TADC INSURANCE LAW UPDATE

Spring 2012

David A. Clark
Robert L. Horn
Brian T. Bagley
Scott R. Davis
Benjamin T. Zinnecker
Kent L. Harkness

Beirne, Maynard & Parsons, L.L.P.
Houston, Texas

This newsletter is intended to summarize significant cases impacting the insurance practice since the Fall 2011 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.

APPRAISAL

Blum's Furniture Co., Inc. v. Certain Underwriters at Lloyds London, No. 11-20221, 2012 WL 181413 (5th Cir. Jan. 24, 2012) (per curiam) (not designated for publication under 5TH CIR. R. 47.5)

Making an "Erie guess," the Fifth Circuit held that an insurer is entitled to summary judgment on a bad faith claim if the appraisal process is invoked and a subsequent award is promptly paid and accepted by the insured.

Certain Underwriters at Lloyds London issued an insurance policy to Blum's Furniture Company covering Blum's business property. The property and its contents sustained extensive damage in Hurricane Ike. On September 26, 2008, in response to Blum's September 17, 2008 claim submission, Lloyds dispatched an independent insurance claims adjuster to inspect the property. After receipt of the adjuster's report, Lloyds requested that Blum's submit a sworn proof of loss in exchange for payment of $50,000. Lloyds subsequently obtained a second estimate of damage, adjusted the claim, and paid Blum's $300,000.

Within a month of invoking the appraisal process, Blum's filed suit for breach of contract, fraud, conspiracy and bad faith. Lloyds removed the case and asserted the defense of estoppel based on the appraisal procedure. Meanwhile, the appraisal process continued, including the selection of an umpire when the two impartial appraisers could not agree. The umpire ultimately issued an award of $1,000,000. Lloyds paid the claim, but Blum's continued to prosecute its causes of action against Lloyds, including its claim for bad faith.

Lloyds moved for summary judgment. The trial court granted Lloyds motion on the grounds that "when an insurer makes a timely payment of a binding and enforceable appraisal award, and the insured accepts that payment, the insured is estopped by the appraisal award from pursuing breach of contract claim." The trial court then reasoned that in the absence of a viable breach of contract claim, there can be no bad faith claim, absent evidence of one of the two recognized exceptions (*i.e.*, insurer commits some extreme act that causes injury independent of the policy claim, or insurer fails to timely investigate the claim), which was lacking in the record before the court. Blum's appealed.

Blum's argued that Lloyds breached its duty of good faith and fair dealing by failing to promptly pay the full policy claim. The Fifth Circuit disagreed, holding that the mere fact that the initial payment made by Lloyds was less that the appraised award did not support any of the exceptions to the general rule that an insured may not maintain an action for bad faith where the breach of contract claim fails. The Court reasoned that such a disagreement is contemplated and addressed by the policy through the appraisal process, which was invoked, applied, and resulted in an award that was promptly paid by Lloyds. Accordingly, the court affirmed summary judgment in favor of Lloyds.

Sam v. Nat'l Lloyds Ins. Co., No. H-10-2521, 2011 WL 4860009 (S.D. Tex. Oct. 13, 2011)

In this Hurricane Ike case, the insured sought to invoke the appraisal provision under the Standard Flood Insurance Policy at issue in order to determine whether the policy covered having a superintendent on site while the property was commercially restored. The court determined that the appraisal provision was not implicated because the dispute did not exclusively concern a disagreement between the insurer and the insured pertaining to the actual cash value or replacement value of the loss. In other

words, the dispute did not relate to the amount of the loss.

In re Certain Underwriters at Lloyds, No. 10-11-00263-CV, 2011 WL 4837869 (Tex. App.—Waco Oct. 12, 2011, orig. proceeding)

In this mandamus proceeding, the Tenth Court of Appeals determined that the trial court abused its discretion: (a) in refusing to enforce the appraisal provision contained in the underlying homeowner's policy; and (b) in concluding that the insurer had waived its appraisal right.

After the insureds' house was damaged as a result of Hurricane Ike, they filed a claim with their carrier for alleged damages to the roof, ceilings, walls, and flooring. Two different adjusters inspected the property and concluded that the extent of damage failed to exceed the deductible. For several months, the insureds communicated with the insurer, complaining about the adjuster's investigation. Then the insureds ceased all communications. Approximately two years later, the insureds filed suit against the insurer, asserting causes of action for violations of the insurance code (including unfair settlement practices and the failure to promptly pay claims), fraud, conspiracy to commit fraud, breach of contract, and breach of the duty of good faith and fair dealing.

In its answer and in a separate motion, the insurer sought to have the underlying suit abated so that the matter could be sent to appraisal, as specified in the policy. In response, the insureds argued that the appraisal request had been waived. The trial court twice denied the appraisal request because it concluded, *inter alia*, that an impasse had occurred after the insureds ceased communicating with the insurer (two years prior to the lawsuit filing date), and that the insurer was unreasonable in its delay seeking the appraisal, thereby waiving its right to same. The insurer sought mandamus relief.

The relevant portions of the homeowner's policy provided as follows:

> **8. Appraisal**. If you and we fail to agree on the actual cash value, amount of loss, or cost of repair or replacement, either can make a written demand for appraisal.
>
> ….
>
> **18. Waiver or Change of Policy Provisions**. . . . No provision of this policy may be waived unless the terms of this policy allow the provision to be waived. Our request for an appraisal or examination will not waive any of our rights.

The Tenth Court of Appeals determined that the impasse was reached when the insureds filed suit—not two years prior when communications ended—because the insurer never stated that the claim was closed. Rather, the insurer suggested that the insureds submit additional information that would support a re-evaluation and further negotiation of the claim. Within two weeks of the lawsuit being filed, the insurer invoked its appraisal right. Accordingly, there was no unreasonable delay, and, moreover, paragraph 18 of the policy (quoted above) expressly prohibited a finding of waiver. As such, mandamus relief was appropriate because the insurer had not waived its right to an appraisal.

