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Rick Boepple, Jr.
David A. Clark
Timothy Cook
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 Fall 2018 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.

Who, What, Where – *Deepwater* Revisited.

***Exxon Mobil Corp. v. Ins. Co. of the State of Pennsylvania,* 568 S.W.3d 650 (Tex. 2019).**

Endorsement waiving workers' compensation insurer's subrogation rights applied to preclude carrier's recovery because the endorsement refers to another contract only to identify who may claim the waiver and at what operations, but the endorsement does not refer to, and thus does not incorporate, any other limitations in the other contract. Courts refer to an incorporated document only to the extent required by the insurance policy.

Exxon Mobil hired Savage Refinery Services to perform work at its Baytown refinery pursuant to its Standard Procurement Agreement (the "Service Contract"). Two of Savage's employees were injured while performing the work and Savage's workers' compensation carrier, the Insurance Company of the State of Pennsylvania ("ISOP"), paid benefits to the injured workers. One of the injured workers sued Exxon. In that lawsuit, Exxon did not contend that Savage was responsible for the accident or had agreed to assume liability for Exxon's liability. Rather, Exxon filed a declaratory judgment action seeking a determination that ISOP had waived all recovery rights against Exxon by virtue of an endorsement to its workers' compensation policy that provided as follows:

> We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization [1] named in the Schedule, but this waiver applies only with respect to [2] bodily injury [3] arising out of the operations described in the Schedule where [Savage is] required by a written contract to obtain this waiver from us.

Exxon was not specifically named in the Schedule. Rather, the policy included a blanket waiver that waived subrogation when the insured had contractually agreed to provide it to a particular party, but only if the insured agreed to provide the waiver for Texas operations causally connected to the injuries.

ISOP contended that the Service Contract should be consulted to ascertain whether

Savage "agreed by written contract" and is "required by a written contract" to furnish the waiver of subrogation. The Texas Supreme Court stated that the provisions of the Service Contract dealing with Savage's insurance-coverage obligations and indemnity obligations were potentially at issue. Savage was required to obtain and maintain particular types of insurance and to obtain its insurers' waivers of subrogation and contribution rights against Exxon "to the extent" Savage "assumed" "liabilities." The Service Contract also included mutual indemnity agreements whereby Savage and Exxon agreed to indemnify each other for personal injury claims resulting from their own negligence, but they did not assume liability for claims resulting from the other party's tortious conduct. Thus, if a Savage employee was injured due to Exxon's negligence, as alleged, Exxon and ISOP both agreed that Savage was not required to indemnify Exxon. The question was whether the limited indemnity agreement had any impact on Savage's agreement to obtain a waiver of subrogation.

ISOP contended that Savage's agreement to provide a subrogation waiver was conditioned on its assumption of liability and was, therefore, limited to Savage's indemnity obligations under the contract. Exxon, on the other hand, asserted that if the Service Contract could be considered, it simply identified who was entitled to a subrogation waiver and no other contractual limitations on the obligation to provide the waiver could be considered. Alternatively, Exxon argued that Savage's assumption of liability extended not only to its indemnity obligation, but also to its obligation to provide workers' compensation insurance. Thus, whether the waiver of subrogation provisions in the ISOP policy inured to Exxon's benefit depended upon whether the right to invoke the waiver was limited by the terms of the Service Agreement.

The Court held that "the standard subrogation-waiver endorsement directs us to consult the Service Contract to determine whether Savage was 'required by a written contract' to obtain a subrogation waiver for Exxon and to determine whether that obligation applies to the operations described in the Schedule, but only to that extent." The Court noted that unlike the insurance policies at issue in *In re Deepwater Horizon* and *Ken Petroleum Corp. v. Questor Drilling Corp,* the subrogation waiver does not refer to or incorporate any limits on coverage that might exist in the Service Contract. Therefore, the Court did not consider any limitation on the scope of coverage in the Service Contract.

