TADC INSURANCE LAW UPDATE

Fall 2019

Rick Boepple, Jr.
David A. Clark
Thanh Le
Alexandra Ledyard
Clarissa Medrano
Kristen W. McDanald
Mark B. Shutt
Nicholas Stepp

AKERMAN LLP
HOUSTON, TEXAS

This newsletter is intended to summarize significant cases impacting the insurance practice since the Spring 2019 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 Akerman LLP.

Appraisal: Rest in Peace

Barbara Technologies Corp. v. State Farm Lloyds, 2019 WL 2710089, ___S.W.3d ___ (Tex. June 28, 2019)

Departing from well-established intermediate court authority, the majority held that payment of an appraisal award does not foreclose the possibility of the award of attorneys' fees and statutory penalties, thus greatly diminishing, if not eliminating, the utility of appraisal, because it will never again result in finality as intended.

The majority began with an analysis of the "plain language" of the TPPCA, noting that the TPPCA contains both payment deadlines and non-payment deadlines and that damages can be imposed for any violation. Section 542.055 provides that an insurer must acknowledge receipt of the claim, commence an investigation, and request from the claimant all items, statements and forms it believes at that time will be required from the claimant within fifteen days of receiving notice of the claim. Section 542.055(b) provides that the insurer may make additional requests for information if it determines such additional requests are necessary during the course of its investigation. The majority stated that additional TPPCA deadlines are triggered when the insurer receives all information and forms needed to secure a "final proof of loss." These deadlines require the insurer to notify the claimant in writing of acceptance or rejection of the claim within fifteen business days after receiving all such information. If the insurer rejects the claim, § 542.055(c) requires the insurer to provide its reasons. If the insurer accepts the claim, the insurer must pay the claim within five business days of providing notice.

If, after receiving all items, statements and forms reasonably required under § 542.055, an insurer delays payment of the claim for more than the period specified, or if no such period is specified, for more than sixty days, the insurer must pay damages of interest at the rate of 18% per annum and reasonable and necessary attorneys' fees. "Thus, the TPPCA has three main components – non-payment requirements and deadlines, deadline for paying claims, and enforcement."

In this case, State Farm requested information and evaluated the claim in compliance with the TPPCA. State Farm acknowledged coverage, but rejected Barbara Tech's claim because, in State Farm's estimation, the claim did not exceed the

deductible. At Barbara Tech's request, State Farm revisited its decision, inspecting the property a second time. State Farm stood by its rejection and Barbara Tech filed suit. More than a year after first rejecting the claim, State Farm demanded an appraisal. The appraisal award significantly exceeded Barbara Tech's deductible and State Farm paid the award four business days later.

The majority stated that an insurer is liable under the TPPCA if the insured establishes that: (1) the requisite time has passed; and (2) the insurer was ultimately liable for the claim. Because the TPPCA makes no mention of the appraisal process, the majority declined to recognize any exception to the statutory deadlines when appraisal is invoked, stating that when appraisal is invoked after rejection of a claim "the issue generally becomes a contractual matter of dispute resolution, rather than a statutory matter of prompt payment of claims."

The majority first rejected State Farm's contention that the appraisal process was a request for additional information under § 542.055(b) such that invoking appraisal would extend the deadline to accept or reject the claim. Because State Farm rejected Barbara Tech's claim before it invoked the appraisal process, the majority concluded that appraisal was not part of the insurer's investigation.

The majority also rejected State Farm's argument that full and timely payment in accordance with the appraisal award forecloses any possibility of TPPCA damages, disapproving of numerous intermediate court opinions "to the extent those opinions could be read to excuse an insurer liable under the policy from having to pay TPPCA damages merely because it tendered payment based on an appraisal award, or to foreclose any further proceedings to determine the insurer's liability under the policy."

Finally, the majority rejected State Farm's contention that it had not been shown to be, and could not be shown to be, *liable* under the policy as required by § 542.060(a). The majority reasoned that an insurer could not be "liable" on the claim until (1) it has completed its investigation, evaluated the claim and come to a determination to accept and pay at least some portion of the claim; or (2) been adjudicated liable by a court or arbitration panel. The majority concluded that when the insurer rejects the claim, it is not "liable" until it later accepts the claim, thereby admitting liability, or there is a judgment that the insurer wrongfully rejected the claim.

The majority then concluded that the appraisal process and the insurer's payment of the appraisal award constitutes a form of alternative dispute resolution, not a determination of liability. Accordingly, payment of an appraisal award is not an acknowledgment of liability or a determination of liability under § 542.060. Therefore, in order to determine if the insurer is liable for penalties under the TPPCA, despite the parties' having gone through the appraisal process ostensibly to avoid the cost and inconvenience of litigation, the parties must then litigate whether the appraisal award that has already been paid was owed under the policy.

Justice Boyd's Opinion (concurring in part; dissenting in part)

Justice Boyd agreed with the majority's holding that an insurer's invocation of the appraisal process does not affect the insurer's obligations under the TPPCA. However, he would hold that an insurer's payment of an appraisal award was an admission of liability

automatically subjecting the insurer to interest and attorneys' fees under the TPPCA whether the claim was otherwise covered or not.

Justice Hecht's dissent, joined by Justice Brown and Justice Blacklock.

In short, Justices Hecht, Brown and Blacklock would hold that the appraisal process is part of the information that the TPPCA specifically authorizes the insurer to request and that the payment deadline thus should not run until the insurer receives the appraisal award. Because any attempted paraphrase could not do Justice Hecht's well-reasoned dissent justice, we include a series of direct quotes.

> Appraisals have been used in Texas for more than a century, and to good end. "Access to the appraisal process to resolve disputes", the Court writes, "is an important tool in the insurance claim context, curbing costs and adding efficiency in resolving insurance claims", echoing our earlier observation that "[a]ppraisals can provide a less expensive, more efficient alternative to litigation". But after praising appraisal's effectiveness, the Court proceeds to hobble it. By today's decision, as a practical matter, whenever an appraisal is requested, even by the insured, an insurer is subject to paying 18% interest and attorney fees if the award exceeds what the insurer has found to be due. That certainly discourages use of appraisals, at least by insurers, and may effectively doom the process altogether. I come, then, to bury appraisals, not to praise them.
>
> . . .
>
> In all, over the past two decades, the issue has been addressed by several Texas appellate courts, by the U.S. Court of Appeals for the Fifth Circuit, and by U.S. District Courts in all four Texas districts. Only one federal district court has disagreed, and the Fifth Circuit later disapproved of that decision's reasoning. In eight legislative sessions, not a single bill has been introduced to correct or repudiate this unanimous caselaw.
>
> . . .
>
> Today, the Court holds that in 1991, the Legislature not only intended but *clearly* intended, in plain language no less, to penalize the use of the appraisal process to resolve covered claims, contrary to two dozen decisions of a dozen courts, which the Legislature has left undisturbed for more than a decade. There is a better way to read the Act. I respectfully dissent.
>
> . . .
>
> The Court says that "the rejection or acceptance of a claim is the insurer's acknowledgement that it had all the information it needed from the claimant to determine whether the claimant was entitled to benefits under the policy."
>
> . . .
>
> The Court agrees that an insurer should reconsider its decision based on new Info but then holds that if the insurer does so, it violates the Act's deadlines. The only way to serve the Act is to violate it.
>
> . . .
>
> I think this is a fair paraphrase: the crux of the courts' opinions is that the Act does not penalize a postclaim-

rejection payment of an appraisal award, and we do not disagree with that; but the Act does not excuse a postclaim-rejection payment of an appraisal award from its penalties, so we disapprove of them. Well.

. . .

The result of today's decision is this: If an appraisal is requested, either by the insurer or the insured, after a claim has been rejected in whole or in part, and the insurer immediately pays the award, it is nevertheless liable for 18% interest and attorney fees if the claim is later adjudicated to be covered by the policy. Unless the insured gives up, litigation is unavoidable, either over the rejection or over the penalty. If that does not make appraisal requests unlikely, it certainly makes them less likely. The Court renders the appraisal process it praises of little use.

We are, of course, bound by the text of the Act and cannot rewrite it to achieve what we think are better policies. Under the Act, an insurer is not to be penalized until it has received all information necessary to evaluate a claim. But an appraisal award can be a critical part of that information. The Court's interpretation of the Act is inconsistent with its clear meaning; discourages continued use of a century-old appraisal process that fosters settlements, which the Legislature cannot possibly have intended; and upends 15 years of unanimous caselaw, which the Legislature has had multiple opportunities to correct if wrong.

Appraisal: The Final Nail

Ortiz v. State Farm Lloyds ___S.W.3d ___, 2019 WL 2710032 (Tex. June 28, 2019)

The Texas Supreme Court considered the effect of the payment of an appraisal award on the insured's claims for breach of contract, bad faith insurance practices and violations of the Texas Prompt Payment of Claims Act ("TPPCA"). The Court held that payment of the appraisal award bars the insured's breach of contract claim and his common law and statutory bad faith claims to the extent the only actual damages sought are lost policy benefits. However, for the reasons announced in *Barbara Technologies*, the Court held that the insured could proceed with his claims under the TPPCA.