Essex Ins. Co. v. Helton, No H-10-2229 (S.D. Tex. Jan. 24, 2012).

In denying Essex's motion for summary judgment, the court held that an appraiser may consider causation, and is not required to itemize appraised damages absent policy language requiring such action.

Essex issued a policy to the Heltons covering metal buildings used in their business. The property sustained damage when Hurricane Ike made landfall on September 13, 2008. After the Heltons filed their claim, Essex paid the Heltons $53,386.07, which the Heltons contended was insufficient to cover the claimed loss.

The parties agreed to submit the claims to an appraisal panel consisting of two impartial appraisers selected by Essex and the Heltons, respectively, and an umpire selected by the appraisers. Essex's appraiser assessed damage at $34,000, and the Heltons' appraiser assessed damage at $400,000. The umpire found that the Heltons' appraiser's opinion "was clearly the more credible of the two opinions presented" and awarded $417,000. Essex filed declaratory judgment to set aside the appraisal award and the Heltons counterclaimed for breach of contract and bad faith. Both parties moved for summary judgment regarding the propriety of the appraisal award.

Essex complained that the umpire should have itemized each element of damages instead of making a lump sum $417,000 award. The trial court rejected this argument, noting first that the umpire did break down the award into three components, and second that there was no legal authority and/or applicable policy language requiring detailed itemization of the elements of damage. The court did recognize that causation is a liability question for the court where different causes are alleged for a single injury to property. Nonetheless, the court denied Essex's motion for summary judgment, holding that the question of causation is not beyond the authority of the appraiser when property is not new and the appraiser must distinguish damage from wear and tear and that caused by the covered peril. The court granted the Helton's motion for summary judgment, thereby affirming the appraisal award and dismissing Essex's claim for declaratory judgment.

RIPENESS

Darwin Nat'l Assurance Co. v. McCathern Mooty LLP, No. 3:10-CV-2486-B, 2011 WL 5041331 (N.D. Tex. Oct. 22, 2011)

The insurer's declaratory judgment action regarding whether it had a duty to defend was not ripe because there had yet to be an underlying lawsuit filed against the insured.

BUSINESS INTERRUPTION

H&H Hospitality LLC v. Discover Specialty Ins. Co., No. H-10-1886, 2011 WL 6372825 (S.D. Tex. Dec. 20, 2011)

Business interruption provision requiring "necessary suspension of your [insured's] 'operations'" not triggered when insured's business operations were only reduced or partially suspended.

H&H Hospitality LLC operated a Super 8 Motel in Spring, Texas, which was damaged during Hurricane Ike. Although approximately forty hotel rooms were unrentable as a result of hurricane damage, there were rentable rooms that kept the property open continuously after the hurricane. Discover Specialty Insurance Company, which issued a CGL policy insuring H&H, paid only a part of H&H's claimed business interruption losses.

Discover moved for partial summary judgment on H&H's business interruption claim. Discover contended that the "necessary suspension of your 'operations'" required a complete cessation or stoppage of business activities. H&H responded that "the nature of the premises at issue" should be considered, and since H&H operated a hotel with multiple rooms, the fact that there were unrentable rooms implied that there was a suspension of operations.

Relying on the plain language of the policy at issue, the court rejected H&H's argument. The court cited several cases for the proposition that "necessary suspension of your operations" requires a complete cessation of business at the covered premises, which in this case was a Super 8 Motel on I-45 in Spring, Texas. The court contrasted business interruption clauses that provide coverage during a "necessary or *potential* suspension" of business operations or "necessary interruption of business, whether total or *partial*," which would allow coverage for a partial cessation of business. The policy insuring H&H did not have such a qualifying clause.

Finally, the court noted that the result may have been different if H&H had presented evidence showing that it was unable to meet customer demand for rooms, which might have constituted a "suspension of operations" for purposes of the business interruption clause at issue. On the evidence presented, however, the court granted Discover's motion for partial summary judgment on H&H's business interruption claim.

NUMBER OF OCCURRENCES

Twin City Fire Ins. Co. v. Illinois Nat'l Ins. Co., No. 1:11-CV-00144-SS (W.D. Tex. Mar. 12, 2012)

Three separate car accidents were a single "occurrence" under road construction contractor's CGL policy.

Capital Excavation Company contracted to widen part of State Highway 71 in Travis County, Texas. The work was completed in March 2007. On June 20, June 25 and July 14 of that same year, there were three automobile accidents, each within the boundaries of CEC's construction. Each of the accidents gave rise to a separate lawsuit, each asserting construction defect claims against CEC.

At the time of the accidents, CEC was insured by a CGL policy issued by Twin City and a Commercial Umbrella Liability policy issued by Illinois National. The Twin City policy defined "occurrence" as a

"continuous or repeated exposure to substantially the same general harmful conditions."

CEC settled all but one of the claims, with Twin City paying "substantially all" of its $2,000,000 per occurrence limit. Twin City offered the remainder of its per occurrence limit to settle the final claim. That offer was rejected.

In the declaratory action, the court held that the three accidents were a single "occurrence." The court noted that, in interpreting the typical definition of "occurrence" under a CGL policy, the proper focus was on the events that cause the injuries and gave rise to the insured's liability, rather than on the injurious effects. Because only one such cause gave rise to CEC's liability—CEC's allegedly defective construction—the three accidents were a single occurrence. In reaching its conclusion, the court relied on *Maurice Pincoffs Co. v. St. Paul Fire & Marine Insurance Co.*, 447 F.2d 204 (5th Cir. 1971).

