell asleep, causing the vehicle to leave the roadway and roll over. Clanton and Satterfield sued Texas Crewboats and Sylvester in Louisiana State Court, alleging negligence and recklessness against Sylvester, and bringing a Jones Act claim against Texas Crewboats.

Texas Crewboats had a $1 million primary auto liability policy with Amerisure. The Amerisure policy contained a workers' compensation exclusion, which precluded coverage for:

> Any obligation for which the insured or the insured's insurer may be held liable under any workers' compensation, disability benefits or unemployment compensation law or any similar law.

The issue before the Fifth Circuit was whether the Jones Act is "similar" to workers' compensation. Noting that the Texas Supreme Court has not addressed this issue, the court looked to other

jurisdictions. Only one published case directly on point, *Sanders v. Homes Indemnity Insurance Co.*, 594 So. 2d 1345 (La. Ct. App. 3d Cir. 1994), was located. In *Sanders*, the court held that liability under the Jones Act, unlike workers' compensation, is based on the employer's negligence. Thus, the Fifth Circuit concluded that the phrase "any similar law" was ambiguous with respect to the Jones Act claims. Construing the exclusion in favor of the insured, the court concluded that it did not preclude coverage for the Jones Act claims.

EXEMPLARY DAMAGES

Minter v. Great Am. Ins. Co. of New York, No. 09-10734 (5th Cir. Aug. 27, 2010)

Texas public policy prohibits an insurer from indemnifying for exemplary damages awarded against an insured in connection with an accident that resulted in the insured's third DWI conviction.

A tractor-trailer driven by Largent was involved in a motor vehicle accident with Morris. Both drivers were intoxicated and Morris was injured. After the accident, Largent pled guilty to DWI, his third such conviction. Largent also testified that he was intoxicated at the time of the accident, that he knew he was a danger, and that he knew it was possible that someone might get hurt. A jury awarded $2.6 million in actual damages and $1.65 million in exemplary damages against Largent.

Morris then filed an action to appoint Minter as a receiver to collect insurance proceeds covering the judgment against Largent. Minter settled with the primary carrier, which had limits of $1 million per occurrence, for $1.9 million. The receiver then filed suit against Great American, the umbrella carrier. The district court granted Great American's motion for summary judgment on the grounds that Largent was not an insured under the policy. In 2005, the Fifth Circuit reversed in part and remanded for trial on the issue of whether Largent was a permissive user of the tractor-trailer.

At trial, the jury found that Largent was a permissive user and, thus, was an insured under the Great American policy. The court entered judgment for $8.1 million, which was the value of the state court judgment, plus interest, offset by the amount of the settlement with the primary insurer. The trial court denied Great American's motion for new trial or to amend the judgment on the ground that exemplary damages were not covered by the umbrella policy. Great American appealed.

The Fifth Circuit applied the two-step analysis described in *Fairfield Insurance Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008). Great American conceded that the plain language of the umbrella policy allowed for coverage of exemplary damages. Accordingly, the Fifth Circuit analyzed the second step and considered the "general public policies of Texas." The Fifth Circuit had little difficulty in determining that under the circumstances, given that it was Largent's third conviction for DWI, Texas public policy prohibited Great American from indemnifying him for the exemplary damage award.

"USE" OF A COVERED AUTO

Employers Mut. Cas. Co. v. Bonilla, 613 F.3d 512 (5th Cir. 2010)

Injuries sustained by a cook caused by a fire in a catering truck that occurred while the truck was parked in the insured mobile catering business's parking lot resulted from the "use" of a covered auto.

Jolly Chef operated a mobile catering business. It leased a catering truck and space on its commissary and parking lot to Bonilla. Bonilla hired a driver and cook, who would return to the commissary at the end of each day to clean the truck and prepare for the next day. While the truck was parked in Jolly Chef's lot, the driver poured gasoline on the floor of the truck to loosen grease. The driver then left the truck to turn in the day's receipts. Molina, the cook, remained in the truck washing dishes. A pilot light from the stove in the truck ignited the gasoline and the cook was severely injured in the resulting explosion.