Ortiz filed a claim for wind and hail damage under his homeowner's policy with State Farm. State Farm inspected the property and determined that the amount of the covered damages did not exceed the policy's $1,000 deductible. Ortiz sent State Farm a letter from a public adjustor purporting to value the loss at $23,525.99. State Farm conducted a second inspection of the property, again concluding that the damages due to a covered cause of loss were less than the deductible. Ortiz sued State Farm, and State Farm demanded appraisal. The appraisal award set the replacement cost value of the loss at $9,447.52 and the actual cash value at $5,243.93. State Farm paid the award, less the deductible, and moved for summary judgment. Ultimately, the trial court granted State Farm's motion and Ortiz appealed. The Court of Appeals affirmed and the Texas Supreme Court granted review.

The Texas Supreme Court affirmed the judgment as to Ortiz's breach of contract claim, reasoning that State Farm invoked the agreed upon procedure for determining the amount of the loss and having paid the

binding amount, complied with its obligations under the policy. Because Ortiz failed to identify any breach other than the alleged failure to timely pay the amount of the covered loss, State Farm was entitled to summary judgment on the breach of contract claim.

The Supreme Court affirmed summary judgment as to Ortiz's statutory and common law bad faith claim, largely because the only damages sought by Ortiz were attorneys' fees and treble damages under Chapter 541. The Court held that attorneys' fees and costs are not "damages." Because the only actual damages sought by Ortiz were the amounts he had already been paid, Ortiz could not maintain a bad faith claim either under the common law or Chapter 541. The Court stated that it expressed no opinion on whether costs incurred by the insured in connection with the appraisal process or pre-appraisal assessments of the property would constitute damages "independent from the loss of [policy] benefits" and thus be recoverable under *Menchaca,* implying that at least some justices would so hold.

The Court reversed the Court of Appeals and remanded to the trial court to allow Ortiz to pursue his claims under the TPPCA for the reasons stated in *Barbara Technologies.*

Drunk Driving Collision was an "Accident"

Frederking v. Cincinnati Ins. Co., ___F.3d ___, 2019 WL 2751700 (5th Cir. July 2, 2019)

The significance of this opinion is not the rather unremarkable holding that a collision caused by a drunk driver was an "accident" as defined in an insurance policy, but rather that the case was remanded to the district court which presumably will be called upon to decide whether Texas public policy prohibits insuring against exemplary damages awarded in the context of a drunk driving accident.

Sanchez was driving a truck assigned to him by his employer, Advantage Plumbing Services. Sanchez, who was under the influence of alcohol, failed to yield the right of way, colliding with a car driven by Frederking. A jury found that Sanchez was grossly negligent and that Advantage was negligent in entrusting Sanchez with its vehicle. The jury held Sanchez and Advantage jointly and severally liable for $137,025 in compensatory damages. It further awarded exemplary damages against Sanchez for $207,550. Cincinnati insured Advantage under an auto policy that covered damages resulting from "accidents" caused by Advantage's employees. Cincinnati also issued Advantage a Commercial Umbrella Policy that, in addition to applying in excess of the auto policy's limits, applied where the auto policy does not. The Umbrella Policy covered damages caused by an "occurrence," defined as an accident.

Cincinnati agreed to pay Frederking the compensatory award, thereby discharging Advantage's liability. However, Cincinnati refused to pay the exemplary damages awarded against Sanchez, and Frederking brought suit against Cincinnati.

Cincinnati moved for summary judgment, contending that: (1) Sanchez was not an "insured" at the time of the collision; (2) Sanchez's grossly negligent conduct could not result in a covered "accident"; (3) the exemplary damage award is uninsurable as a matter of contract and public policy; and (4) Cincinnati had no duty to indemnify Sanchez. Frederking cross-moved for partial summary judgment and further argued that there were

fact issues as to whether Sanchez was an "insured."

The district court granted Cincinnati's motion for summary judgment, concluding that Sanchez's intentional decision to drive while intoxicated meant that the collision was not an "accident." In disagreeing with this conclusion, the Fifth Circuit wrote: "Only an insurance company could come up with the policy interpretation advanced here." Noting that no court other than the district court has accepted the notion that a drunk driving collision is not an accident because the driver made the intentional decision to drink and then drive, the Fifth Circuit held that this interpretation conflicts with the plain meaning and common usage of the term "accident."

The Fifth Circuit remanded to the district court for further consideration. In doing so, the Court noted that Cincinnati raised two alternative grounds for summary judgment: that Sanchez was not an insured; and that public policy prohibits insuring against Sanchez's exemplary damages citing *Fairfield Ins. Co. v. Stephens Martin Paving, L.P.*, 246 S.W.3d 653, 655 (Tex. 2008).

Hopefully, on remand the district court will address the public policy concerns about insuring against exemplary damages and further define the "extreme circumstances" warranting a different analysis as envisioned by the Texas Supreme Court in *Fairfield*, and as addressed by the Fifth Circuit in *American Int'l Specialty Lines Ins. Co. v. Res-Care, Inc.*, 529 F.3d 649 (5th Cir. 2008) and *Minter* 394 F.. App'x. 47 (5th Cir. 2010).

D & O Policies – Notice of Claim

ADI Worldlink, LLC v. RSUI Indem. Co., ___ F.3d ___ 2019 WL 3521815 (5th Cir. August 2, 2019)

The Fifth Circuit affirmed the district court's holding that the insured learned of a related claim when the previous year's policy was in effect such that the first policy was the only policy that covered the subsequently made claims. Thus, even though the insured gave timely notice of the later claims, since it did not give timely notice of the initial claim, all claims were properly denied.

ADI Worldlink LLC ("Worldlink") had purchased D & O policies from RSUI Indemnity Company ("RSUI") since 2012. After purchasing the initial policy in 2012, it purchased two subsequent policies with policy periods from December 31, 2013 to December 31, 2014 (the "2014 Policy") and from December 31, 2014 to December 31, 2015 (the "2015 Policy"), which was subsequently extended through January 14, 2016. The policies were written on a claims made basis. The last 2015 Policy also contained a provision whereby related claims would be deemed to be a single claim first made when the earliest of such claims was first made, regardless of whether such date was before or during the policy period.

In August of 2014, an employee of Worldlink made a claim regarding Worldlink's alleged failure to pay overtime wages to non-exempt employees. In April of 2015, other employees made similar claims. Worldlink first provided notice of these claims to RSUI in September of 2015. Relying on the interrelatedness provision of the 2015 Policy, RSUI deemed all the employment claims to be a single claim first made during the 2014 Policy period. Because the first employment claim was not timely reported as required by the 2014 Policy, and because the claims first made during the 2015 Policy period were deemed first made during the 2014 Policy period, RSUI contended that there was no coverage for any of the claims.

The district court granted RSUI's motion for summary judgment and the Fifth Circuit affirmed. The Fifth Circuit stated that the purpose of the interrelated claim provision of the 2015 policy was clear: when an initial claim is made and the insured gives proper notice of that claim, then the handling of related claims made in a subsequent policy year "continues consistently under that first policy." Since the subsequent claims made during the 2015 Policy period were deemed to relate back to the claim first made during the 2014 Policy period, and Worldlink did not timely report the earlier claim, all of the claims were deemed a single claim first made during the 2014 Policy period and none of the claims were covered by either policy.

As an aside, the Court entered into a lengthy discussion of the prior litigation provision and distinguished *Gastar Exploration Ltd v. U.S. Specialty Ins. Co.*; 412 S.W.3d 577 (Tex. App [14th Dist.] 2013, pet. denied), which may be of interest to those addressing similar issues, but ultimately this did not impact the Court's ruling.

Void Turnover Order Leads to Lack of Standing.

Old Am. Cnty Mut. Fire Ins. Co. v. Villegas, No. 01-17-00750-CV, 2019 WL 3121853(Tex. App.—Houston [1st Dist.] July 16, 2019, no pet.) (mem. op., not designated for publication).

The Houston Court of Appeals vacated the judgment of the trial court on the grounds that the turnover order it was based on was void, causing the plaintiff to lack standing.

Magdaleno Villegas ("Villegas") filed suit against Jorge Arellano ("Arellano") and Maria Martinez ("Martinez") for damages he sustained in a head-on collision with Arellano, who was driving a vehicle owned by Martinez. Villegas alleged claims for negligence, negligence per se, and gross negligence against Arellano, and negligent entrustment against Martinez.

Arellano did not answer the lawsuit and, on March 19, 2015, the trial court entered a default judgment against Arellano in the amount of $254,838.44, including $150,000 in exemplary damages. The default judgment did not address the negligent entrustment claim against Martinez. Additionally, just above the signature block in the judgment appeared the following statement: "This judgment does no dispose of all claims and all parties, and is not appealable."

Following the entry of this default judgment, Villegas filed an application for turnover relief, which was granted. The turnover order purported to turn over any and all claims or causes of action Arellano had against his liability insurer, Old American County Mutual Fire Insurance Company ("Old American"). Based on the turnover order, Villegas filed suit directly against Old American and, after a bench trial, the Court rendered a final judgment ordering Old American to pay the full amount of damages awarded in the default judgment of $254,838.44.