With respect to the subrogation waiver, the Service Contract provided that:

> [Savage] and its insurer(s) providing coverage in this Section shall waive all rights of subrogation and/or contribution against [Exxon] to the extent liabilities are assumed by [Savage] …

ISOP contended the Court must consider the limitation in the Service Contract, which leads to the indemnity agreement, and that since Savage is not required to indemnify Exxon, it has not assumed liability, and similarly, is not obligated to obtain a waiver of subrogation. Exxon contended that the Court could not consider the limitation at all because the endorsement does not incorporate any extrinsic limitations and that even if the limitation was considered, it is satisfied despite the fact that Savage is not obligated to indemnify Exxon for the loss.

In analyzing the waiver of subrogation endorsement, the Court stated that the

endorsement called for three requirements to activate the waiver – Who, What, and Where. The endorsement required: (1) identification of the claimant as a covered party in the Schedule – either specifically named or by reference to another contract – Who; (2) bodily injury – What; (3) arising from operations meeting the description in the Schedule for which the waiver was required by a written contract – Where. While reference to the Service Contract was necessary to identify the party for whom Savage was obligated to obtain a waiver of subrogation – Exxon – and was also necessary to identify the "where" – Texas operations where Savage was required by written contract to obtain the waiver of subrogation from its insurer -- the endorsement did not incorporate any other limitations.

Therefore, despite the fact that all parties agreed that Savage was not obligated to indemnify Exxon for the loss, the Court held that, "[t]he subrogation waiver does not instruct us to look for an assumption of liability or an agreement to indemnify, so we must not."

Thus, considering the Service Contract only to the extent necessary, the Texas Supreme Court held that ISOP agreed to waive subrogation against Exxon with respect to the bodily injury claim of Savage's employee.

Context Matters – "Lingering Ripples" from Deepwater Horizon.

***Anadarko Petroleum Corp. v. Houston Cas. Co.*, ___S.W.3d ___; 2019 WL 321921 (Tex. 2019).**

Joint Venture Provision in Energy Package Policy reduced limits owed by underwriters for the insured's "liability … insured," but did not reduce the limits available to pay "Defence Expenses." As a result, Underwriters owed the insured for its defense costs up to the total remaining policy limit.

Anadarko entered into a joint venture with BP entities and MOEX Offshore 2007 LLC regarding the Macondo Well in the Gulf of Mexico. Anadarko held a twenty-five percent interest.

Numerous parties filed claims against BP, Anadarko and MOEX seeking damages for bodily injury, wrongful death and property damage as a result of the well blow-out in April of 2010. Many of those claims were consolidated into a multi-district litigation (the "MDL") pending in federal court in Louisiana. The federal government also sought civil penalties under the Clean Water Act and a declaratory judgment of liability under the Oil Pollution Act of 1990. The MDL court entered a declaratory finding that BP and Anadarko were jointly and severally liable under the Oil Pollution Act. BP and Anadarko reached a settlement whereby Anadarko agreed to transfer its twenty-five percent ownership interest to BP and additionally to pay BP $4 billion. BP released any claims it had against Anadarko and agreed to indemnify Anadarko against any liabilities arising from the Deepwater Horizon incident. BP did not agree to pay Anadarko's legal fees or defense expenses.

Anadarko had purchased an "energy package" policy through the Lloyd's London market. Section III of the policy provided excess liability coverage up to $150 million per occurrence. Section III's insuring agreement obligated Underwriters to indemnify Anadarko for Ultimate Net Loss "by reason of liability imposed upon [Anadarko] by law" for damages with respect to bodily injury, personal injury, property damage or advertising injury caused by an

occurrence. Ultimate Net Loss was defined as:

> [T]he amount [Anadarko] is obligated to pay, by judgement or settlement, as damages resulting from an "Occurrence" covered by this Policy, including the service of suit, institution of arbitration proceedings and all "Defence Expenses" in respect of such "Occurrence."

Thus, while the policy did not require Underwriters to defend Anadarko, it did require Underwriters to reimburse Anadarko for expenses incurred in its defense, up to the policy limit.