Jolly Chef's trucks were insured by a CGL policy and an Umbrella policy issued by Employers Mutual and a Commercial Auto Policy issued by Emcasco. Bonilla did not have any insurance of his own. Employers Mutual and Emcasco defended both Jolly Chef and Bonilla under a reservation of rights. Molina obtained a judgment against Bonilla for over $1.8 million.

Employers Mutual and Emcasco filed a declaratory judgment action against Bonilla and Molina, denying any liability under any of the policies. The parties filed cross-motions for summary judgment. The district court granted Employers Mutual's and Emcasco's motions, finding no coverage under the CGL policy because neither Bonilla nor Molina were insureds and that there was no coverage under the Auto policy because the fire

did not arise from the "use" of the vehicle as a vehicle. Since the meaning of "use" in the Umbrella policy was the same as under the Auto policy, the court found no coverage under the Umbrella policy either. No issues were raised on appeal about the CGL policy.

In examining the coverage afforded under the Auto policy, the Fifth Circuit noted that it was issued to Jolly Chef, whose business was described as "mobile catering." Thus, the policy was intended to cover motor vehicles involved in a motor catering business. Since Bonilla had leased the truck from Jolly Chef, he was using the covered auto with Jolly Chef's permission. Thus, the issue was whether the accident resulted from "the ownership, maintenance or use of a covered auto."

The Fifth Circuit relied heavily on the Texas Supreme Court's analysis in *Lindsey*, as well as the treatises cited in that opinion, in determining that "use" means the "use of a vehicle as such and does not include a use which is foreign to a vehicle's inherent purpose." While the "inherent purpose" of an ordinary vehicle would not include cooking and cleaning and maintenance of kitchen facilities, such uses could be seen as the "inherent purpose" of a mobile catering truck.

While noting that the Texas Supreme Court had not considered these precise facts, the court made a "slight *Erie* guess" in concluding that: 1) a business vehicle policy covers the intended and identified uses of that business vehicle; 2) the accident occurred within the natural territorial limits of the vehicle because the truck was parked on Jolly Chef's lot and Molina's injuries occurred inside the truck; and 3) the vehicle produced the injury because it resulted from the known and expected uses of the vehicle related to cooking, and the fire was ignited by the truck's pilot light. Thus, the Auto policy and the Umbrella policy provided coverage.

However, the insurers had also raised the Employee Injury Exclusion in the district court, but the court did not reach the issue due to its decision on the "use" of the vehicle. Accordingly, the Fifth Circuit remanded the case to the district court for a determination of whether the Employee Injury Exclusion precluded coverage.

SUBROGATION AND CONTRIBUTION

Amerisure Ins. Co. v. Navigators Ins. Co., 611 F.3d 299 (5th Cir. 2010)

Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co., 236 S.W.3d 765 (Tex. 2007), does not preclude contractual subrogation when one insurer that contributed to the settlement has denied coverage simply because the insured has been fully indemnified.

Texas Crewboats was insured by a $1 million primary auto liability policy issued by Amerisure, a $1 million primary marine protection and indemnity policy issued by Fireman's Fund and a $9 million excess policy issued by Navigators. The insurers settled a case involving personal injuries resulting from an automobile accident for $2.35 million. Although Amerisure contended it had no duty to indemnify, Navigators demanded that it contribute its policy limits. Amerisure paid $1 million of the settlement, but reserved its right to seek reimbursement. Navigators and the other carrier paid the balance of the settlement.

Amerisure then sought reimbursement from Navigators through equitable and contractual subrogation. The district court granted summary judgment for Navigators, holding that although the Amerisure policy did not cover the incident, Amerisure could not recover through equitable or contractual subrogation. The district court reasoned that Amerisure could not pursue its contractual subrogation claim because Navigators had been released from liability as a party to the settlement and, under *Mid-Continent v. Liberty Mutual*, the insured parties were fully indemnified. The district court held that Amerisure had no right of equitable subrogation because it had voluntarily contributed to the settlement.