On appeal, however, the Houston Court of Appeals vacated the trial court's judgment against Old American on the grounds that the turnover was void. The Court of Appeals noted that without a final judgment a turnover order is void, and Villegas' turnover order was based on the interlocutory default judgment entered against Arellano. As a result, Villegas' turnover order was held to be void, causing Villegas to lack standing to bring suit against Old American. Accordingly, the Court of Appeals vacated the trial court's judgment entered against Old

American because it lacked subject matter jurisdiction.

Insured's Failure to Apportion Segregation of Damages, Concurrent Causes, and Unreasonable Reliance on Expert Reports.

USAA Tex. Lloyd's Co. v. Griffith, No. 13-17-00337-CV, 2019 WL 2611015 (Tex. App.—Corpus Christi June 26, 2019, no pet.).

This case arises out of USAA Texas Lloyd's Company's ("USAA") refusal to replace the entire roof on a house belonging to John Griffith ("Griffith") that was damaged by a hail storm. To assess the hail damage, USAA initially sent an inspector from Allcat Claims Service, LP ("Allcat"), who recommended repair of a portion of the house. Griffith hired his own inspector, Rimkus, an inspection company often used by insurers, who recommended the entire roof be replaced. USAA then hired a third-party engineering firm called Project Time and Cost ("PTC") to re-evaluate the hail claim. PTC estimated the damage to Griffith's roof was less than what was originally observed by Allcat. Relying on PTC's report, USAA refused to pay Griffith to replace the entire roof. Griffith sued USAA for breach of contract, bad faith violations of the insurance code, and fraud and ultimately prevailed at trial.

On appeal, USAA first argued there was legally insufficient evidence to support the breach of contract claim. USAA contended it had sole discretion to either repair or replace the roof. However, Griffith's experts provided evidence that repairing the roof would have cost more than replacing the roof, and the jury found this more credible and awarded the least amount necessary to fulfill USAA's obligations. USAA also argued Griffith failed to apportion his damages between covered and non-covered perils. But there was no evidence wear or fungus acted as a concurrent cause to damage to the roof. In fact, the Allcat inspector hired by USAA testified that any damage to the roof was caused solely by hail.

Second, USAA urged the court to reverse the bad faith finding. The court found there was sufficient evidence to support bad faith because (1) both PTC and Allcat worked mostly for insurers, (2) Allcat and PTC conducted substandard investigations based on inadequate information, (3) USAA and its inspectors did not contact Rimkus to identify the root of the difference in opinions, (4) and even USAA's own experts partially disagreed with PTC's conclusions. Further, there was sufficient evidence giving rise to a knowing violation due to the relationship between Allcat and USAA, USAA's handling of Allcat's estimate, and USAA's refusal to discuss with Griffith his reason for disagreeing with Allcat's estimate.

Third, USAA argued there was insufficient evidence to support the jury's finding on the fraud claim. The court agreed because Griffith failed to prove reliance and reversed the award of $33,000 in lost premiums and $200,000 in exemplary damages. USAA also argued Griffith was not entitled to the entire award of attorney's fees due to the reduction in damages. Because the total amount awarded was only one of the eight factors in determining reasonableness of attorney's fees promulgated by the Texas Supreme Court, the court upheld the entire attorney's fees award in light of Griffith prevailing on both his breach of contract and bad faith claims.

***Stowers:* Voluntary Payment of Settlement by Insured.**

In re Farmers Tex. Cnty. Mut. Ins. Co., No. 04-19-00180-CV, 2019 WL 2605630 (Tex. App.—San Antonio June 26, 2019, pet. filed).

Insured who voluntarily paid the difference between the plaintiff's settlement demand and what the insurer offered to pay could not prevail on breach of contract claim against insurer. The court declined to determine on mandamus whether a *Stowers* claim required an excess judgment.

Farmers Texas County Mutual Insurance ("Farmers") issued Cassandra Longoria ("Longoria") a personal auto policy with a $500,000 policy limit. After a motor vehicle accident, Gary Gibson ("Gibson") sued Longoria and sought damages in the amount of $1 million. The mediator recommended the case be settled for $350,000, but Farmers only agreed to settle the case for $250,000. As trial approached and because Farmers failed to timely designate experts, Longoria offered to pay the remaining $100,000 and then sued Farmers for breach of contract and negligent failure to settle Gibson's claim.

Farmers filed Rule 91a motions to dismiss both of Longoria's claims. The trial court denied both motions, and Farmers filed its petition for writ of mandamus on both trial court orders. Longoria first claimed Farmers breached the contract by failing to timely designate witnesses, forcing her to face trial without a single expert in her defense. But because trial had not occurred, the court of appeals did not find Longoria suffered any damages as a result of Farmers' failure to timely designate experts. Longoria then claimed Farmers breached the contract by failing to settle the suit for $350,000. The policy only required Farmers to settle or defend "as [it] consider[ed] appropriate," not necessarily to pay any amount within its policy limits. Thus, the policy provided Farmers discretion to settle claims against its insured, and Farmers fulfilled its contractual obligation when it offered to settle the claim for $250,000.

As to the negligent failure to settle claim, Farmers argued the trial court abused its discretion in denying its 91a motion because there can be no *Stowers* claim without a judgment in excess of policy limits. But the court concluded that whether a *Stowers* claim always requires an excess judgment is not so clearly established. The court observed that Texas has only extended a *Stowers* duty in settlement cases in excess of policy limits between an excess insurer and its primary insurer.

As a result, the court found that whether an insured has a *Stowers* claim against her insurer when the case settles pre-trial and the insured has paid a portion of the settlement because the insurer refused to pay the entirety of the settlement demand is an issue of first impression. An issue of first impression can qualify for mandamus relief when the factual scenario has never been addressed but the law has been clearly established. However, according to the court, whether a *Stowers* claim always requires an excess judgment has not been clearly established. Accordingly, Farmers was not entitled to mandamus relief on this claim.

Insurer Owed No Duty of Care to Protect Insureds at Scene of Accident

Kenyon v. Elephant Ins. Co., LLC, No. 04-18-00131-CV, 2019 WL 1779933 (Tex. App.—San Antonio Apr. 24, 2019)

After being involved in a single-vehicle accident, the insured, Lorraine Kenyon ("Lorraine"), remained in her car and on the side of the road. She first called her husband Theodore and then Elephant Insurance Company ("Elephant Insurance") to report the claim. The Elephant Insurance claims representative encouraged Lorraine to contact the police and to take pictures of the

scene. When Theodore arrived at the scene, he began taking pictures. Another motorist lost control of her vehicle, left the roadway, and struck Theodore, killing him.

Lorraine sued Elephant Insurance for negligence, negligent undertaking, negligent failure to train and license, negligence per se, and gross negligence. Elephant Insurance filed traditional and no-evidence motions for summary judgment, which the trial court granted. On permissive interlocutory appeal, the San Antonio Court of Appeals held that an insurer owes no duty to protect its insureds at crash scenes from injuries caused in subsequent collisions. Because the insured is at the scene and can immediately apprehend the risks, the insured is in the best position to protect him/herself from those risks.

Insured Could not Challenge TWIA's Valuation of Damages After Failing to Seek Appraisal

Texas Windstorm Ins. Ass'n v. Park, No. 13-18-00634-CV, 2019 WL 1831771 (Tex. App.—Corpus Christi Apr. 25, 2019).

Joseph Park's ("Park") two-story house in Rockport was damaged by Hurricane Harvey in 2017. An independent adjuster declared the house a total loss, and recommended that Texas Windstorm Insurance Association ("TWIA") pay policy limits of $330,000. TWIA refused to accept that recommendation, assigned an adjuster who viewed photographs, and accepted that adjuster's recommendation that TWIA pay approximately half the original adjuster's amount. TWIA paid the latter amount while continuing to assert that it had accepted coverage of Park's claim in full. Park filed suit against TWIA alleging breach of contract and statutory claims.

TWIA filed a plea to the jurisdiction, or in the alternative, motion for summary judgment, arguing that Park's claim is barred because Park did not seek appraisal before filing suit. Park claimed that there was a fact issue about whether TWIA accepted, denied, or accepted in part and denied in part Park's claim. The court distinguished between TWIA's acceptance of Park's claim in full and TWIA's valuation of the claim. Because TWIA agreed to cover each part of the damaged house for which Park sought coverage, the valuation disagreement could be determined only through the statutory appraisal process. Park, however, did not demand an appraisal under the property, so the court held that he had waived his right to contest TWIA's determination of the amount of loss it would pay. Because Park waived the only avenue for challenging TWIA's valuation, the Corpus Christi Court of Appeals reversed the denial of TWIA's motion for summary judgment and rendered judgment against Park.

Evidence Conclusively Showed that Appraisal Award Resulted from Mistake When Award Included Damages to Property of Third Party

United Fire & Cas. Co. v. Gossetts, Inc., No. 07-18-00204-CV, 2019 WL 2572042 (Tex. App.—Amarillo June 21, 2019, no pet. h.)

The Amarillo Court of Appeals reversed summary judgment rendered in favor of the insured, Gossetts, Inc. ("Gossetts"), holding that the appraisal award on which the judgment was based resulted from a mistake and was therefore invalid.

The suit arose from a dispute concerning damage to Gossetts' property allegedly sustained in a hailstorm in May 2013. After Gossetts submitted the claim to its property insurer, United Fire & Casualty Company

("United Fire"), the two sides agreed to set the amount of loss through appraisal. Gossetts' appraiser and the umpire subsequently issued an appraisal award for approximately $212,000. While the appraisal process had been ongoing, Gossetts filed suit asserting breach of contract and extra-contractual causes of action for United Fire's failure to pay the claim.