Significantly, the court distinguished *U.E. Texas One-Barrington, Ltd. v. General Star Indemnity Co.*, 332 F.3d 274 (5th Cir. 2003) (multiple broken pipes in dozens of apartment buildings were separate occurrences) and *Goose Creek Consolidated I.S.D. v. Continental Casualty Co.*, 658 S.W.2d 338 (Tex. App.—Houston [1st Dist.] 1983, no writ) (two fires, set at two different times, at two different schools, were two occurrences). Both *General Star* and *Goose Creek* involved first-party policies in which the definition of "occurrence" was focused on each event that caused a loss, rather than liability of the insured to third parties.

"NON-OCCURRENCE" SCENARIOS

Mid-Continent Casualty Co. v. Brock, No. 10-20726, 2011 WL 4807715 (5th Cir. Oct. 11, 2011)

Findings of "producing cause" and "intentional conduct" under the DTPA do not preclude an "occurrence" under a CGL policy.

Brock's home was damaged in a fire, and Strickling's company offered to restore and remediate Brock's home. The job "went poorly," and Brock sued Strickling under the DTPA (among other causes of action). The jury found that Strickling committed at least one false, misleading, or deceptive act or practice and an unconscionable action under the DTPA, both of which were a producing cause of damages to Brock. The jury further found that Strickling did so knowingly and/or intentionally.

Mid-Continent insured Strickling under a CGL policy that defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Mid-Continent brought a declaratory judgment action seeking a declaration that the damages found by the jury in the underlying lawsuit did not arise out of an "occurrence." The district court held that Strickling's conduct was intentional and that the damages suffered by Brock did not arise from an "occurrence," which precluded coverage. The Fifth Circuit reversed.

The court noted that, under *Lamar Homes Inc. v. Mid-Continent Casualty Co.*, deliberate acts may constitute an accident unless: (1) the resulting damage was "highly probable" because it was "the natural and expected result of the insured's actions"; or (2) "the insured intended the injury" (intent is presumed in intentional tort cases). 242 S.W.3d 1, 8-9 (Tex. 2007). Based on the *Lamar Homes* test, the court held that a finding of "producing cause" under the DTPA does not include the necessary finding of a "natural *and expected* result" under the first prong of *Lamar Homes*, because "producing cause" lacks the required foreseeability component of causation. With respect to the second prong, the court held that even an intentional finding under the DTPA does not necessarily preclude an "occurrence," because an intentional finding under the DTPA only requires that the actor intended the *conduct* rather than the *injury*. The court therefore held that the jury's findings did not necessarily preclude an "occurrence."

About a month and a half after the *Brock* decision, the Fifth Circuit decided *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Puget Plastics Corp.*, 454 F. App'x 291 (5th Cir. 2011). *Puget* is an appeal from a bench trial in a declaratory judgment action. In *Puget*, the district court specifically held that the injury to a third party, as a result of deliberate actions of the insured, was "highly probable" to cause the resulting damage under the first prong of *Lamar Homes*—which meant that there was no "occurrence" under the policy. In affirming the district court, the Fifth Circuit distinguished *Brock* on the basis that the district court made specific findings precluding an "occurrence" under the policy.

INSURED CONTRACTS

Gilbane Bldg. Co. v. Admiral Ins. Co., 664 F.3d 589 (5th Cir. 2011)

The Fifth Circuit applied the reasoning of *D.R. Horton v. Markel* to hold that an insurer had a duty to

indemnify an additional insured, even though it had no duty to defend.

Parr was an employee of Empire, a subcontractor on a construction project. Gilbane was the general contractor. Parr was injured when he fell from a ladder. Parr sued Gilbane and Baker Concrete—who was the subcontractor responsible for installing and maintaining the ladder—for failure to maintain a safe workplace. Baker was not part of the appeal.

Gilbane requested coverage under the additional insured provision of a CGL policy issued by Admiral to Empire. Specifically, Gilbane argued that it was an additional insured by virtue of the Trade Contractor Agreement ("TCA"), which Gilbane argued, and Admiral disputed, was an insured contract.

On cross-motions for summary judgment in the declaratory action, the district court held that Admiral had both a duty to defend and a duty to indemnify. Specifically, after a trial by written submission on stipulated facts, the court determined that Admiral had a duty to indemnify because a jury would have found Parr or Empire at least 1% responsible for Parr's injuries.

On appeal, the Fifth Circuit initially assumed without deciding that the TCA's indemnity provision was unenforceable because it violated the fair notice requirement for indemnity provisions. However, because the additional insured question turns not on enforceability of the indemnity provision, but rather on whether Empire agreed to "assume the tort liability of another party," the TCA was an insured contract even if the indemnity provision was unenforceable.

As to the duty to defend, based on the eight-corners rule, the court first looked at the policy, which explicitly required that the injuries be "caused, in whole or in part, by" Empire—which, under Texas law, requires proximate causation. Because the live petition in the underlying lawsuit stated only that "[Parr's] injuries were brought to occur, directly and proximately by reason of the negligence of" Gilbane, the petition did not allege the negligence of Empire—meaning a duty to defend had not been triggered. The court rejected Gilbane's various arguments that the court should make an exception to the eight-corners rule and consider extrinsic evidence. Significantly, the court found that the four corners of Parr's pleading did not allege that Empire, or its employee Parr, were negligent. Therefore, under the eight-corners rule, Admiral had no duty to defend.

The court then addressed whether Admiral had a duty to indemnify. The court noted the holding of the district court that "[a] jury in the Underlying Lawsuit would have found Michael Parr or his employer, Empire Steel, 1% or more responsible for causing the occurrence and/or injuries at issue." As a result, the court of appeals affirmed the district court's holding that the comparative fault of the named insured's employee triggered a duty to indemnify, even though there was no duty to defend.

Colony Nat'l Ins. Co. v. Manitex, L.L.C., 1:09-CV-724, 2012 WL 555524 (W.D. Tex. Feb. 20, 2012)

Insured contract exception to contractual liability exclusion did not provide coverage for tort liability contractually assumed by seller, and in turn assumed by insured purchaser under a purchase agreement.