Noting that the majority of district courts that have considered the effect of *Mid-Continent* have limited the holding to its facts, the Fifth Circuit rejected the reasoning of the two district courts that broadly construed *Mid-Continent* to preclude contractual subrogation any time the insured is fully indemnified and defended. The court stated that the latter view "would effectively end contractual subrogation in Texas." The court relied upon a well-reasoned opinion by Judge Lee Rosenthal in *Employers Insurance Company of Wausau v. Penn-American Insurance Co.*, 705 F. Supp. 2d 696 (S.D. Tex. 2010), in which the court stated that *Mid-Continent* is limited to situations where the insurers

(1) were co-primary insurers, (2) did not dispute coverage, and (3) were subject to pro-rata clauses.

The Fifth Circuit also relied on the Texas Supreme Court's contractual subrogation decision in *Texas Health Insurance Risk Pool v. Sigmundik*, 315 S.W.3d 12 (Tex. 2010). There, the court held that although the insurer had fully indemnified the insured for his medical expenses, it was entitled to recover those payments from a settlement of a related tort action through contractual subrogation. While noting that the *Sigmundik* opinion did not specifically address *Mid-Continent*, the Fifth Circuit concluded that the Texas Supreme Court could not have reached this result if the broad view of *Mid-Continent* was in fact the law of Texas. Therefore, the Fifth Circuit concluded that *Mid-Continent* does not bar contractual subrogation simply because the insured is fully indemnified.

The Fifth Circuit then analyzed the facts of the case and concluded that *Mid-Continent* did not bar equitable subrogation under those facts. Specifically, Amerisure insisted that its policy did not provide coverage. However, Navigators refused to indemnify until Amerisure had paid its policy limit. Applying *Mid-Continent* to such a situation "would have further deviated from settled principles of Texas insurance law by discouraging insurers from first defending and indemnifying [their insured] and then seeking reimbursement for the costs a coinsurer should have paid." Thus, the Fifth Circuit held that *Mid-Continent* does not bar contractual subrogation when an insurer has denied coverage.

Therefore, because it concluded that Amerisure was entitled to contractual subrogation, the Fifth Circuit did not reach the equitable subrogation issue.

Truck Ins. Exch. v. Mid-Continent Cas. Co., 320 S.W.3d 613 (Tex. App.—Austin 2010, no pet.).

The Austin Court of Appeals rejected the Fifth Circuit's analysis of *Mid-Continent v. Liberty Mutual* in *Trinity Universal Insurance Co. v. Employers Mutual Casualty Co.*, 592 F.3d 687 (5th Cir. 2010), holding that a co-insurer's contribution claim for defense costs against another co-insurer is barred as a matter of law.

Daneshjou Company, an architectural and construction company, brought suit against one of its customers and the customer counterclaimed for damages related to faulty construction of a multi-million dollar home. Daneshjou was insured by both Truck and Mid-Continent. Mid-Continent denied coverage and refused to indemnify its insured. Truck spent millions of dollars defending Daneshjou in the lawsuit, which resulted in a judgment against the insured. Truck also paid $2 million fund a settlement.

After the verdict against the insured, Mid-Continent filed an action in federal court against the insured and the plaintiff in the underlying lawsuit, seeking a declaration that it had no duty to defend or indemnify. Truck was not a party to the federal suit. The federal district court granted summary judgment in Mid-Continent's favor, finding that the damages occurred outside Mid-Continent's policy period.

While the federal case was pending, Truck filed a state court action against Mid-Continent seeking a declaration that Mid-Continent owed a duty to defend and indemnify its insured in the underlying case and seeking reimbursement of defense costs and settlement costs under theories of contribution, subrogation and breach of contract.