Gossetts then filed a partial motion for summary judgment, seeking recovery based on the appraisal award issued by the panel and the prompt payment statute under Chapter 542 of the Texas Insurance Code. At the same time, United Fire filed traditional and no-evidence motions for summary judgment, seeking to nullify the appraisal award and negate liability for Gossetts' breach of contract and extra-contractual claims. The trial court denied United Fire's motions but granted Gossetts' motion and entered judgment awarding Gossetts the amount of the appraisal award, prompt payment penalties, and attorney's fees. Gossetts' remaining statutory causes of action were severed.

On appeal, United Fire argued that the appraisal award was invalid because it incorporated damages to a portion of the roof that was owned by a third party. The Court of appeals agreed, relying on uncontested evidence attached to United Fire's traditional motion that showed, among other things, Gossetts' appraiser's estimate included the portion of the roof owned by the third-party, the appraiser did not know Gossett did not own the entire roof, the umpire relied on the appraiser's estimate in calculating the appraisal award, and the umpire was unable to recalculate the award to reflect damage to the portion of the roof owned by Gossetts. The Court also rejected Gossetts' argument that the mistake was inconsequential, reasoning that prior precedent concerning the validity of appraisal awards did not incorporate an element of severity or harm and that, in any event, the sum attributed to the non-owned portion of the roof was not *de minimus* considering the evidence.

The Court therefore reversed judgment entered in favor of Gossetts, vacated the appraisal award, and rendered judgment in favor of United Fire.

Summary Judgment Affirmed in Favor of Insurer Dismissing Insured's PIP and Extra-Contractual Claims Because the Insured's Injuries did Not Result from an Automobile Accident and the Insured was not a "Covered Person."

Alan Kiely v. Texas Farm Bureau Cas. Ins. Co., No. 06-19-00012-CV, 2019 WL 3269326 (Tex. App.—Texarkana July 22, 2019, no pet. h.).

The Texarkana Court of Appeals affirmed summary judgment rendered in favor of the insurer, Texas Farm Bureau Casualty Insurance Company ("Texas Farm Bureau"), holding that the injuries of the insured, Alan Kiely ("Kiely"), did not result from an automobile accident and that Kiely was not a "covered person" and therefore was not entitled to any personal injury protection ("PIP") benefits under his automobile policy nor any extra-contractual damages.

After a hailstorm damaged the roof of Kiely's residence, Kiely ordered metal roofing sheets from a lumber company. A lumber company employee, Brian Reeves ("Reeves"), came to Kiely's residence to deliver the metal sheets that were bound in three bundles. As Reeves was attempting to unload the sheets, one of the bundles slid off the truck and pinned Reeves to the ground. When Kiely attempted to help Reeves, Kiely fractured two vertebrae

in his back and had to undergo several surgeries.

Kiely submitted a PIP claim with Texas Farm Bureau and then filed suit when the claim was denied, asserting breach of contract and extra-contractual claims. Kiely thereafter filed a partial motion for summary judgment on his breach of contract claim, and Texas Farm Bureau filed a cross-motion for summary judgment, seeking dismissal of the breach of contract and extra-contractual claims. The parties stipulated that Kiely did not come into contact with any part of the delivery truck before or during the incident that Kiely never came into contact with the metal sheets except in his attempt to lift the sheets off Reeves, and that Kiely never came into contact with Reeves. The trial court denied Kiely's motion and granted Texas Farm Bureau's motion.

On appeal, the issue was whether Kiely's injuries fell within the scope of the PIP coverage agreement of the policy under which Texas Farm Bureau agreed to pay PIP benefits for bodily injury resulting from a "motor vehicle accident" and sustained by a "covered person." A "covered person" was defined as the policyholder or any family member "while occupying" or "when struck by…a motor vehicle designed for use mainly on public roads or a trailer of any type."

Addressing first whether Kiely's injuries resulted from a "motor vehicle accident," the court cited the test articulated by the Texas Supreme Court in *Texas Farm Bureau Mutual Insurance Co. v. Sturrock*, 146 S.W.3d 123, 125 (Tex. 2004) under which a motor vehicle accident occurs when:

> (1) one or more vehicles are involved with another vehicle, an object, or a person, (2) the vehicle is being used, including exit and entry, as a motor vehicle, and (3) a causal connection exists between the vehicle's use and the injury-producing event.

Under this test, the court held that Kiely's injuries did not result from a motor vehicle accident because the delivery truck "was not directly involved in the circumstances leading up to Kiely's injuries[,] Kiely was not exiting the vehicle or entering the vehicle when he sustained the injuries, …he was not injured while removing, or trying to remove, the metal sheets from the bed of the truck, and the 'injury producing-event' occurred as a direct result of Kiely's intentional act of lifting the metal sheets off Reeves." The court further distinguished prior precedent holding that a vehicle is in "use" during the loading and unloading process, reasoning that Kiely was not injured while loading the truck, but rather when he attempted to lift metal sheets off Reeves that were already unloaded.

Addressing the second issue, the court held that Kiely was not a "covered person" because the undisputed facts show that Kiely never came into contact with the truck before or during the incident and, thus, he was not "occupying" the truck and was not "struck by" the truck.

Accordingly, the court affirmed the summary judgment dismissing Kiely's breach of contract and extra-contractual claims.

Mandamus Granted in Favor of Insurer Ordering Trial Court to Vacate Order Setting Aside Appraisal Award Because Appraisal Panel Properly Excluded Pre-Existing Damage from Award.

In re Auto Club Indem. Co., No. 14-19-00490, 2019 WL 3432144 (Tex. App.—

Houston [14th Dist.] July 19, 2019, orig. proceeding).

The Houston Court of Appeals [14th District] conditionally granted a petition for writ of mandamus and ordered the trial court to vacate its order setting aside an appraisal award, holding that there was no evidence that the award was issued as the result of fraud, and that the appraisal panel had properly excluded pre-existing damages from the appraisal award.

The insureds, Angie and Jay Lees (the "Lees"), filed suit against their homeowners' insurer, Auto Club Indemnity Company ("AAA"), seeking recovery for alleged storm-related damage to their home and demanding an appraisal. The umpire and AAA's appraiser issued an appraisal award of "$0" on the basis that the damage to the property resulted from pre-existing conditions. The Lees filed a motion to set aside the appraisal award, arguing that the appraisal was not an "honest assessment of the damages" and that the umpire and AAA's appraiser acted outside the scope of their authority by determining coverage issues. The only evidence offered by the Lees was the appraisal award itself. The trial court granted the Lees' motion and AAA filed a petition for writ of mandamus.

The appellate court summarily dismissed the Lees' first argument, finding there was no evidence that the appraisal award was the result of fraud and that the award of $0 was consistent with the appraisal panel's conclusion that the damages were pre-existing.

The court also rejected the Lees' second argument, recognizing that, pursuant to Texas Supreme Court precedent in *State Farm Lloyds v. Johnson*, 290 S.W.3d 886 (Tex. 2009), an appraisal panel properly exercises its authority when distinguishing between damages for which coverage is claimed from damages caused by everything else and when separating loss due to a covered event from a pre-existing condition. Because the umpire and AAA's appraiser found that the only damages to the Lees' property was pre-existing or caused by pre-existing conditions, the panel acted within its authority by returning an award of $0.

Finding that AAA had no adequate remedy by appeal, the appellate court conditionally granted the petition for writ of mandamus and ordered the trial court to vacate its order setting aside the appraisal award.

"Co-Employee" and "Co-Employer" not Interchangeable. Co-Employee is not the Same as Employer

Maxim Crane Works, LP v. Zurich Am. Ins. Co., 2019 WL 2524244 (S.D. Tex. June 19, 2019)

The Texas Anti-Indemnity Act voids Additional-Insured coverage for purported additional insured that was not a party to a contractor-controlled insurance program ("CCIP").

The Underlying Contracts

This was an insurance coverage case to determine whether Maxim Crane Works, LP ("Maxim") was an additional insured under a CGL policy issued to Berkel & Company Contractors ("Berkel") by Zurich American Insurance Company ("Zurich") for injuries sustained by Tyler Lee ("Lee"), an employee of Skanska USA Building, Inc. ("Skanska"), the general contractor on a construction project. Berkel, a subcontractor on the project, leased a crane from Maxim. Skanska had a CCIP that included workers compensation coverage and required Berkel

and other subcontractors to enroll in the CCIP. Berkel had a separate CGL policy with Zurich (the "Berkel Policy"). Maxim did not enroll in the CCIP, but it had a separate CGL policy with Zurich (the "Maxim Policy").

The Lease Agreement for the crane between Berkel and Maxim required Berkel to have Maxim named as an additional insured on its insurance policies. A "person or organization to whom or to which [Berkel is] required to provide additional insured status in a written contract or written agreement prior to the loss except where such contract or agreement is prohibited by law" was an Additional Insured on the Berkel Policy. The parties stipulated that Maxim was an Additional Insured under the Berkel Policy.