The policy also contained an endorsement entitled "Joint Venture Provision" which contained three clauses, the first of which reduced the coverage limit for liability arising out of the operation of a joint venture to the insured's percentage ownership. The second and third clauses were exceptions to the first clause, which the court ultimately did not have to address. The first clause read as follows:

> [A]s regards any *liability* of [Anadarko] which is *insured* under this Section III and which arises in any manner whatsoever out of the operation or existence of any joint venture … in which [Anadarko] has an interest, the liability of Underwriters under this Section III shall be limited to the product of (a) the percentage interest of [Anadarko] in said Joint Venture and (b) the total limit afforded [Anadarko] under this Section III.

Relying on the Joint Venture Provision, Underwriters paid Anadarko $37.5 million (25% of the $150 million limit, corresponding with Anadarko's ownership interest) in connection with its settlement with BP. Anadarko maintained that Underwriters must also pay its defense costs up to the remaining portion of the $150 million limit. Underwriters contended that the Joint Venture provision limits their liability to twenty-five percent of Anadarko's $150 million limit and that was satisfied by the payment of $37.5 million.

The parties debated the meaning of the "liability … insured", in the first clause of the Joint Venture Provision, as well as the interaction of that term with the definition of Ultimate Net Loss, which included "Defence Expenses."

The Texas Supreme Court concluded that various provisions of Section III, including the Joint Venture Provision, used the term "liability" to refer to a legally-imposed obligation to pay for a third-party's damages. The Court found no policy provision that suggested that a reference to "liability … insured" included defense expenses and in fact noted that the policy frequently referred to liabilities and expenses separately.

Turning to the specific language of the first clause of the Joint Venture Provision, the Court found that it limited Underwriters' liability under Section III "'as regards any liability' of Anadarko that is insured and arises out of a joint venture." While the Joint Venture Provision limited Underwriters' liability for Anadarko's $4 billion settlement to twenty-five percent of the $150 million limit, because Anadarko's defense costs are not *liabilities*, the clause did not limit Underwriters' obligation to pay those defense costs up to the remaining portion of the $150 million limit.

The Court reversed the Court of Appeals' judgment, rendered judgment granting

Anadarko's motion for partial summary judgment and remanded the case to the trial court for further proceedings.

Client or Testifying Expert? – Issues with Attorney-Client Privilege.

***In Re City of Dickinson,* 2019 WL 638555, -- S.W.3d -- (Tex. 2019).**

In a mandamus proceeding, the Texas Supreme Court was tasked with resolving whether a client, who testifies as an expert witness in the client's own case, waives the attorney-client privilege with respect to the client's expert testimony. The Court held it is not waived in such circumstances.

The City of Dickinson purchased a commercial windstorm policy from Texas Windstorm Insurance Association ("TWIA"). In a lawsuit filed by the City, it alleges that TWIA did not pay all it owes under the policy for property damage caused by Hurricane Ike. The City filed a motion for summary judgment in the suit on the issue of causation.. TWIA's response to the motion included an affidavit of its corporate representative, Paul Strickland, providing both factual and expert opinion testimony.

The City subsequently learned during Strickland's deposition that his affidavit had been revised in a series of emails between Strickland and TWIA's counsel. The City in turn moved to compel TWIA to produce these email exchanges with counsel along with all other "documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for Strickland in anticipation of his testimony as an expert," or alternatively to strike Strickland's testimony.

TWIA responded that the emails were protected by the attorney-client privilege. However, in a filing error, TWIA efiled fifty-five pages of the emails it asserted were privileged information. TWIA immediately filed a motion to withdraw the email communications it accidently filed pursuant to Texas Rule of Civil Procedure 193.3(d)—the snap-back provision. This motion, however, was denied by the trial court, and the City's motion to compel was granted.

Thereafter, TWIA sought mandamus relief from the Fourteenth Court of Appeals. The Court of Appeals conditionally granted TWIA's mandamus petition, holding that the trial court's orders compelling production and denying snap-back were an abuse of discretion. The Court of Appeals concluded that the email exchanges and accompanying drafts of Strickland's affidavit between him and counsel were attorney-client communications and subject to privilege notwithstanding Strickland's additional role as a testifying expert in the litigation.