The Austin Court of Appeals held that Mid-Continent was entitled to summary judgment as to all of Truck's claims because of the preclusive effect of the federal coverage decision and stated that it need not reach Truck's other issues. Nevertheless, the court decided to address *Mid-Continent v. Liberty Mutual's* applicability to Truck's claim for contribution.

The Austin Court rejected Truck's argument that *Mid-Continent v. Liberty Mutual* was distinguishable because both co-insurer's had defended the insured in that case and only Truck provided a defense in this case. Thus, it seems likely that the Austin Court would also reject the Fifth Circuit's analysis in *Amerisure*.

The Austin Court specifically rejected the Fifth Circuit's reasoning in *Trinity Universal v. Employers*, which held that one co-insurer could recover the disproportionate portion of defense costs it paid from a co-insurer because the "other insurance" clauses apply only to the duty to indemnify and not the duty to defend.

The Austin Court reached this conclusion based upon the Texas Supreme Court's reliance in *Mid-Continent v. Liberty Mutual* on *Employers Casualty Co. v. Transport Insurance Co.*, 444 S.W.2d 606 (Tex. 1969) and *Trader's & General Insurance Co. v. Hick's Rubber Co.*, 169 S.W.2d 142 (Tex. 1943), which both held that the existence of an "other

insurance" clause precludes a contribution claim for defense costs.

***STOWERS* DOCTRINE**

AFTCO Enters., Inc. v. Acceptance Indem. Ins. Co., 321 S.W.3d 65 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

A settlement offer that would require funding from multiple insurers, and which no single insurer could fund within the limits of its particular policy does not trigger a duty under *Stowers*.

AFTCO and ETSI brought *Stowers* actions against two of their primary and excess carriers alleging that both carriers had failed to tender their policy limits in response to a $2.6 million global settlement offer to settle four Louisiana personal injury lawsuits that arose out of a single tractor-trailer accident in 2003. As a result of this accident, two people died and nine were injured. At the time of the accident, the tractor's owner was working for ETSI and the trailer had been leased to AFTCO.

AFTCO and ETSI were insured under two primary and two excess policies:

1) A Home State primary policy issued to AFTCO as the insured and ETSI as an additional insured, with $600,000 in remaining limits;

2) A Southern County Mutual primary policy naming the trailer owner as the named insured and AFTCO and ETSI as additional insureds, with $1 million in limits;

3) An Acceptance Indemnity excess policy naming AFTCO as the insured and ETSI as an additional insured, with $1 million in limits; and

4) A $10 million excess policy issued by Harco.

In 2006, the remaining personal injury plaintiffs sent a letter to all of the insurance companies other than Harco, offering to settle their claims against the tractor owner, AFTCO, Home State, Southern and Acceptance for the remaining limits under those insurance policies (approximately $2.6 million). The plaintiffs reserved their rights to proceed against Harco. Southern did not respond to the plaintiffs' settlement demand. Acceptance responded, stating that it had no obligation to consider the demand until the limits of all underlying policies were exhausted. It is unclear from the opinion whether Home State replied to the plaintiffs' demand.

Subsequently, the plaintiffs sent another letter to the insurers, including Harco, in which they demanded the limits of all of the insurance policies (approximately $12.6 million) in settlement of all claims against all of the defendants. Southern and Acceptance tendered their policy limits, but Harco continued to deny coverage.

As a result, the personal injury suits went to trial, resulting in a judgment of over $20 million. This judgment also declared that the Harco policy provided coverage for the claims. After entry of judgment, the insurers settled all of the outstanding claims for the available policy limits, resolving AFTCO's and ETSI's liability in the underlying cases.

AFTCO and ETSI brought suit against the insurers alleging that they violated their *Stowers* duties in failing to accept reasonable settlement demands within limits, causing AFTCO and ETSI to incur additional attorneys' fees and expenses. Southern and Acceptance moved for summary judgment, which the trial court granted on the ground that there was no evidence that the plaintiffs' settlement demands triggered a duty under *Stowers*.