The Underlying Lawsuit

Lee was an employee of Skanska. A Berkel employee overtaxed the crane Berkel leased from Maxim, causing it to fall over and strike Lee. Lee's leg was amputated and he received worker's compensation benefits through the CCIP. Lee sued Berkel and Maxim. Maxim cross-claimed against Berkel, claiming that Berkel was required to defend and indemnify Maxim. A jury awarded Lee $35 million and apportioned 90% of the fault to Berkel and 10% to Maxim.

Maxim settled with Lee for $3,444,300.60, which Zurich paid under the Maxim Policy. However, under the Deductible Endorsement of the Maxim Policy, Maxim was required to reimburse Zurich $3,000,000 of the settlement costs and $824,839.38 of defense costs. The trial court entered a final judgment that stated that Maxim would take nothing on its cross-claim against Berkel. Berkel appealed the final judgment.

The Court of Appeals reversed the judgment against Berkel, holding that because Berkel and Skanska were covered under the CCIP, Skanska was Berkel's statutory employer under the Texas Workers' Compensation Act and Lee, as Skanska's actual employee, was Berkel's "co-employee." Thus, Berkel was immune from liability to Lee.

Maxim also appealed the state court judgment, but the appellate court held that Maxim had not preserved error as to its issues regarding the applicability of the Texas Anti-Indemnity Act.

The Coverage Dispute

Maxim demanded that Zurich cover its defense and settlement costs under the Berkel Policy. Zurich denied coverage, contending that the Texas Anti-Indemnity Act prohibited covering Maxim as an additional insured. Maxim sued Zurich in the overage action and the parties filed cross-motions for summary judgment.

Zurich's first ground for summary judgment, that issue preclusion or collateral estoppel barred Maxim's claim because it litigated the same issue in state court, involved the interpretation of the Deductible Endorsement of the Maxim Policy under Pennsylvania law and is not discussed herein. The district court ultimately determined that Maxim had standing to pursue its claim against Zurich under the Berkel Policy.

The Court next considered the application of the Texas Anti-Indemnity Act, TEX. INS. CODE §§ 151.001-151.151, which applied to "a construction contract for a construction project" in which an indemnitor procures insurance. In general, the statute prohibits indemnification for claims caused by the indemnitee. It also provides that additional insured coverage is void "to the extent that it

requires or provides coverage the scope of which is prohibited under this subchapter for an agreement to indemnify, hold harmless, or defend." TEX. INS. CODE §151.104(a).

The Court noted, however, that § 151.102's broad prohibition of indemnity agreements in construction contracts does not apply to a provision that requires a person to defend or indemnify another party to the construction contract or a third party against a claim for the bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier. TEX. INS. CODE §151.103. Thus, an indemnity agreement requiring the indemnitor to defend or indemnify another party for claims brought by an employee of the indemnitor, or an employee of any subcontractor below the indemnitor, is not void. However, the Texas Anti-Indemnity Act further provides that it "does not affect . . . the benefits and protections under the [Texas] workers' compensation laws."

Thus, the district court concluded that the Anti-Indemnity Act prohibits additional insured coverage when the policy requires the indemnitor to provide coverage for a claim caused by the Additional Insured's negligence or fault. In the crane Lease Agreement, Berkel was required to provide CGL coverage to Maxim on a primary and non-contributory basis.

However, since the underlying lawsuit alleged that Maxim was independently liable for its own negligence, the Texas Anti-Indemnity Act voids additional insured coverage for Maxim unless an exception applies.

The Employee Exclusion

Maxim argued that the exception allowing indemnification for "a claim for bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier" applied to Lee's claims because Berkel "has been deemed the functional equivalent of Lee's employer." While TEX. LAB. CODE §406.123 provides that under certain circumstances, a general contractor may be deemed the statutory employer of a subcontractor and the subcontractor's employees, this statutory relationship exists only for the purposes of the Texas workers' compensation laws. Although Berkel and Lee were "co-employees," the court concluded that this did not make Berkel Lee's employer because only an employee of a lower-tiered subcontractor enrolled in a CCIP would be deemed an employee. Because Lee was an employee of a higher-tiered contractor, he was not deemed to be an employee of Berkel.

Further, TEX. LAB. CODE §406.123 makes the general contractor the employer of the subcontractor "only for purposes of the [Texas] workers' compensation laws." Thus, the Court concluded that TEX. LAB. CODE § 406.123 could not be imported wholesale into the Texas Anti-Indemnity Act, and concluded that the Employee exception did not apply.

The Workers' Compensation Exception

The Texas Anti-Indemnity Act also excepts from its application agreements that affect "the benefits and protections under the [Texas] workers' compensation laws." TEX. INS. CODE § 151.105(5). The Court noted that no court had previously construed this section. Maxim argued that the workers' compensation exception applied because Lee and Berkel received the benefits and protections of the Texas Workers' Compensation Act. The Court disagreed, holding that applying the Texas Anti-Indemnity Act to relieve Zurich of the obligation to indemnify Maxim would not

affect a benefit or protection of the Texas Workers' Compensation laws.

Thus, the Court concluded that the Texas Anti-Indemnity Act voids Maxim's Additional Insured Coverage under the Berkel Policy, and Maxim was not entitled to recover the amounts it paid in settlement and defense costs under the Deductible Endorsement of the Maxim Policy. The Court granted Zurich's motion for summary judgment and denied Maxim's motion for summary judgment.

Insured's Common Law and Statutory Claims against Flood Insurer Were Preempted by Federal Law

La Mirage Homeowners Ass'n Inc. v. Wright Nat'l Flood Ins. Co., No. 2:19-CV-138, 2019 WL 4109502 (S.D. Tex. Aug. 29, 2019).

La Mirage Homeowners Association (the "Association") sued Wright National Flood Insurance Co. ("Wright"), alleging that Wright breached the insurance policy by underpaying the Association's flood loss claims on three of the Association's condominium buildings and by not initiating the appraisal the Association demanded. The Association pleaded claims for negligence, statutory penalties, attorney's fees, and pre- and post-judgment interest. The Association also demanded a jury trial.

The established rule in the Fifth Circuit is that tort claims based on claims-handling by write-your-own providers of flood insurance ("WYOs") under the National Flood Insurance Program are preempted by federal law. To determine whether an extra-contractual claim against a WYO is preempted, courts look to the status of the insured at the time of the interaction between the parties. If the individual is already covered and in the midst of a non-lapsed insurance policy, the interactions between the insurer and insured are claims-handling, and therefore preempted. Because the Association was an insured at the time of the alleged underpayment of the claim, the Court held that the alleged wrongful conduct was claims-handling and therefore preempted.

Similarly, state law claims for statutory penalties, attorney's fees, and pre- and post-judgment interest are preempted when they are predicated on claims-handling. Finally, because the only claim remaining was for breach of the NFIP flood insurance policy and FEMA was presumed to be paying litigation costs and any resulting damage award, the Association did not have a right to a jury trial.

Insured Could not Maintain Texas Insurance Code and Common Law Claims Against Engineering Firm Hired by Insurer to Inspect Damages

MJ & JJ, LLC v. Clear Blue Specialty Ins. Co., No. 2:19-CV-15, 2019 WL 3412598 (S.D. Tex. July 29, 2019).

MJ & JJ, LLC (dba "Peacock Manor"), an apartment complex, sustained damage to roofs, interiors, and exteriors of buildings in Hurricane Harvey. Clear Blue Specialty Insurance Company ("Clear Blue"), which issued an insurance policy to Peacock Manor, assigned an adjuster to inspect the damage. The adjuster allegedly informed Peacock Manor that there was "severe" damage and that he would submit an estimate for the full scope of the damage. Clear Blue then retained MKA, an engineering firm, to adjust the damages. MKA engineers, Hylton Cruickshank and Charles Jendrusch, allegedly underscoped, undervalued, and denied the damage caused by the hurricane.

Peacock Manor sued Clear Blue, Madsen, Kneppers & Associates, Inc., Hylton Cruickshank, and Charles Jendrusch in Texas state court. Clear Blue removed the case to federal court, claiming complete diversity among all properly joined parties. MKA, Cruickshank, and Jendrusch moved to dismiss the claims against them.

The Court recognized the general rule in Texas that engineers and engineering firms who investigate and consult with insurance companies in adjusting claims are not persons engaged in the business of insurance and are not proper defendants for an unfair settlement practices claim under the Texas Insurance Code. The Court also held that an agreement between an insurer and a consulting engineer to resist an insurance claim is not an actionable civil conspiracy, and the submission of a report indicating that there were no damages is not an overt, unlawful act in furtherance of any conspiracy. The Court also dismissed Peacock Manor's tortious interference claim because MKA could not have tortiously interfered with the insurance contract given its lack of knowledge about the prior adjuster's damage estimate. Finally, noting that report says it is for Clear Blue's use only, the Court held that any reliance by Peacock Manor on the MKA inspection report was not justified.

In Light of *Barbara Technologies, Ortiz,* and *Menchaca,* Insured's Breach of Contract and Statutory Claims Survived Appraisal Payment

Park Board Ltd. v. State Auto. Mut. Ins. Co. and Daniel Prough, No. 4:18-cv-382, 2019 WL 3776450 (E.D. Tex. August 12, 2019).