The City subsequently filed a mandamus petition with the Texas Supreme Court complaining that the Court of Appeals abused its discretion in setting aside the trial court's orders because the discovery rules clearly require the production of documents furnished by or to a testifying expert and make no exception for when that expert is also a party or employee of a party to the litigation. In essence, the City argued that in such circumstances, the attorney-client privilege is waived.

The Texas Supreme Court rejected the City's argument, however, stating it "will not create a new exception" to the attorney-client privilege. Rather, the Supreme Court focused its examination on whether the text of the discovery rules the City relied on actually waives the attorney-client privilege when the client or its employee is a testifying expert witness. Using statutory construction rules

and principles, the Texas Supreme Court held that the discovery rules do not operate to waive the attorney-client privilege whenever a client or its representative offers expert testimony, reasoning as follows:

> The City of Dickinson seeks to broaden the scope of expert discovery to include materials that is otherwise protected by the attorney-client privilege. While Texas's expert discovery rules ae broad, they remain subject to the attorney-client privilege, which is not waived merely by a client's decision to offer expert testimony.

Accordingly, the Supreme Court found that the Court of Appeals did not abuse its discretion in vacating the trial court's discovery orders, and denied the City's petition for mandamus relief.

Disposition of Claims and Notices of Appraisal Rights in Other Cases – Discovery Issues.

***In Re Texas Windstorm Insurance Association*, No. 09-18-00446-CV, 2019 WL 1387107, at *1 (Tex. App.—Beaumont March 28, 2019, no pet.) (mem. op.).**

In a writ of mandamus proceeding, the Beaumont Court of Appeals found that the trial court abused its discretion by allowing discovery of an insurer's letters regarding the disposition of claims and notices of appraisal rights in cases other than that of the plaintiff.

Dolores Gonzalez filed suit against her property insurer, Texas Windstorm Insurance Association ("TWIA"). Gonzalez alleged in her pleadings that her property was damaged by Hurricane Harvey and sought coverage for her damages under her TWIA insurance policy. According to Gonzalez, TWIA initially denied her claim for alleged wind and hail damage, but after she filed suit and demanded appraisal, TWIA issued a revised claim-disposition letter accepting coverage for interior damage but continuing to deny coverage for all exterior damage.

After filing suit, Gonzalez deposed the claims adjuster assigned to her claim and obtained a November 2, 2018 trial court order compelling TWIA to produce a corporate representative to address the following topics:

> 1. The purpose, intent and effect of "new disposition" letters;
>
> 2. The standard procedure for gathering information for, and then sending, notice letters (acceptance, denial, or partial acceptance);
>
> 3. The TWIA employee (or indep. contractor) hierarchy during Hurricane Harvey and now; and
>
> 4. The meaning of documentation sent to insureds informing them of their rights to appraisal and what will be appraised.
>
> The aforementioned topics and examination thereon will be limited, however, to this matter, as well as TWIA's general standards, policies, and procedures on instances where changes were made to an initial determination of coverage or payment of a claim. In such instances, Plaintiff may inquire into those topics set forth herein, including without limitation TWIA's practices, guidelines, and policies in situations where any changes were made to an initial determination of coverage or payment of a claim.

On TWIA's petition for writ of mandamus, the Beaumont Court of Appeals pointed to the Texas Supreme Court's opinion in *In re Nat'l Lloyds Ins. Co.* where it held that National Lloyds' payment of claims of unrelated parties with property damaged in the same storms as the plaintiff's was not probative of the insurer's conduct with respect to the plaintiff's claim that her property had been undervalued. In finding that the mandamus proceeding in Gonzalez's lawsuit presented a similar situation, the Court of Appeals found that the trial court abused its discretion in allowing the discovery of letters regarding the disposition of claims and notices of appraisal rights in cases other than Gonzalez's:

> The trial court allowed discovery of procedures for gathering information and sending notice letters without regard to whether the procedure in question was applied in Gonzalez's case or was applicable to her but was not applied... By allowing discovery where any changes were made to an initial determination of coverage or payment of a claim, the trial court allowed discovery that is not probative of TWIA's conduct with respect to Gonzalez's claim.

Accordingly, the Beaumont Court of Appeals granted TWIA's petition for writ of mandamus and ordered the trial court to vacate its November 2, 2018 order.