In affirming the trial court's summary judgment, the Court of Appeals relied on *Mid-Continent* "for the proposition that, in a claim involving multiple policies, a settlement demand does not activate one primary insurer's *Stowers* duty unless the demand falls within the applicable limits available under that single policy." The court also relied on *Keck, Mahin & Cate* for the observation that "[a]n excess insurer owes its insured a duty to accept reasonable settlements, but that duty is also not typically invoked until the primary insurer has tendered its policy limits." Thus, the Court of Appeals concluded that "*Stowers* looks to whether the plaintiffs have made a demand within the limits of a single policy, not on a single insurer."

Applying these principles to the facts of the case, the court observed that the $2.6 million demand was an aggregate of multiple policies and exceeded Southern's primary limits of $1 million. Thus, the court concluded that the trial court properly granted summary judgment in favor of Southern.

The Court of Appeals also held that Acceptance's *Stowers* duty could only arise "after the primary carrier: (1) received a settlement demand within the primary policy's limits and (2) in acting as an ordinarily prudent insurer, discharged its *Stowers* duty by tendering the limits of that policy." The Court of Appeals held that the trial court properly granted summary judgment in favor of Acceptance because the primary carrier never tendered its policy limits.

EXTRINSIC EVIDENCE

Liberty Mut. Fire Ins. Co. v. Trovato, No. A-10-CA-135-LY (W.D. Tex. Sept. 7, 2010)

In this declaratory judgment action, the court granted the insured's motion for summary judgment, finding that—under the homeowner's insurance policy at issue—extrinsic evidence established that the insurer owed no duty to defend or indemnify.

According to allegations in the underlying lawsuit, Trovato, the named insured under a homeowner's policy issued by Liberty Mutual, asked one of his "friends," Hall, to help him clean his attic by removing some boxes. Allegedly, while Hall was attempting to move some boxes out of the attic, she accidentally fell through the attic floor and sustained serious injuries. Hall then sued Trovato.

In the instant case, Liberty Mutual argued that coverage for the underlying action was excluded per Exclusion 2.e., which provided that liability coverage did not apply to "bodily injury to you or an insured within the meaning of [the personal liability coverage section of the policy]." The policy defined "insured" as "you and residents of your household who are . . . your relatives." Furthermore, by an endorsement to the policy, "you" and "your" were defined as the "named insured" and "the spouse of the 'named insured' . . ., if a resident of the same household" or "the partner in a civil union . . . or similar union or partnership, . . . if a resident of the same household."

To support its argument that coverage was excluded, Liberty Mutual presented extrinsic evidence (*e.g.*, Hall's car registration, which listed Trovato's home address, and a marriage declaration filed by Trovato and Hall with the county clerk) establishing that Hall was an "insured" under the policy because she was a spouse, partner, or relative of Trovato and a resident of his household. Hall and Trovato denied that she was a resident of his household at the time of the accident, and responded that they were married after the accident.

After noting that the Texas Supreme Court has not expressly recognized an exception to the eight-corners rule, the court relied upon *GuideOne Elite Insurance Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305 (Tex. 2006), to conclude that extrinsic evidence could be considered because it related only to coverage, not liability. In other words, only Hall's status as an insured was at issue, not the merits of her claims against Trovato. According to the court, the marriage declaration established that Hall was married to Trovato. Moreover, under Texas law, she was a resident of his household because she stayed at his residence (albeit on a temporary, but regular, basis), and when she left his home to work in another city, she always intended to, and did, return. Therefore, per the terms of the policy, Hall was an insured. Accordingly, coverage for her claims against Trovato were excluded.

UNDERINSURED MOTORIST

McQuinnie v. Am. Home Assurance Co., No. 10-10042 (5th Cir. Oct. 7, 2010).

A rental car owned by a self-insured rental car company was not an "uninsured motor vehicle" under the UIM coverage afforded under a Business Auto Policy, despite the fact that the operator of the rental car was underinsured and that federal law precluded the insured from recovering from the rental car company.