A federal court out of the Eastern District of Texas granted in part and denied in part a motion to dismiss filed by the insurer, State Auto Mutual Insurance Company ("State Auto"), after State Auto paid an appraisal award, holding that the payment of the appraisal award did not extinguish the breach of contract claim of the insured, Park Board Ltd. ("Park Board"), to the extent the breach of contract was premised on State Auto's initial denial of the insured's request for appraisal. The payment of the appraisal award did not extinguish the insured's extra-contractual claims because the insured alleged that the same breach caused it to lose the right to recover replacement cost benefits, and the appraisal payment did not extinguish the insured's prompt payment claims because an appraisal payment neither establishes nor forecloses the insured's right to recover prompt payment penalties.

Park Board submitted a claim to State Auto after its property allegedly sustained wind and hailstorm damage. State Auto investigated the claim and determined that the damage was less than the policy's deductible. Park Board alleged that it then submitted a demand for appraisal to State Auto, which State Auto rejected. Park Board filed suit against State Auto, and the parties thereafter commenced the appraisal process.

At the conclusion of appraisal, State Auto's appraiser and the umpire issued an appraisal award of approximately $210,000, including within that amount depreciation of approximately $80,000. State Auto issued an actual cash value payment that took into account the policy's deductible and prior payments. State Auto also informed Park Board that it could recover the replacement cost benefits in the appraisal award if it completed repairs within two years of the date of loss, which had already passed by that point in time. Following payment of the appraisal award, State Auto filed a motion to dismiss arguing that the payment foreclosed

liability for Park Board's contract, extra-contractual, and prompt payment claims.

The court first addressed Park Board's breach of contract claim which was premised on two alleged breaches: (1) the initial undervaluation of the damaged property; and (2) the denial of Park Board's first request for appraisal. Citing to and discussing the Texas Supreme Court's opinion in *Ortiz v. State Farm Lloyds*, __ S.W.3d __, No. 17-1048, 2019 WL 2710032 (Tex. June 28, 2019), the Court held that a valuation below the amount of an appraisal award did not equate to a breach and the appraisal process had already resolved the dispute over the amount of loss. However, the Court held that the insured was entitled to proceed on its breach of contract based on State Auto's alleged refusal to comply with the appraisal demand and attempt to prove damages resulted from that breach and not the mere denial of policy benefits.

Turning to Park Board's extra-contractual claims under Chapter 541, DTPA, and the common law, the Court held that such claims were moot to the extent that they sought damages for policy benefits. However, the Court stated that under *Menchaca*, the insured could still seek to recover "additional" damages based on an injury independent of the loss of policy benefits. The Court found such damages in Park Board's allegations that State Auto's failure to promptly process its claim precluded Park Board from being able to timely complete repairs and recover depreciation costs. According to the Court, because Park Board was not entitled to depreciation, Park Board's "extra-contractual claims necessarily seek relief separate from its actual policy benefits." The Court indicated that Park Board's alleged damages for business interruption "may" also constitute harms independent from policy benefits.

Finally, turning to Park Board's Chapter 542 prompt payment claims, the court held that under *Barbara Techs. Corp v. State Farm Lloyds*, __ S.W.3d __, No. 17-0640, 2019 WL 270089 (Tex. June 28, 2019), the payment of an appraisal award neither establishes nor forecloses liability, making summary judgment inappropriate.

Despite *Barbara Technologies*, Insured Could Not Maintain Prompt Payment Claim After Appraisal Payment Because Initial Payment was Reasonable as a Matter of Law.

Shin v. Allstate Tex. Lloyds, No. 4:18-CV-01784, 2019 WL 4170259 (S.D. Tex. Sept. 3, 2019).

A federal court sitting in the Southern District of Texas granted a motion for reconsideration filed by the insured, Hyewon Shin ("Shin"), but reaffirmed its grant of summary judgment in favor of the insurer, Allstate Texas Lloyds ("Allstate"), dismissing the insured's prompt payment claim under Chapter 542.

In its prior opinion, the court granted summary judgment in favor of Allstate, dismissing Shin's breach of contract, extra-contractual, and prompt payment claims arising from alleged Hurricane Harvey damage to Shin's property after the claim was submitted to appraisal and Allstate paid the appraisal award. *See Shin v. Allstate Tex. Lloyds*, 4:18-CV-1784, 2019 WL 2869355 (S.D. Tex. July 3, 2019). Based on the Texas Supreme Court's decision in *Barbara Techs. Corp v. State Farm Lloyds*, __ S.W.3d __, No. 17-0640, 2019 WL 270089 (Tex. June 28, 2019), Shin filed a motion for reconsideration, asking the court to reconsider its holding solely as to Shin's prompt payment claim.

The court first considered the opinion in *Mainali Corp. v. Covington Specialty Ins. Co*., 872 F.3d 255 (5th Cir. 2017), in which the Fifth Circuit held there can be no violation of Chapter 542 if the insurer's pre-appraisal payment is "reasonable" and concluded that *Mainali's* "reasonableness" exception survived *Barbara Technologies* in light of *Barbara Technologies'* citation to, and apparent approval of, *Mainali*. The court read *Barbara Technologies* and *Mainali* together "as standing for the proposition that, in order for an insurer to avoid a Prompt Payment Act claim by a plaintiff, the insurer must have made a reasonable pre-appraisal payment within the statutorily-provided period."

Finding that Allstate made a pre-appraisal payment within the statutory time period, the court turned to whether the payment had been reasonable. Looking to the amount of the pre-appraisal payment of $4,616.63 in comparison to the appraisal award of $25,944.94, the court noted that the appraisal award was 5.6 times greater than the prior payment. However, the court found that the pre-appraisal payment was reasonable as a matter of law because Allstate had complied with Chapter 542 in responding to the claim, requesting necessary information, and investigating and reaching a decision on the claim, and because the difference between the pre-appraisal payment and the appraisal award was no larger than the difference in other cases in which courts made a similar reasonableness finding. The court specifically cited to *Hinojos v. State Farm Lloyds*, 569 S.W.3d 304 (Tex. App.—El Paso 2019, pet. filed) in which the court held that an insurer's pre-appraisal payment was reasonable where the appraisal award was 6.8 times greater than the prior payment.

Finding the pre-appraisal payment was reasonable, the court held that Shin's prompt payment claim was foreclosed as a matter of law.

Court Applies Exception to "Eight Corners' Rule" in Finding that Insurer did not Owe a Duty to Defend Under Non-Trucking Liability

Hudson Ins. Co. v. Alamo Crude Oil, LLC, SA-19-CV-137-XR, 2019 WL 3322867 (W.D. Tex. July 24, 2019).

A court in the Western District of Texas granted summary judgment in favor of an insurance company, holding that the insurer had no duty to defend or indemnify its insured under a non-trucking liability policy.

Hudson Insurance Company ("Hudson") issued a Non-Trucking Liability Policy to Pablo Castaneda, the managing member of Alamo Crude Oil, LLC ("Alamo"), for a policy period of January 1, 2015 to January 1, 2016 (the "Policy"). Coverage under the Policy applied to a 2003 Volvo Truck/Tractor (the "Truck") while it was being operated for non-commercial operations. In the court's words, coverage applied "when the Truck [was being] driven without a trailer attached and without any intent to perform business related activity for the motor carrier that leased the Truck." The Policy had an exclusion for "business-use."

The Truck was involved in a collision while being driven by a driver for a company to which Alamo leased or rented the Truck. In the underlying lawsuit, the driver was alleged to "have acted within the course and scope of his employment for Alamo." However, the driver's reason for traveling westbound on IH-20 when the collision occurred was not alleged. Thus, when Alamo and the driver were named as defendants in the suit, Hudson provided a defense. Subsequently, however, Hudson filed a

declaratory judgment action and a motion for summary judgment against Alamo, seeking a declaration that it owed no duty to defend or indemnify Alamo.

As part of its motion for summary judgment, Hudson argued that it was undisputed that the driver of the Truck was on his way to pick up and haul a load for the company, that there was a trailer attached to the Truck, and that the driver exclusively hauled for the company when he drove the truck. Moreover, it was not disputed that the company's placard was on the Truck at the time of the collision. However, because it was not alleged why the driver was traveling westbound on IH-20 at the time of the collision, Hudson argued that it was impossible to determine whether coverage was potentially implicated by the allegations and, thus, whether a duty to defend had been triggered. As a result, Hudson asked the court to consider extrinsic evidence outside of the "eight corners"—namely, the stipulated facts set out in the parties' Rule 26 report to determine the duty to defend issue.

The court agreed that given the conclusory allegations in the underlying petition, it was impossible to determine whether coverage was potentially implicated, thereby satisfying the first prong of the extrinsic evidence exception.

The court determined that the extrinsic evidence –the parties' stipulated facts that the driver was on his way to pick up a load for the company at the time of the incident —did not overlap with the underlying petition's merits and thus the second prong to the extrinsic evidence exclusion was met.

Considering this evidence, the court then concluded that Hudson met its burden to show that the business-use coverage exclusion in the Policy applied and that Hudson did not owe a duty to defend or indemnify Alamo.

Case Remanded to State Court for Lack of Diversity Under Voluntary-Involuntary Rule When Insurer Accepted Responsibility for Non-Diverse Adjuster After Suit was Filed.