Severance of Extra-Contractual Claims in UIM – Sufficiency of Extra-Contractual Claims.

***Am. Nat'l County Mut. Ins. Co. v. Holland*, 12-18-00141-CV, 2019 WL 1272954, at *1 (Tex. App.—Tyler Mar. 20, 2019, no pet. h.).**

The Tyler Court of Appeals reversed, remanded, and rendered in part a trial court's judgment in favor of an insured, holding that the court should have severed and abated the insured's extracontractual claims and that the evidence with regard to the extracontractual claims was insufficient to support the jury's findings.

American National County Mutual Insurance Company ("American") issued Tina Holland a personal automobile policy. Holland was involved in a motor vehicle collision and informed American that she intended to recover her damages from the other driver's insurance carrier. Holland also told American that she did not intend to make a PIP claim at that time. Holland sought American's permission to settle with the other driver's carrier and American responded that Holland could settle as long as it was within the other carrier's policy limits and no payments were claimed under American's PIP or UIM coverage. However, after settling with the other driver and his carrier, Holland requested payment of the full UIM benefits and also requested PIP benefits. Although American paid Holland the full PIP benefits, it did not pay UIM. Holland sued American for breach of contract under the UIM provision and also for violations of the Texas Insurance Code. American filed a motion to sever and abate which the trial court denied. Following the trial, the jury awarded Holland $120,000 and found that American "knowingly" engaged in an unfair or deceptive act or practice and also violated the duty of good faith and fair dealing.

In reviewing the lower court's findings, the appellate court noted that it was undisputed that the extracontractual claims would be the proper subject of a lawsuit if independently asserted and not so interwoven with the UIM claim that they involved the same facts and

issues. Therefore, the primary inquiry was whether American was prejudiced by the failure to sever. Because the jury was able to hear testimony that Holland was aggravated with American and endured hardship because her UIM claim had not been paid, the court found that American had been prejudiced because UIM benefits were not owed until Holland obtained a judgment establishing that the other driver was underinsured and showing the extent of her damages. As a result, the court found that the jury inflated the damage award to ensure that Holland received the entirety of her $100,000 in UIM benefits.

With regard to the sufficiency of the evidence behind the jury's finding that American breached its duty of good faith and fair dealing under the Texas Insurance Code, the court analyzed whether American's consent-to-settlement letter could constitute a breach. Holland argued that the letter misstated her rights by attempting to condition permission to settle with the underlying motorist on waiving her PIP and UIM claims and thus there was sufficient evidence to support the jury's findings that American engaged in a deceptive or unfair act or practice and violated the duty of good faith and fair dealing. In turn, the court reasoned that the purpose of the consent-to-settlement letter in a UIM case is to protect the insurance company's subrogation rights. As a result, the court held that the letter did not misrepresent Holland's rights or policy provisions and did not constitute, in this context, an unfair settlement practice. Moreover, the court underscored that American sent its consent-to-settlement letter before Holland had settled her claim and therefore before American had a duty to settle Holland's UIM claim. As the court reiterated, American had no duty to pay until the other driver's liability and Holland's damages were established. As a result, the court concluded that American could not have breached its duty regarding payment of UIM benefits and could not have engaged in an unfair or deceptive settlement practice or violated the duty of good faith and fair dealing at the time of the letter. Based on the foregoing, the court held that there was no evidence to support the jury's findings that American engaged in a deceptive or unfair act or practice or violated its duty of good faith and fair dealing. As a result, the court held that the evidence was legally insufficient. The court remanded the contractual UIM clam for a new trial, reversed the trial court's judgment on the extracontractual claims and rendered a take nothing judgment in favor of American on those claims.

An Ex Parte Hearing is Clearly Error, But Such Error is Not Harmful if the Court Properly Applies the Law and the Absent Party's Presence Would Not Have Changed the Outcome of the Court's Ruling.