JLG manufactured and sold cranes to Powerscreen, and Powerscreen assumed JLG's liabilities associated with the cranes. Powerscreen later sold the cranes to another company, Manitowoc, which assumed the associated liabilities. Manitowoc subsequently changed its name to Manitex.

Under the purchase agreement with Powerscreen, Manitex assumed "[a]ll liabilities of the Seller [(Powerscreen)] for claims, . . . and actions in law . . . brought after the Effective Time of Closing by any Person seeking recovery from personal injury."

Manitex was the named insured under a policy issued by Colony National Insurance Company ("Colony"). The policy had a contractual liability exclusion for "'Bodily injury' or 'property damage' for which the insured is obligated to pay damages by the reasons of the assumption of liability in a contract or agreement." In turn, there was an insured contract exception to that exclusion: "This exclusion does not apply to liability for damages: . . . (2) Assumed in an 'insured contract,' provided that the 'bodily injury' or 'property damage' occurs subsequent to the execution of the contract or agreement." The policy defined "Insured contract" as follows:

> . . . .
>
> f. That part of any other contract or agreement pertaining to your business (including indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another

> party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

During the term of the policy, a JLG-manufactured crane allegedly malfunctioned, injuring two men, who sued JLG under theories of negligence, breach of warranty, and strict liability. Manitex defended JLG based upon its perceived obligation to do so under its purchase agreement with Powerscreen.

Colony brought a declaratory judgment action asking the court to construe the policy such that it had no duty to defend or indemnify Manitex. The district court found the policy ambiguous and, because it found Manitex's interpretation of the policy reasonable, it found that it was obligated to adopt Manitex's interpretation providing coverage.

The Fifth Circuit reversed, finding the policy unambiguous. The court held that, under the language of the purchase agreement quoted above, Manitex only assumed Powerscreen's liability. Since Powerscreen's liability arose solely from the contract that it had with JLG, it was not liability that "would be imposed by law in the absence of any contract or agreement"—meaning that it was not tort liability. By assuming Powerscreen's *contractual* liability to JLG, Manitex did not assume tort liability through its purchase agreement with Powerscreen. Thus, the purchase agreement was outside the scope of the insured contract exception.

UIM

Ibarra v. Progressive County Mutual Ins. Co., No. 02-10-00312-CV, 2012 WL 117955 (Tex. App.—Fort Worth Jan. 12, 2012, no pet. h.)

Parties are free to negotiate scope of damaged property to be covered by UM/UIM policies and the Insurance Code does not require such policies to cover all conceivable types of property damage.

An intoxicated driver lost control of her vehicle and crashed through the wall of the insured's home, coming to rest in the kitchen. The damage to the insured's home was estimated at $50,000. The insured received $25,000 from the driver's insurer, which was the limit of the driver's policy. The insured then submitted a claim under her UM/UIM coverage for the balance of the damage to her home.

The insured's policy restricted the scope of UM/UIM coverage to "property damage" to a "covered auto" and narrowly defined "property damage" as "physical damage to, or destruction or loss of use of (1) a covered auto, (2) any property owned by an insured person and contained in the covered auto at the time of the accident, and (3) any property owned by appellant or a relative while contained in an auto being operated by appellant or her relative." Based on this language, the insurer denied the claim and the insured filed suit for breach of contract.

The insurer sought and obtained summary judgment asserting that the damage to the insured's home was not covered because the home was (1) not a covered auto, (2) not contained within a covered auto, and (3) not property located in an auto operated by appellant or her relative.

On appeal, as she had argued below, the insured asserted the UM/UIM coverage provision was invalid because it improperly limited the scope of property damage coverage in contravention of the Insurance Code. In response, the court first noted that the Insurance Code requires insurers to provide UM/UIM coverage as an aspect of *automobile* policies. The court also explained that both the state legislature and the Texas Supreme Court have stated that the purpose of the UM/UIM statute is to protect *motorists*. This purpose was further reinforced by the facts that the insured's UM/UIM coverage was part of her *automobile* policy and that she paid separate UM/UIM premiums for each of her three autos.

The second factor relied upon by the court was that Section 1952.106 of the Texas Insurance Code does not define property damage, imply that all types of property damage must be covered, or state that parties may not agree to limit the scope of property damage to be covered. Finally, the court pointed out that numerous Texas courts have upheld UM/UIM policies that limit the scope of property damage to be covered. In other words, Texas courts have not required that auto policies apply to property damage under all conceivable circumstances.

Malham v. Gov't Employees Ins. Co., No. 03-11-00006-CV, 2012 WL 413969 (Tex. App.—Austin Feb. 8, 2012, no pet. h.)

Agreement between local government entities that established a fund for liability coverage of its members constituted a "liability policy" within the meaning of the insured's uninsured motorist coverage.

Malham was injured when her vehicle was struck by a pickup truck owned by the City of Killeen and driven by a City employee in the course and scope of his employment. Malham settled her claims against the City and the employee. Thereafter, Malham filed a claim under the uninsured motorist coverage provision of her GEICO policy for medical expenses associated with a related back surgery. Malham then filed a lawsuit seeking a declaration that the City's pickup truck was an "uninsured motor vehicle," as defined by the terms of her GEICO policy, and that she was entitled to uninsured motorist benefits. The coverage issue was tried before the court, which ruled that GEICO was not liable to Malham for any uninsured motorist benefits. Malham appealed.

An "uninsured motor vehicle" was defined as "a land motor vehicle or trailer of any type: To which no liability bond or policy applies at the time of the accident." The policy excluded from the definition any vehicle "[o]wned or operated by a self insurer under any applicable motor vehicle law" or "[o]wned by any governmental body unless: the operator of the vehicle is uninsured[] and there is no statute imposing liability for damage because of bodily injury or property damage on the governmental body for an amount not less than the limit of liability for this coverage."