River of Life Assembly of God v. Church Mut. Ins. Co., No. 1:19-CV-49-RP, 2019 WL 1767339 (W.D. Tex. Apr. 22, 2019).

Unhappy with how its storm damage claim was handled, River of Life Assembly of God ("River of Life") sued its insurer, Church Mutual Insurance Company ("Church Mutual"), and Harris, the adjuster who handled the claim, in state court. There was diversity of citizenship between River of Life and Church Mutual, but not between River of Life and Harris. Church Mutual elected responsibility for Harris under Section 542A.006(c) of the Texas Insurance Code and removed to federal court.

Church Mutual's election required the court to dismiss all claims against the adjuster with prejudice. TEX. INS. CODE § 542A.006(c). Church Mutual opposed River of Life's Motion to Remand by claiming improper joinder. The general rule is removal of a case that is non-removable on the initial pleadings is proper only when the case becomes removable pursuant to a voluntary act of the plaintiff. Church Mutual's election of responsibility for Harris was not a voluntary act of River of Life, so the voluntary–involuntary rule for removal did not support removal.

One exception to the voluntary–involuntary rule is improper joinder. Church Mutual argued that Harris was improperly joined because River of Life merely recited provisions of the Texas Insurance Code

against him and did not make specific allegations sufficient to establish a reasonable basis for recovery. River of Life had, however, alleged that Harris informed them that he was retaining an engineer to inspect the property, that the engineer would conclude no functional damage had been done to the property, and that Harris would rely on the engineer's report regardless of the evidence River of Life provided him—all before the engineer ever inspected the property. Because the focus of improper joinder is on whether joinder was proper at the time of joinder (i.e., pleading), and River of Life provided a factual basis for at least one of their claims against Harris, the court concluded that Harris was not improperly joined, and remanded the case to state court.

In this case, Judge Robert Pittman of the Western District of Texas reversed his own precedent of denying prior motions to remand on these facts. In doing so, Judge Pittman joined several other district courts in the Fifth Circuit that have remanded these cases to state courts. Importantly, the law is not settled on this issue. A careful look at the issue judge by judge is necessary. And this case demonstrates that, even if a particular judge has retained prior cases in federal court, that pattern may not predict how a new motion to remand will be handled.

Court Dismisses Insured's UM Claim in the Absence of a Judgment Against the Uninsured Driver.

Duhaly v. Cincinnati Ins. Co., CV H-18-4158, 2019 WL 4034315(S.D. Tex. Aug. 27, 2019).

A federal district court in the Southern District of Texas dismissed, without prejudice, a breach of contract claim arising out of the insurer's alleged failure to pay uninsured motorists ("UM") coverage for lack of subject-matter jurisdiction.

Plaintiff was a passenger in a truck that was rear-ended by an uninsured driver. The truck belonged to Plaintiff's employer who had an insurance policy with The Cincinnati Insurance Company ("Cincinnati") which provided UM coverage.

The UM coverage provision stated that Cincinnati would "pay all sums the 'insured' is legally entitled to recover as compensatory damages from the owner or operator of ... [a]n uninsured motor vehicle" to which "no liability bond or policy applies at the time of the accident,"

Plaintiff sued Cincinnati in Texas state court for failure to pay such benefits and Cincinnati removed. Plaintiff alleged breach of contract and negligence against Cincinnati. Cincinnati moved for summary judgment on Plaintiff's claims, and Plaintiff withdrew the negligence cause of action.

With regard to Plaintiff's breach of contract claim, however, Cincinnati argued that the court lacked subject-matter jurisdiction over the Plaintiff's claims because they were not ripe. This was so because the policy gave Plaintiff's employer UM motorist coverage for "sums the 'insured' is legally entitled to recover," and the Plaintiff had not obtained a judgment establishing the liability or uninsured status of the motorist who caused the collision, or the Plaintiff's damages

The Court based this holding on prior Texas Supreme Court precedent in which it held that an insurer has no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and uninsured status of the other motorist. To determine the liability of the uninsured motorist, the Texas Supreme Court stated that the insured may

obtain a judgment against the tortfeasor or settle the claim and litigate coverage with the insurer. Because Plaintiff had neither offered nor identified summary judgment evidence controverting the absence of a judgment establishing the tortfeasor's liability, his uninsured status, or the damages, the Court held that Plaintiff's breach of contract claim was not ripe and it granted summary judgment in favor of Cincinnati

Court Allows Insured's UIM Claim to Proceed Even in the Absence of a Judgment Against the Underinsured Driver While Abating Insured's Extra-Contractual Claims.

Green v. Allstate Fire & Cas. Ins. Co., SA-19-CV-360-XR, 2019 WL 2744183(W.D. Tex. July 1, 2019)

A federal district court in the Western District of Texas abated an underinsured motorist ("UIM") claim in lieu of dismissal, citing the "unsettled" law regarding the tolling of a UIM cause of action.

Plaintiff Laura Lee Green was rear-ended and alleged severe, disabling, and permanent injuries as a result. Plaintiff submitted an UIM motorist claim to Defendant Allstate Fire and Casualty Insurance Company ("Allstate"), but Allstate allegedly failed to make an offer of settlement or provide Plaintiff a reasonable explanation of the basis for denying Plaintiff's claim. Plaintiff further alleged that Allstate refused to affirm or deny coverage within a reasonable time, refused to pay Plaintiff's claim without conducting a proper investigation, and refused to pay or delayed paying the claim after liability became reasonably clear. Allstate moved for dismissal of Plaintiff's breach of contract, common law bad faith, and Texas Insurance Code violations claims on the basis that Plaintiff failed to state a claim for relief. Plaintiff filed suit against Allstate seeking declaratory relief as well as asserting breach of contract and extra-contractual claims.

With regard to Plaintiff's breach of contract claim, Allstate argued that an insured is not entitled to receive UIM benefits until there is a judgment establishing liability of the underinsured driver and damages for the collision.

However, because the court concluded that the law is unclear as to "what causes of action may be brought in order to settle the liability and damages issues in the UIM litigation context," the prudent course was to allow Plaintiff's breach of contract claim to proceed. Otherwise, Plaintiff would be at risk of losing her remedy altogether based on the unsettled state of the law.

The "unsettled" law that the court referred to was whether a settlement or admission of liability alone was sufficient to establish the insurer's duty to pay UIM benefits. Because courts had stated that the insured may settle with a tortfeasor and litigate the issue of UIM coverage with the insurer without first obtaining a judgment against the tortfeasor, the court considered that the issue of how to litigate UIM coverage was "unsettled."

Further, despite the fact that the insurer's breach of contract could not occur until a plaintiff established legal entitlement to UIM benefits under the contract through a judgment of liability and damages against the tortfeasor, the Court underscored that at least one court has held that the statute of limitations on a breach of contract claim begins to run on the date the insurer denies the claim.

Court chose to abate Plaintiff's common-law and statutory bad faith claims, even though Allstate argued that the claims should be dismissed because of the absence of a

judgment on the breach of contract claim. In so holding, the court noted that a number of Texas appeals courts have held that abatement of extra-contractual claims is required because the parties may incur unnecessary expenses if the breach of contract claim were decided in the insurer's favor. The Court further noted that a number of federal district courts have similarly abated extra-contractual claims pending resolution of an underlying UIM claim. As a result, the Court decided to allow Plaintiff's breach of contract to proceed along with her declaratory judgment claim and to abate Plaintiff's extra-contractual claims.

Insured's Texas Insurance Code and DTPA Claims were Time-Barred.

Roberson v. Allstate Vehicle & Prop. Ins. Co., CV H-19-1393, 2019 WL 2861287(S.D. Tex. July 2, 2019).

A federal district court out of the Southern District of Texas dismissed an insured's first party property damage claims under the Texas Insurance Code and Deceptive Trade Practices Act because the claims were time-barred.

Plaintiff Nancy Roberson filed a hail damage claim with her insurer, Allstate Vehicle and Property Insurance Company ("Allstate"). An Allstate adjuster inspected the damage but concluded that the loss was below Plaintiff's deducible. Later, a tree fell on Plaintiff's home during a storm, and Plaintiff asked Allstate to cover the damage. The Allstate adjuster estimated a cost of repair, but Plaintiff alleged that the adjuster failed to account for the other storm damage that the roof sustained. Plaintiff argued that the Allstate adjusters "had a vested interest in undervaluing the claims assigned to them… to maintain their employment" and also alleged fraud.

Plaintiff first sued Allstate in 2016 but voluntarily dismissed the case to "re-plead…at a higher level of damages." Plaintiff then refiled the case, but voluntarily dismissed it after Allstate moved for abatement. Plaintiff filed her third suit against Allstate in March of 2019 and Allstate timely removed. Allstate moved for judgment on the pleadings, asserting that Plaintiff's non-fraud claims were time-barred because the two-year limitations period expired before the action was filed. In response, Plaintiff argued that the court should equitably toll the limitations period based on alleged misrepresentations that Allstate made during Plaintiff's second lawsuit.

Because claims under the Texas Insurance Code and Deceptive Practices Act are subject to a two-year statute of limitations, the Court held that Plaintiff's causes of action were time-barred unless equitable tolling applied. The Court underscored that Texas courts "sparingly apply equitable tolling" and look to whether a plaintiff diligently pursued her rights. According to the Court, the Texas Supreme Court has recognized only two doctrines that may toll a limitations period: the discovery rule and fraudulent inducement.