***Salinas v. State Farm Lloyds*, No. 13-18-00129-CV, 2019 WL 1561998 (Tex. App.—Corpus Christi Apr. 11, 2019, no pet.).**

While holding the trial court's ex parte hearing was error, the Corpus Christi Court of Appeals found the error was not harmful because the trial court properly applied the offer-of-settlement standard under Texas Rule of Civil Procedure 167 to the one-satisfaction rule.

Israel and Hilda Salinas sued State Farm Lloyds ("State Farm") for failing to pay for damages to their home caused by a hailstorm asserting multiple causes of action, including breach of contract and unconscionable conduct under the Texas Deceptive Trade Practices Act. Thereafter, State Farm offered the Salinases a settlement of $25,900 under

Rule 167. The settlement offer expired without a response from the Salinases.

At trial, the jury returned a verdict in favor of the Salinases and awarded them $10,500 for the breach of contract claim and $10,500 for the unconscionable conduct claim. The final judgment awarded the Salinases $10,500 for the breach of contract claim, $9,066.82 for prejudgment interest, $10,500 for attorney's fees, and $8,097.05 for costs of court, totaling $38,163.87.

Subsequently, State Farm filed a motion to modify the final judgment, arguing for a take-nothing judgment because the Salinases' award was less than 80% of its original offer of settlement. The trial court reset the hearing several times due to schedule conflicts.

When the hearing was finally set on December 11, 2017, the Salinases' counsel informed the trial court that he would be unavailable in person due to a deposition. The court agreed to hold the hearing by telephone between 8:15 a.m. and 8:30 a.m. Around 8:30 a.m. on December 11, 2017, the Salinases' counsel called the court and was informed that the judge had not yet arrived but that the court would call him at 9:00 a.m. The trial court never called the Salinases' counsel and signed a modified final judgment that reduced the Salinases' award to zero without the Salinases or their counsel present. The trial court found the Salinases could only recover under either the breach of contract or unconscionable conduct claim under the one-satisfaction rule because the awards were for the same injury. After subtracting the deductible from the award for the breach of contract claim, accounting for attorney's fees incurred prior to the expiration of the settlement offer, and adding interest, the Salinases' judgment totaled $15,354.45, which was less than 80% of State Farm's settlement offer and lower than State Farm's litigation costs

The Corpus Christi Court of Appeals found the Salinases had the right to be at the hearing, and, thus, the trial court erroneously held an ex parte hearing. Regardless, such error was not harmful because the trial court properly limited the Salinases' recovery to the breach of contract claim under the one-satisfaction rule. Further, because the actual damages totaled less than 80% of State Farm's settlement offer, State Farm was entitled to offset the Salinases' award of damages with its litigation costs of $31,254.35 under Rule 167.

As the Salinases' presence at the hearing would have made no difference in the trial court's ruling, the ex parte hearing did not lead to an improper judgment.

Professional Liability Endorsements and Cooperation Clauses – Policy Interpretation Issues.

***Mid-Continent Casualty Company v. Petroleum Solutions, Inc.*, 2019 WL 927020, -- F.3d – (5th Cir. 2019).**

In 1997, Petroleum Solutions, Inc. ("PSI") constructed and installed an underground fuel tank system for Bill Head Enterprises ("Head") underneath its truck stop. In 2001, Head discovered fuel had leaked from the system. PSI notified Mid-Continent Casualty Company, with whom it had a commercial general liability policy. Mid-Continent and PSI believed that the cause of the leak was a faulty flex connector manufactured by Titeflex Corporation ("Titeflex").

Head eventually sued PSI in February 2006. Mid-Continent assumed PSI's defense but reserved its rights as to coverage obligations under the Policy. PSI later filed a third-party

claim against Titeflex, arguing that Titeflex was strictly liable and seeking contribution and indemnity. Titeflex in turn filed a counterclaim against PSI.

In June 2008, Mid-Continent informed PSI that Titeflex had offered to dismiss its counterclaim if PSI would dismiss its third-party claim with prejudice. However, PSI refused to dismiss its claims with prejudice, despite Mid-Continent's urging for it to do so. The case proceeded to trial and the jury returned a verdict in favor of Titeflex.