The City was a party to an agreement between local government entities that established a fund for coverage under the agreement's Texas Municipal League Liability Self-Insurance Plan (the "Plan"). The Plan contained a liability coverage document stating that it would "pay on behalf of the Member or Covered Party all sums which the Member or Covered Party shall become legally obligated to pay as damages . . . because of bodily injury or property damage . . . arising out of the ownership, operation, use, loading, unloading or maintenance of an automobile." "Covered Party" included the City and any employee acting within the scope of employment.

The court framed the issue as whether the coverage provided under the Plan constituted a "liability policy" within the meaning of the GEICO policy. The court first addressed Malham's contention that the term "liability policy" must be strictly construed to mean only a contract called an "insurance policy" issued by an "insurance company" as defined by the Texas Insurance Code. Malham argued that the coverage provided by the agreement was not "insurance" within the meaning of the policy language because it was not issued by an insurance company. The court summarily dismissed this contention by pointing out that the policy language was broader than that suggested by Malham because the policy referred to a "liability bond or policy," not an "insurance policy."

Next, Malham contended the exception to the exclusion in the policy applied. The second prong clearly applied; however, Malham argued the pickup truck driver was uninsured and thus both prongs of the exception to the exclusion were met. The court summarily dismissed this argument on the basis that the court had concluded the coverage provided by the Plan constituted a "liability bond or policy," meaning the driver was not uninsured.

"YOUR WORK" EXCLUSION

Am. Home Assurance Co. v. Cat Tech, LLC, 660 F.3d 216 (5th Cir. 2011).

Fifth Circuit held that the "your work" exclusion precludes coverage for property damage to property upon which defective and non-defective work is performed.

In the course of servicing a hydrotreating reactor owned by Ergon Refining, Inc., Cat Tech, LLC improperly placed "rope packing" around certain components, which in turn damaged several of the reactor's internal components. Ergon and Cat Tech arbitrated the resulting dispute, which resulted in an award of $1,973,180 in damages to Ergon. The award stated that "Cat Tech failed to properly place the rope packing around the Bed 3 Johnson screens which, *among other things*, caused the damage to the Bed 3 reactor internals, migration of catalyst from Bed 3 into Bed 4, and damage to some of the catalyst." (emphasis added). Cat Tech sought indemnity from the insurers under a CGL policy and an umbrella policy. The insurers denied the claim citing the "your work" exclusions in both policies. The insurers filed a declaratory judgment action and obtained summary judgment in their favor. Cat Tech appealed.

The respective "your work" exclusions precluded coverage for:

> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."
>
> This exclusion does not apply if the damaged work or the work out of

> which the damage arises was performed on your behalf by a subcontractor.

The policies further defined "your work" as "(1) work or operations performed by you or on your behalf; and (2) materials, parts or equipment furnished in connection with such work or operations."

The Fifth Circuit identified three categories of property damage at issue: (1) damage to parts on which Cat Tech performed defective work, (2) damage to parts on which Cat Tech performed non-defective work, and (3) damage to parts that Cat Tech did not work on. The Court found the "your work" exclusion precluded coverage for damage to parts/property upon which Cat Tech performed defective *and* non-defective work (categories 1 & 2).

The Court then reconciled and distinguished cases that upon first glance appear to hold otherwise, including *Mid-Continent Casualty Co. v. JHP Development, Inc*., 557 F.3d 207 (5th Cir. 2009). The Court noted that that these cases involved the more narrowly tailored "particular part" exclusion which excluded coverage for property damage to "'*[t]hat particular part* of any property that must be restored, repaired or replaced because 'your work' was *incorrectly performed* on it.'" (emphasis added). Noting the absence of such language in the subject policies, the Court concluded the "your work" exclusions at issue were much broader, encompassing damage to property upon which both defective and non-defective work was performed.

Next, the Court addressed Cat Tech's argument that the "'your work' exclusion preclude[d] coverage only for damage to its own intangible repairs (which constitute[d] its "work") and d[id] not exclude damage to third-party property (such as Ergon's reactor) upon which it performed those services." The Fifth Circuit rejected this argument, stating: "This interpretation is entitely inconsistent with *Wilshire*, where we found that 'your work' exclusion applied to an insured's defective repair work on a house's foundation, 581 F.3d at 226-27, and *Volentine*, where the exclusion was applied to an insured's faulty repairs upon the valves of an engine. 578 S.W.2d at 503-04."

Turning to the facts of the case, the Court noted that the proper applciatition of the "your work" exclusion hinged upon the specific parts of the reactor that were damaged. The Court found that the trial court erred in granting summary judgment in favor of the insurers, as the arbitration award language upon which the insurers relied was too vague and failed to show that the damage to Ergon's reactor was limited to those components that Cat Tech serviced. Specifically, the Court foccused on the "*among other things*" language in the award, and the award's failure to particularly describe the resulting damage or explain how the damage corresponded to work performed by Cat Tech. Accordingly, the Court reversed and remanded the case.

RELEASE

Philadelphia Indem. Ins. Co. v. SSR Hospitatlity, Inc., No. 11-50282, 2012 WL 181461 (5th Cir. Jan. 17, 2012).

Making an "Erie guess," the Fifth Circuit held that a release executed by an insured is binding even when the insurer's legal name is not accurately reflected in the release. The Court further affirmed an award of attorney's fees to the insurer under the Texas DJA because the insured failed to timely object to the award, and there was no plain error in awarding such fees.

SSR Hospitality purchased a hotel for $5.725 million in March 2007. In August 2007, the conference room floor in the Hotel collapsed, causing estimated damages in excess of $450,000. SSR filed a claim with its insurer, Philadelphia Indemnity Insurance Co. Philadelphia Indemnity partially denied the coverage, but agreed to pay repair expesnses in the amount of $13,984.39. In consideration of payment of the $13,984.39, SSR executed a release. The release named a separate but affiliated entity – Philadelphia Insurance Company, as opposed to Philadelphia *Indemnity* Insurance Company – as the released party, but included the correct policy number.