Plaintiff argued that the court should toll the limitations period in her case based on fraudulent inducement because Allstate refused to negotiate or re-inspect her property after dismissal of the second case. However, Plaintiff conceded that the parties did in fact negotiate after the dismissal, foreclosing Plaintiff's argument.

Accordingly, the Court held that equitable tolling did not apply and that the filing of the prior two suits did not toll the limitations period. As a result, the Court held that

Plaintiff's non-fraud claims under the Texas Insurance Code and DTPA were time-barred and dismissed the claims with prejudice.

Insurers Must Share Equally in Defense of Insured Because Other Insurance Clauses were Mutually Repugnant and Indemnity Agreement did not Apply

Employers Mutual Cas. Co. v Amerisure Ins. Co., No. 4:18-CV-00330, 2019 WL 3717634, at 1 (E.D. Tex. Aug. 7, 2019).

Finding that an indemnity agreement between a general contractor and subcontractor was not triggered by an injured plaintiff's lawsuit, a federal district court out of the Eastern District of Texas held that two general liability insurers must split the costs of defense on a pro rata basis for the general contractor.

As part of the construction of a church, Mycon General Contractors, Inc. ('Mycon") hired Hatfield Acousticals & Drywall, Inc. ("Hatfield") as a subcontractor. Mycon was covered under a liability policy issued to it by Employers Mutual Casualty Company ("Employers"), while Hatfield was insured under a liability policy issued by Amerisure Insurance Company ("Amerisure"). Both policies contained mutually repugnant "other insurance" clauses stating that when other insurance provides coverage they are excess to such insurance. Pursuant to the subcontract between them, Hatfield named Mycon as an additional insured on its liability policy issued by Amerisure and agreed to defend and indemnify Mycon against all claims arising out of or resulting from Hatfield's work.

Thereafter, Hatfield employed a drywall mechanic named Vincente Chavez ("Chavez") during the construction project. Chavez allegedly sustained injuries during the construction project when a steel beam broke and struck Chavez in the head. In his personal injury lawsuit filed against Mycon and Lloyd Plyler Construction L.P. ("Plyler"), a third party, Chavez alleged that he and another Hatfield employee were working on the bottom floor of the church while Plyler employees were cutting a steel beam above Chavez. Before finishing the cut, a Mycon safety supervisor noticed that the Plyler employees were not properly tied off or secured. Accordingly, he ordered them to stop their work and retrieve the proper safety equipment. However, as the Plyler employees left to retrieve their safety equipment, a partially cut steel beam was left unsecured. The beam then broke off and swung around striking Chavez in the head. Chavez only sued Mycon and Plyler—not Hatfield—for negligence and gross negligence.

In a subsequent coverage action brought by both insurers for Mycon and Hatfield regarding the insurers' respective duties to defend, Amerisure argued that the two policies' other insurance provisions were mutually repugnant, requiring the Court to disregard them and to apportion the costs of Mycon's defense on a pro rata basis between Amerisure and Employers. Employers, on the other hand, focused on the indemnity provision in the subcontract between Hatfield and Mycon in which Hatfield agreed to defend and indemnify Mycon. It asserted that the indemnity provision is enforceable and Chavez's lawsuit triggered the indemnity provision. Therefore, Employers asserted that the indemnity provision shifts exposure for Chavez's lawsuit to Hatfield, and since Amerisure insures Hatfield, it bears the sole duty to defend Mycon without contribution from Employers.

However, on competing motions for summary judgment, the trial court agreed with Amerisure and found that Chavez's

allegations in his lawsuit did not trigger the subcontract's indemnity provision. The Court noted that the words of limitation in the Mycon-Hatfield indemnity provision demonstrated that the parties intended for Hatfield to indemnify Mycon only for claims arising from or as a result of Hatfield's work. It further noted that Chavez's allegations in his lawsuit did not demonstrate that his or Hatfield's presence on the construction project "formed part of the natural and continuous sequence that produced his injury." Accordingly, because Chavez's lawsuit did not trigger the indemnity provision of the Mycon-Hatfiled subcontract, the mutually repugnant other insurance clauses cancelled each other out, requiring Amerisure and Employers to contribute to Mycon's defense on a pro rata basis.

Remand of a Property Damage Claim Denied Even Though Insured Alleged He Would Never Take a Judgment Exceeding $75,000

Abascal v. United Prop. & Cas. Ins. Co., 4:18-CV-03930, 2019 WL 3229174(S.D. Tex. July 18, 2019)

A federal district court out of the Southern District of Texas denied a Plaintiff's motion to remand even though in his state court petition Plaintiff alleged that he would "never ask, receive, or take a judgment for any amount exceeding $75,000."

Defendant United Property & Casualty Insurance Company ("United") insured Plaintiff Fernando Abascal against windstorm damages. After Hurricane Harvey, Plaintiff filed an insurance claim for property damage which United partially denied. As a result, Plaintiff filed suit in state court, but United removed.

In considering whether Plaintiff stipulated with legal certainty that the amount in controversy was below $75,000, the Court looked at the Plaintiff's allegations that he had incurred economic damages of $19,303.41. The court noted that Plaintiff also sought treble damages, eighteen percent penalty interest, attorney's fees, court costs, "punitive and exemplary damages" for alleged violations of the Texas Insurance Code, fraud, and breach of good faith and fair dealing.

The court reviewed a similar case in which a court held that because the plaintiff's original petition sought treble damages and exemplary damages in addition to other requested damages, it was clear that the amount in controversy exceeded $75,000. Likewise, here, by the face of the petition, the court held that it was clear that the amount in controversy exceeded $75,000. The Court also held that Plaintiff's allegation that he would not take any amount above $75,000 was not a binding stipulation. Thus, the federal court had jurisdiction.

Breach of Contract Exclusion Precluded a Duty to Defend a Suit for Property Damage Causally Attributable or Related to an Insured's Breach of its Contractual Obligations

Mt. Hawley Ins. Co. v. Slay Eng'g, 390 F. Supp. 3d 794 (W.D. Tex. 2019).

Mt. Hawley Insurance Company ("Mt. Hawley") argued it did not have a duty to defend its insured, a general contractor, in a suit arising from a construction project due to the "Breach of Contract Exclusion" endorsement. The endorsement states that coverage does not extend "to any claim or 'suit' for . . . 'property damage' . . . arising directly or indirectly out of . . . [b]reach of express or implied contract." The Court

found the scope of the endorsement ambiguous and concluded the endorsement did not exclude coverage for property damage caused solely by defective work of the insured's subcontractors.

Regardless, this limited scope applied to all alleged property damage in the suit because all of the alleged property damage was "causally attributable" to the insured's breach of contractual obligations. The Court considered the fact the insured agreed to obligations far exceeding a basic agreement to not perform defective work under the construction contract, such as managing construction activities and providing onsite quality control and assurance. The Court also factored in allegations in the pleadings that defective work completed by the insured's subcontractors was done at the direction of the insured, and that the insured breached the contract by failing to correct all defective work.

These allegations show that even if the subcontractors were initially responsible for the defective work, the insured breached the contract by failing to supervise the work and by not repairing the defective work as required under the contract. In summary, the contract claims relate to property damage that "arises directly or indirectly" out of breach of contract. Additionally, the endorsement applied to the negligence claim because the negligence was "incidentally related" to the breach of contract claim. Specifically, allegations the insured failed to perform work in a good and workmanlike manner, to comply with plans and specifications, and to use the standard of care employed by a reasonably prudent contractor overlapped with allegations supporting the breach of contract claim. Accordingly, Mt. Hawley had no duty to defend the insured in the underlying suit.

Breaching Insurer may not Challenge the Reasonableness and Necessity of an Insured's Attorney's Fees, Though it may Contest the Admissibility and Sufficiency of the Insured's Evidence. TPPCA Penalty Interest Begins When an Insured Incurs Defense Costs and Ends When Final Judgment is Entered.

Columbia Lloyds Ins. Co. v. Liberty Ins. Underwriters, Inc., No. 3:17-CV-005, 2019 WL 2296920 (S.D. Tex. May 20, 2019).

The Court in this case held the insurer breached its duty to defend its insureds. The insurer then attempted to challenge the reasonableness and necessity of its insureds' attorney's fees. But a breaching insurer cannot directly challenge the reasonableness and necessity of an insured's attorney's fees, though it can contest the admissibility or sufficiency of the insured's evidence. As such, the Court required an invoice, at a minimum, must include proof of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required in order to sufficiently support the amount of attorney's fees requested.

The insurer also argued that the 18% penalty interest under the Texas Prompt Payment of Claims Act ("TPPCA") should be calculated based on the amount of fees owed at the time of the Court's damages determination. The Court disagreed and held that TPPCA penalty interest is calculated at the time the insurer breaches its duty to defend, which begins when an insured incurs defense costs or pays each bill for attorney's fees. But TPPCA penalty interest ends when there is a judgment or other final adjudication in the underlying action. In an arbitration, an arbitrator's award is final when it is confirmed by a court of competent jurisdiction. The TPPCA also allows for the

recovery of prejudgment interest, but such calculation must be reserved until the court enters final judgment.