Mid-Continent then filed a declaratory judgment action seeking a determination of the parties rights under the policy issued to PSI. It alerted PSI that it was denying coverage for the Titeflex judgment because PSI breached the Cooperation Clause by refusing to dismiss its third-party claims against Titeflex. Mid-Continent also informed PSI that although the Professional Liability Endorsement ("PLE") potentially provided coverage for the Titeflex judgment, Exclusion q of the endorsement for intentional acts precluded coverage.

Cross motions for summary judgment were filed and the trial court held that the PLE did not provide coverage for the Titeflex judgment, but that if it had, Exclusion q would not apply. The court concluded that without the PLE the Policy provided coverage for only part of the Titeflex judgment. It also concluded that the Cooperation Clause applied to PSI's claim against Titeflex, but genuine issues of material fact existed about whether PSI complied with the Cooperation Clause. The case proceeded to trial on this issue and the jury entered a verdict in PSI's favor. The trial court then entered judgment partially in PSI's favor pursuant to its conclusion that only a portion of the Titeflex judgment was covered. PSI appealed and Mid-Continent cross appealed.

Dealing first with the Cooperation Clause, the Fifth Circuit noted that the policy requires PSI to "cooperate with [Mid-Continent] in the investigation or settlement of the claim or defense against the 'suit.'" Mid-Continent argued that PSI breached this clause by refusing to dismiss its third-party claim against Titeflex. However, the Fifth Circuit rejected this argument reasoning that "Mid-Continent offer[ed] no law to support its novel and dubious concept that the Cooperation Clause applies to an insured's affirmative claims against a third party, and the direction of the law in this area is against such a conclusion." Thus, the Court refused to endorse the trial court's holding, but given that PSI prevailed at trial on the issue as to whether it beached the Cooperation Clause, it found it "unnecessary to address the legal question further."

Turning next to whether the PLE covers the entire Titeflex judgment, the Fifth Circuit noted that the Endorsement added a subsection to the policy's insuring agreement providing that "'Bodily Injury', 'Property Damage' or 'Money Damages' arising out of the rendering or failure to render professional services shall be deemed to be caused by an 'occurrence.'" "Money Damages" was defined in the policy to mean "a monetary judgment, award, or settlement." It was also noted that the Exclusion q under the PLE for "loss caused intentionally by or at the direction of the insured..."

On appeal, PSI argued that the PLE provided coverage for the Titeflex judgment because the Titeflex judgment was a monetary judgment arising out of PSI's professional services: installation of the fuel tank system at Head's truck stop. Mid-Continent countered this argument contending first that

the PLE does not expand coverage beyond the damages covered under the insuring agreement, but instead simply created another definition of "occurrence" by clarifying that damages "arising out of the rendering or failure to render professional services" are considered accidental. Second, Mid-Continent argued that the Titeflex judgment did not arise out of PSI's installation of the fuel tank system, but from PSI's intentional refusal to settle Titeflex's claim, triggering Exclusion q.

The Fifth Circuit rejected Mid-Continent's first argument reasoning that Mid-Continent's interpretation of the PLE "renders superfluous the definition of 'occurrence' based on Money Damages and the addition of Money Damages to the 'Definitions' section of the Policy." The Court further noted that, despite Mid-Continent's argument to the contrary, the purpose of the PLE must be to add coverage, and prior case law has concluded the same for similar endorsements. Accordingly, the Fifth Circuit found that the PLE provided coverage for the entire Titeflex judgment, and the district court erred in its summary judgment holding that it does not.

The Court also rejected Mid-Continent's second argument that the PLE's Exclusion q applied to preclude coverage for the Titeflex judgment. The Fifth Circuit noted that even if Mid-Continent is correct that the relevant underlying conduct is PSI's refusal to settle the Titeflex claim, "[t]here is no genuine issue of material fact as to whether PSI caused the Titeflex judgment intentionally... [T]he mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent." As a result, the Fifth Circuit found that the trial court did not err in concluding that Exclusion q did not apply. The trial court's judgment was affirmed in part and reversed in part.

Submission of a Proof of Loss Form Required Under the Standard Flood Policy a Prerequisite for Obtaining Policy Benefits that Cannot be Altered or Waived.