When SSR filed a claim for additional damages, Philadelphia Indemnity filed a declaratory judgment action to determine its rights and obligations under the policy and moved for summary judgment based on the release. SSR responded with its own motion for summary judgment, arguing that the release did not name Philadelphia Indemnity as a party to the release, and even if it had, the release was unconscionable. The trial court granted summary judgment for Philadelphia Indemnity, and SSR appealed.

Noting the lack of any Texas Supreme Court decision addressing this issue, the Fifth Circuit held that the release was enforceable. The Court emphasized that

the parties clearly intended the release to apply to Philadelphia Indemnity, which was evidenced by the inclusion of the subject Philadelphia Indemnity policy number in the release. The Court then rejected SSR's unconscionability agrument.

Finally, the Court affirmed an award of $280,641.38 in attorney's fees and $26,070.53 in costs to Philadelphia Indemnity under the Texas Declaratory Judgment Act, despite the Court's holding in *Utica Lloyd's of Tex. V. Mitchell*, 138 F.3d 208, 210 (5th Cir. 1998), that a party may not rely on the Texas DJA for recovery of attorney's fees in a diversity action. The Court noted that because SSR did not challenge the award of fees under *Utica* before the district court or on appeal, the plain error standard for review applied. Noting that the award of fees was in all liklihood an error that was plain and affected SSR's substantial rights, the Court nevertheless affirmed the award because it would not "'seriously affect the fariness, intergrity, or public reputation of the judicial proceeding.'" The Court reasoned that awarding fees was appropriate because SSR knew who was released in settling its insurance claim, but nevertheless prosecuted a baseless claim premised on a typographical error to circumvent the consequences of an agreement through needlessly prolonged litigation.

AUTO EXCLUSION

National Casualty Company v. Western World Insurance Company, 669 F.3d 608 (5th Cir. 2012)

Injury allegedly resulting form being loading into ambulance may trigger duty to defend under both auto and CGL policies.

Plaintiff in the underlying lawsuit alleged her mother died as a result of injuries suffered when the insured, Preferred Ambulance, negligently loaded Plaintiff's mother into an ambulance. National Casualty and Western World had each issued policies to Preferred Ambulance that were in effect at the time of the accident. National Casualty and Western World both sought a declaratory judgment from the district court that their respective policies did not cover the allegations in the underlying state court lawsuit concerning the accidental death. The district court held that both policies provided coverage for the underlying lawsuit. The Fifth Circuit affirmed.

The Business Auto Coverage policy issued by National Casualty covered "bodily injury" caused by an "accident" resulting from use of a covered "auto," but contained a professional services exclusion. Conversely, the CGL policy issued by Western World provided coverage for "bodily injury," "property damage," or "personal injury" caused by "professional incident," but excluded coverage for "bodily injury" arising out of the use of any "auto." The Western World policy further contained an "other insurance" provision, which provided that its policy was excess over any other insurance if the loss arose from the use of an "auto." The policy explained that "[w]hen this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any 'suit' if any other insurer has a duty to defend the insured against that 'suit.'"

The Court first determined whether the National Casualty coverage provision encompassed the injuries alleged in the underlying lawsuit. National Casualty argued that under its policy injuries occurring while a patient is loaded into an ambulance do not result from "use" of an auto, and that the ambulance was merely the site of the injury. In determining whether the decedent's injuries resulted from the "use" of an auto, and thus fell within the National Casualty policy coverage, the Fifth Circuit recited the three "use" factors reaffirmed in *Mid-Continent Cas. Co. v. Global Enercom Mgmt., Inc.*, 323 S.W.3d 151, 154 (Tex. 2010). Since the parties did not dispute the first two factors, the court looked to the Texas Supreme Court's interpretation of the third factor as originally enunciated in *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153 (Tex. 1999).

The court analogized to *Lindsey* in reasoning that: (i) the "sole purpose" of placing decedent in the ambulance was to use the ambulance; (ii) loading decedent into the ambulance "directly caused" her injury; and (iii) it was "not an unexpected or unnatural use of the vehicle" to load a patient into an ambulance. The court then addressed the recent Texas Supreme Court holding, in *Lancer Ins. Co. v. Garcia Holiday Tours*, 345 S.W.3d 50 (Tex. 2011), that there must be "a sufficient nexus between [the vehicle's] use as a motor vehicle and the accident or injury" in order to meet the test for "use" of an automobile. The court held there was a significant nexus between transporting passengers in an auto and loading them into the auto; and, contrasted the "incidental" transmission of tuberculosis in *Lancer Insurance* with the fact that loading passengers into autos is an "integral" use.

Next, in determining whether National Casualty's professional services exclusion negated its duty to defend, the court distinguished between "professional" tasks and "administrative" tasks. The

court also noted that professional services exclusions do not apply when the underlying lawsuit alleges injuries resulting from both professional and non-professional services. The underlying complaint alleged, in part, a "failure to direct appropriate resources to the accident scene," which the court determined was an administrative decision. Because the underlying lawsuit alleged injuries resulting from both administrative tasks (dispatching decisions) and professional services (rendition of medical care) the court held National Casualty's professional services exclusion did not apply. Thus, National Casualty had a duty to defend.

The court next considered the extent of Western World's duty to defend, by determining the applicability of its "auto" exclusion provision and whether it was obligated to provide primary or excess coverage. Western World's policy covered injuries caused by a "professional incident," which was defined to include "ambulance services." The "auto" exclusion defined "use" to "include[e] operation and loading or unloading," and defined "loading and unloading" as the "handling of property." Western World argued the "auto" exclusion applied because some of the injuries alleged in the complaint resulted from "use" of an auto.