McQuinnie was injured in an accident between his vehicle and a rental car owned by Enterprise. McQuinnie was insured under a Business Auto Policy issued by American Home to McQuinnie's employer.

McQuinnie settled his personal injury claim with the insurer of the driver of the rental car for $50,000, the policy limits. McQuinnie then sought uninsured/underinsured motorist benefits from American. American denied the claim, McQuinnie sued and the district court granted American Home's motion for summary judgment. McQuinnie appealed.

On appeal, it was undisputed that Enterprise was a "self-insurer" under the Texas Motor Vehicle Safety Responsibility Act. The American Home policy provided coverage for damages an insured is legally entitled to recover from the owner or operator

of an uninsured motor vehicle. "Uninsured motor vehicle" was defined as an "underinsured motor vehicle," which in turn was defined. However, the policy also provided that an "underinsured motor vehicle" did not include any vehicle *owned or operated* by a self-insurer.

McQuinnie argued that, under federal law, he could not recover from Enterprise and that the self-insurer exception should only apply when the insured is legally entitled to recover from the self-insurer. McQuinnie further argued that the insurance status of the tortfeasor, rather than the vehicle involved in the accident, was the relevant consideration. The Fifth Circuit rejected McQuinnie's arguments, noting that the Texas Insurance Code speaks in terms of uninsured and underinsured *vehicles*, not *tortfeasors*.

The Court held that the American Home policy was unambiguous and was valid under Texas law. Because Enterprise was a "self-insured," the clear language of the policy provided that the rental car was not an uninsured vehicle. Therefore, the Court affirmed summary judgment in favor of American Home.

HO-B POLICY COVERS MOLD DAMAGE TO PERSONAL PROPERTY BUT NOT TO THE DWELLING

State Farm Lloyds v. Page, 315 S.W.3d 525 (Tex. 2010)

In this significant case, the Texas Supreme Court held that when a plumbing leak causes mold contamination, the Texas Standard Homeowners Policy – Form B (HO-B) covers mold damage to personal property but not to the dwelling.

As discussed in the Fall 2008 Newsletter, the insured discovered mold and water damage in her home and reported it to State Farm. After a test of the plumbing system revealed leaks in the sanitary sewer lines and an indoor environmental quality assessment found several forms of mold, it was recommended that both the structure and contents be remediated and certain contents discarded. The insured provided a remediation estimate to State Farm, and State Farm issued drafts for remediation and repair of the structure and for remediation of the contents. In 2002, the insured requested additional funds to replace the carpet because of mold damage, but State Farm refused.

A dispute arose as to whether State Farm had paid sufficient funds, and the insured ultimately filed suit against State Farm alleging breach of contract and extra-contractual claims. State Farm moved for summary judgment, and the trial court initially denied the motion. After the Texas Supreme Court rendered its decision in *Fiess v. State Farm Lloyds*, State Farm filed a motion for reconsideration, which was granted. The trial court then rendered a take nothing judgment in favor of State Farm, but the Waco Court of Appeals reversed holding that the HO-B policy covers *any* loss (including mold) to the dwelling or its contents resulting from a plumbing leak. State Farm then sought review from the Texas Supreme Court.

In its opinion, the Court analyzed the insured's policy, noting that policy separately provides coverage for the dwelling (Coverage A) and its contents (Coverage B). As discussed, Coverage A insures against "all risks" of physical loss to the dwelling except those excluded in Section I Exclusions. In contrast, Coverage B insures against physical loss to personal property *only* if the loss is caused by certain enumerated perils, which includes a plumbing leak (Covered Peril No. 9). As with Coverage A, Converge B is also limited by the exclusions listed in Section I Exclusions. Mold is expressly excluded in the Section I Exclusions portion of the policy under Exclusion 1.f.(2). Importantly, the last sentence of Covered Peril No. 9, commonly known as the "exclusion repeal provision," provides that Exclusions 1.a. through 1.h. (including the mold exclusion) from Section I Exclusions do not apply to loss caused by that peril.