The court rejected this contention, stating that "exclusions negate the insured's duty to defend only when all of the alleged injuries that fall into the coverage provision are subsumed under the exclusionary provision." Since the underlying complaint alleged Preferred Ambulance's employees failed to secure decedent to the gurney and such a task was governed by Texas law, the court concluded the allegation fell under the "ambulance services" coverage provision and triggered Western World's duty to defend. However, injuries resulting from failure to secure decedent to the gurney did not constitute "use" of an auto because they did not result from the "loading or unloading" of property or "operation" of the ambulance. Furthermore, the failure to secure decedent to the gurney occurred prior to the employees moving decedent toward the ambulance. Thus, the "auto" exclusion was inapplicable because the complaint alleged an injury that arose from "ambulance services" but did not arise from "use" of an auto.

Next the court analyzed Western World's contention that the "other insurance" provision in its policy limited its duty to defend to excess coverage over the coverage provided by National Casualty. Western World's policy provided "excess by coincidence" coverage for losses arising from use of an auto, and also contained an "other insurance" provision limiting its duty to defend when another insurer had a duty to defend the lawsuit. Western World reasoned that because some of the injuries alleged in the underlying lawsuit arose from "use of . . . 'autos'" these provisions operated to limit its duty to provide excess coverage. The court rejected this reasoning stating that "other insurance" provisions, like exclusionary provisions, require a different interpretation from coverage provisions. "Other insurance" provisions limit an already-triggered duty to defend only when all of the allegations in the underlying lawsuit that fall under the policy's coverage provision also fall under the policy's "other insurance" provision.

The court further articulated that such a rule spawned from necessity because allegations in the underlying lawsuit falling under a coverage provision but not falling under an "other insurance" provision could potentially be the sole basis for liability. In such instances, given the prospect that an insurer might assume responsibility for primary coverage of the loss, the "other insurance" provision does not limit an insurer's duty to defend. In applying this principle, the court reasoned that since insurers have a duty to defend against any lawsuit which alleges injuries potentially falling within their coverage and the underlying complaint alleged injuries which triggered Western World's duty to defend, the "other insurance" provision did not limit Western World's duty to defend.

Raymundo Salcedo v. Evanston Insurance Co., No. 11-50686, 2012 WL 577108 (5th Cir. Feb. 22, 2012).

.

The Fifth Circuit held that the insurer's auto exclusion applied to an accident in which Plaintiff suffered burn injuries when a hose attached to an asphalt reservoir ruptured while Plaintiff was uploading hot oil from an oil truck into the reservoir. A state court awarded Plaintiff $1.1 million in damages against the plant owner and the plant's insurer denied coverage based on the auto exclusion in its CGL policy. Plaintiff sued the insurer in federal district court arguing that: (i) the exclusion did not apply unless the insured itself was the party loading or unloading or directing such activities; and (ii) the injuries suffered did not arise out of "use" of an auto because the injury resulted from a hose stemming from the asphalt reservoir.

The court dismissed Plaintiff's initial contention that the insured itself must be participating in the conduct for the exclusion to apply by pointing out the policy

language unambiguously provided that the exclusion applied to "use" of an auto regardless of ownership or entrustment. In addressing whether the injury arose out of "use" of an auto, the court focused on the factors enunciated by the Texas Supreme Court in *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153 (Tex. 1999).

Applying the *Lindsey* framework, the court first reasoned that, although the truck was not in movement, the inherent, natural, and expected use of an oil truck involved uploading oil while stopped. Second, the accident occurred in the midst of uploading oil and thus within the truck's natural territorial limits, before the actual use terminated. The court noted that Texas law clearly supports the "complete operation" rule, rather than the "coming to rest" doctrine. However, the court concluded that under either standard "the oil to be transferred undoubtedly encompassed the immediate situs of the injury and was still in transit when the accident occurred, thus clearly invoking the "loading and unloading" clause under either standard."

With respect to the third *Lindsey* factor, the court determined the truck was not merely the situs of injury, but a producing cause because Plaintiff's injury resulted from the uploading of oil into the asphalt reservoir. To support its determination, the court cited "the broad standard for causation in these cases," as exhibited by the Texas Supreme Court's analysis in *Mid-Continent Cas. Co. v. Global Enercom Mgmt.*, 323 S.W.3d 151, 156 (Tex. 2010). The court pointed out that Plaintiff "could not have been injured in this way without the use of the oil truck; the accident did not merely happen near the truck; and the expected purpose of the oil truck was to perform the activity that led to Salcedo's injury." Thus, the court concluded the district court correctly found that the auto exclusion applied to negate coverage.

PROOF OF LOSS

U.S. Fire Ins. Co. v. Lynd, No. 04-11-00347-CV, -- S.W.3d --, 2012 WL 1430541 (Tex. App.--San Antonio, Apr. 25, 2012, no pet. h.).

Although not conclusive, insured's statements in a proof of loss are *prima facie* evidence of the facts of the claim.

Lynd was insured by a primary policy issued by U.S. Fire with limits of $5 million per occurrence and an excess policy issued by RSUI. Lynd submitted a proof of loss stating that a number of its properties were damaged by hail on May 4, 2006, but that all properties had not been inspected and that additional properties may have been damaged. Lynd supplemented this proof of loss adding two Austin apartment complexes that were the subject of the coverage dispute.

Ultimately, U.S. Fire paid $5 million and contended that its per occurrence limit was exhausted. RSUI investigated the claim under its excess policy and concluded that both of the complexes were damaged by a hailstorm that occurred on April 20, 2006 and that one of the complexes was not damaged at all by the May 4, 2006 storm. Accordingly, RSUI paid 50% of the damages to one of the complexes and refused to pay any of the damages for the complex that it contended was not damaged by the May storm. Relying in part on the proof of loss, U.S. Fire contended that there was a single occurrence and its limit was exhausted.

The trial court determined that the summary judgment evidence established that there were two occurrences. It granted Lynd's motion for summary judgment against U.S. Fire and RSUI's motion for summary judgment.