State Farm argued that the Court's decision in *Fiess* controls and that all mold damage to the dwelling is excluded irrespective of its cause. On the other hand, the insured argued that the holding in *Fiess* only concerned mold from roof and window leaks, not mold damage caused by plumbing leaks and that the Court's decision in *Balandran v. Safeco Insurance Co.* controls. According to the insured, the mold exclusion and the "exclusion repeal provision," when read together, expressly cover mold damage caused by plumbing leaks or at the very least create an ambiguity, affording coverage under the policy in either event.

After discussing its decisions in *Fiess* and *Balandran*, the Court held that the mold exclusion unambiguously applies to property loss under Coverage A and Coverage B. The Court then said to hold that the "exclusion repeal provision" reinstates coverage for mold damage under both Coverage A

and Coverage B would render the mold exclusion entirely nugatory. However, the Court noted that limiting the "exclusion repeal provision" to Coverage B where it appears in the policy does not render the repeal provision wholly inoperative as it did in *Balandran*. Relying on the Fifth Circuit's reasoning in *Carrizales v. State Farm Lloyds*, the Court said that "[t]here is no reason apparent from the policy language that would indicate the exclusion repeal applies to the mold exclusion under Coverage A; to construe the repeal provision to reinstate mold coverage for [the insured's] dwelling would wholly ignore the structure of the policy."

While the "exclusion repeal provision" does not reinstate coverage for mold damage to the dwelling under Coverage A, the Court held that it does apply to remove personal property damage from the mold exclusion, as the court of appeals had held. Indeed, given the unambiguous language in the "exclusion repeal provision" that "[e]xclusions 1.a through 1.h under Section I Exclusions do not apply to loss caused by this peril" and that "this peril" refers to plumbing leaks which affect the insured's personal property, the Court held that the insured's claims for mold damage to her personal property resulting from plumbing leaks were covered.

With respect to the insured's extra-contractual claims, the Court noted that there can be no liability under the Texas Insurance Code if there is no coverage under the policy. Conversely, the Court noted that to the extent the policy affords coverage, extra-contractual claims remain viable. As such, the Court held that to the extent the insured's extra-contractual claims are based on State Farm's denial of coverage for mold damage to the insured's dwelling, those claims cannot survive. To the extent the insured's claims are based upon denial of her claim for mold damage to the contents of her home, the Court remanded them to the trial court for further proceedings.

PROFESSIONAL SERVICES EXCLUSION HELD APPLICABLE

Admiral Ins. Co. v. Ford, 607 F.3d 420 (5th Cir. 2010)

The Fifth Circuit held that a professional services exclusion in CGL policy limited professional services to those requiring "specialized knowledge or training" and the insured's conduct was an excluded professional service.

An oil company hired the insured to create a drilling plan for an oil well and to consult and assist in the drilling of the well. During drilling, the well had a blowout, and the oil company filed suit against the insured. After Admiral paid the insured the $50,000 per claim limit pursuant to the insured's professional liability policy, Admiral filed this lawsuit seeking a declaratory judgment that it did not owe the insured any coverage under the insured's commercial general liability policy.

In filing its suit, Admiral claimed that the CGL policy's professional services exclusion precluded coverage for the oil company's lawsuit because the underlying conduct required the insured's specialized or technical knowledge. The exclusion provides that "[w]ith respect to any professional services shown in the Schedule, this insurance does not apply to 'bodily injury,' 'property damage,' 'personal injury,' or 'advertising injury' due to the rendering or failure to render any professional service." The schedule of professional services listed "ALL OPERATIONS OF THE INSURED." In response, the insured argued that because the exclusion purports to apply to "all operations of the insured," it destroyed any grant of CGL coverage and, thus, it should not be given effect.