The San Antonio Court of Appeals reversed the summary judgment in favor of the insured against U.S. Fire and the summary judgment against Lynd in favor or RSUI, finding that statements contained in the proof of loss submitted by the insured created a fact issue as to whether property damage was caused by one or two different hailstorms.

In so doing, the Court held that the proof of loss submitted by the ins8ured referencing only the May 2006 hailstorm created a fact issue. The Court stated that, "while not conclusive or binding, an insured's statements in a proof of loss are considered '*prima facie* evidence' of the facts related, subject to later correction or explanation by the insured."

POLLUTION EXCLUSION

LSG Technologies, Inc., f/k/a Loma Alta Corporation and Longhorn Gasket and Supply Company v. United States Fire Insurance Company, Cause No. 2:07-CV-399-DF (E.D. Tex. Mar. 16, 2012).

District court ruled that asbestos is not a pollutant.

LSG Technologies, Inc. and Longhorn Gasket and Supply Company brought suit against U.S. Fire seeking a determination of coverage for the underlying plaintiffs' asbestos claims. U.S. Fire

moved for summary judgment contending that its standard pollution exclusion barred coverage.

The district court denied U.S. Fire's motion for summary judgment, finding that asbestos is not a pollutant under the terms of the policy's pollution exclusion.

TIMING OF OCCURRENCE

Vines-Herrin Custom Homes, LLC v. Great American Lloyds Ins. Co., 357 S.W.3d 166 (Tex. App.—Dallas 2011, no pet. h.).

In this case applying the Texas Supreme Court's adoption of the "actual injury" approach in *Don's Building. v. OneBeacon,* the court held that the insured was not required to plead and prove the exact date of injury.

In 1999, Vines–Herrin Custom Homes, LLC, built a home in Plano. Before beginning construction, Vines–Herrin obtained CGL coverage from Great American. The Great American policies covered the period from November 9, 1998 to September 18, 2002.

Cerullo purchased the home in May 2000. Within days of moving in, construction defects became apparent to Cerullo. Cerullo informed Vines-Herrin of the ongoing problems. When Vines-Herrin did not make repairs to the home, Cerullo sued Vines-Herrin alleging negligent construction. Vines-Herrin sought a defense and indemnity from Great American. Great American denied coverage. Vines-Herrin filed suit seeking a declaratory judgment determining coverage for Cerullo's claims.

Vines-Herrin assigned its claims against Great American to Cerullo. Cerullo intervened in the coverage suit. At a bench trial, the trial court applied the manifestation rule, (the controlling law at the time) which imposed coverage only if the property damage manifests or becomes apparent during the policy period. The trial court initially found coverage existed, but the trial court set aside its judgment and reopened the evidence after the Texas Supreme Court in *Don's Building* adopted the actual injury approach. Under the actual injury approach, property damage "occurs" during the policy period if "actual physical damage to the property occurred" during the policy period. *Don's Building* indicated that "the key date is when injury happens, not when someone happens upon it" and that the focus should be on "when damage comes to pass, not when damage comes to light."

The trial court subsequently found no coverage and rendered a take nothing judgment because Cerullo failed to offer expert testimony as to when the actual physical damage to the property occurred. Cerullo appealed.

The Dallas Court of Appeals reversed the trial court's judgment on both the duty to defend and the duty to indemnify. The Court of Appeals rejected the trial court's interpretation of *Don's Building* to require proof of: (1) an exact date of actual injury; and (2) expert testimony establishing that date, explaining that "*Don's Building* held *only* that property damage under the CGL policy 'occurred when actual physical damage to the property occurred.'"

Turning to the duty to defend, the court determined that the pleadings sufficiently alleged that the actual physical damage to the home occurred sometime during or after construction, while the insurance policies were in effect.

With respect to the duty to indemnify, the court determined "as a matter of law, that actual damages must occur no later than when they manifest." Because the trial court found that coverage existed prior to the construction of the home through the date the damage manifested itself, the court held that Great American's duty to indemnify was triggered, and expert testimony establishing the exact date of injury was not required to trigger the duty.

FIELD OF ENTERTAINMENT EXCLUSION

Rick's Cabaret Int'l, Inc. v. Indem. Ins. Corp. No. H-11-3716, 2012 WL 208606 (S.D. Tex. Jan. 24, 2012)

A CGL policy's field of entertainment exclusion precluded coverage for lawsuits alleging that an insured violated Federal Communication Commission rules and regulations and the Telephone Consumer Protection Act by sending advertising text messages without the cellular phone subscribers' consent.

Plaintiffs in two class action lawsuits brought suit against Rick's Cabaret International, Inc.for allegedly sending unsolicited advertising text messages to cellular telephone subscribers.

At the time of the lawsuits, Rick's had CGL coverage with Indemnity Insurance Corporation. Rick's sought a defense from Indemnity. Indemnity denied coverage, asserting that the claims against Rick's fell within the "Field of Entertainment" and the "Legal Liability" exclusions in the policy. Rick's filed suit seeking a declaratory judgment.

Indemnity filed a motion to dismiss based upon the Field of Entertainment exclusion, which precluded coverage for claims based upon violations of FCC rules, regulations, interpretations, policies, statutes, laws or codes. The court granted Indemnity's motion to dismiss. With respect to Rick's claim for coverage as to one of the lawsuits the court found that the plaintiffs had asserted a claim based on, involving, or related to FCC regulations and interpretations even though such FCC rulings were declaratory rulings interpreting the TCPA.

With respect to the second lawsuit, while the complaint did not mention any FCC rules, regulations, or interpretations, the court found (a) the TCPA to be an FCC statute to the extent that Congress granted the FCC regulatory and civil enforcement authority for the TCPA and (b) failing to construe the TCPA as an FCC statute would render the Field of Entertainment language in the policy meaningless and superfluous, thereby violating the rules for interpreting insurance contracts. Thus, the court determined that the claims fell within the Field of Entertainment exclusion.