On cross-motions for summary judgment, the district court ruled in favor of the insured, finding that the exclusion was illusory because it defined professional services as all operations of the insured. The district court found that the broad description of professional services "obliterated the entire insurance policy" and gave the exclusion no effect. Thus, it found that Admiral owed the insured a duty to defend in the underlying lawsuit. Admiral appealed.

On appeal to the Fifth Circuit, Admiral argued that the "all operations" language does not define professional services but provides the scope of the exclusion. According to Admiral, the language simply means that the parties intended the legal definition of professional services to exclude coverage for professional services in any of the insured's operations. Admiral urged the court to apply the legal definition of professional services articulated by Texas courts thereby limiting professional services to those that require the professional's "specialized knowledge or training." Relying on the district court's plain language reading, the insured urged the court not to "re-write" the exclusion.

At the outset, the Fifth Circuit noted that the insured's plain language argument was "strange" and

that it was difficult to understand why the insured would purchase a policy that it believed to exclude all of its operations from coverage.

The Fifth Circuit then stated that the district court misinterpreted the *Davis-Ruiz Corp. v. Mid-Continent Casualty Co.* decision in finding that *Davis-Ruiz* prevented it from applying the legal definition of "professional services," as often applied by Texas courts. As the Fifth Circuit noted, *Davis-Ruiz* does not suggest that a court may not look to the contract to define "professional services." It also noted that using the legal definition of "professional service" was not an issue in *Davis-Ruiz*. Further, the Fifth Circuit held that when a policy does not specify a definition of professional services, a court is free to apply the legal definition of "professional services" to the exclusion, and Texas courts, as well as courts interpreting Texas law, often do so.

Although the Fifth Circuit agreed that the provision was confusing and a literal interpretation would imply that "all operations" were excluded as professional services, Admiral advanced the only reasonable interpretation of the exclusion: that the parties intended the legal definition of professional services to exclude coverage for professional services in any of the insured's operations.

The Fifth Circuit then analyzed whether the exclusion negated coverage. Admiral argued that the underlying suit was based only on the insured's failure to use his specialized or technical knowledge in preparing and implementing the drill plan. The insured argued that some of the underlying allegations were not based on specialized knowledge and, thus, fell outside the exclusion.

In deciding this issue, the Fifth Circuit reviewed the allegations in the relevant pleading in the underlying suit. Specifically, the underlying plaintiff alleged that the insured breached the contract with it by failing to "properly inspect the drill pipe for casing wear as it was pulled out of the hole," "instruct the mud logger to look for and report metal shavings," and "use 'ditch magnets,' a device that detects and segregates metal from the mud." The underlying plaintiff also alleged that "[n]ot all operations of [the insured] were professional in nature. While several of the above-described omissions made by [the insured] required the use of [the insured's] specialized training, certain of the omissions and failures to act were done with no necessary professional knowledge and were outside of [the insured's] professional capacity."

After reviewing the underlying plaintiff's self-serving allegations, the Fifth Circuit noted that the only arguably non-professional conduct alleged was failing to look for metal shavings or to use a magnet to detect shavings in mud and that the actual performance of these acts is perhaps akin to conduct that it has found to be non-professional. With that said, the Fifth Circuit then noted that the underlying plaintiff did not sue the insured because the insured was told to watch for pipe wear and metal shavings and failed to do so. Rather, the underlying complaint was that the insured failed to act upon its specialized knowledge that those tasks needed to be performed. Indeed, the specific failures were listed as sub-parts of a general failure "to perform adequate and competent drilling operations." Stated differently, the allegations were not that the insured incorrectly performed some non-professional activity, but that the insured failed to properly implement a plan to drill the well.

Because the underlying suit alleged the existence of and failure to fulfill a contract, the very subject of which was the insured's expertise in drilling operations, the Fifth Circuit found that the professional services exclusion applied, and Admiral had no duty to defend the insured under the CGL policy. Thus, the judgment of the district court was reversed and rendered.