***Yanez v. American Strategic Insurance Corp.*, No. 18-10943, 2019 WL 1219999 (5th Cir. Mar. 13, 2019) (per curiam)**

Plaintiff Andre Yanez's property was damaged in a flood, and he submitted a claim under his flood insurance policy with American Strategic Insurance Corporation ("ASIC"). The claim was assigned to FKS Insurance Services ("FKS") for adjusting. After FKS's evaluation and consistent with Yanez's proof of loss, ASIC paid the claim. Yanez disagreed with the amount paid, but provided no proof of loss form for the additional sum he claimed. After losing an administrative appeal, Yanez sued for breach of contract and breach of the duty of good faith and fair dealing.

The district court granted ASIC's motion to dismiss Yanez's claim for breach of the duty of good faith and fair dealing because that claim was barred by federal law. The district court also granted ASIC's motion for summary judgment because Yanez did not submit the required proof-of-loss form for additional policy benefits.

Yanez appealed only the summary judgment granted against him on the contractual claim. The Fifth Circuit affirmed in a per curiam opinion. Provisions in an insurance policy issued pursuant to a federal program must be strictly construed and enforced. To receive additional benefits under the policy, Yanez was required to sign sand submit a supplemental proof-of-loss form within 60 days of the flood. Because he did not, he could not obtain supplemental policy

benefits. The court rejected Yanez's argument that ASIC somehow waived the 60-day submission period, noting that a private company cannot waive federal regulations applicable to standard-form flood policies.

Insurer Owed a Duty to Defend Pastor of Insured Church Under D&O Provision of Liability Policy for Claims Arising from Alleged Violations of the Texas Election Code and a Genuine Issue of Material Fact Remained on the Duty to Indemnify.

***Word of Life Church of El Paso, Tom Brown v. State Farm Lloyds*, No. 18-50108, 2019 WL 1324845 (5th Cir. Mar. 29, 2019).**

In an unpublished per curiam opinion, the Fifth Circuit Court of Appeals reversed summary judgment in favor of State Farm Lloyds and held that the pastor of the insured church was entitled to a defense in the underlying litigation that arose from the pastor's alleged efforts in a recall campaign of the town's mayor and two other elected officials and that a genuine issue of material fact remained on a duty to indemnify.

Appellant Tom Brown was the president, chairman of the board of directors, and pastor of Appellant Word of Life Church ("WOL Church"). Brown also chaired a specific-purpose political committee that was created to support a measure on the November 10, 2010 ballot called the "Traditional Family Values Ordinance." Voters approved the ordinance, but the city council and mayor, John F. Cook, subsequently amended the ordinance and removed some of its restrictions. Following the amendment, Brown and his political committee began circulating recall petitions seeking a recall election of Cook and two other elected representatives.

In response, Cook sued WOL Church in state court for allegedly violating provisions of the Texas Election Code in circulating and submitting the recall petitions as well as in spending money for the recall effort. Brown intervened in the lawsuit which was appealed to the El Paso Court of Appeals after the trial court denied Cook injunctive relief. The court of appeals reversed the trial court's order, concluding that the WOL Church made improper campaign and political contributions in violation of Sections 253.094(b) and 253.031(b) of the Texas Election Code. After the case was remanded, the trial court granted Cook's motion for partial summary judgment finding Brown and WOL Church liable to Cook for the Texas Election Code violations. The parties subsequently entered into an agreed judgment for $475,000.

WOL Church previously purchased a liability policy with State Farm which gave State Farm "the right and duty to defend any claim or suit seeking damages payable under this policy even though the allegations of the suit may be groundless, false or fraudulent." The policy also included a "Directors, Officers, and Trustees Liability" provision (the "D&O Provision") that stated "[State Farm] will pay those sums that the insured becomes legally obligated to pay as damages because of 'wrongful acts' committed by an insured solely in the conduct of their management responsibilities for the church." The D&O Provision defined "wrongful acts" as "any negligent acts, errors, omissions, or breach of duty directly related to the operations of your church." "Operations" is not defined. Further, the D&O Provision included a "criminal acts" exclusion, which stated that coverage "does not apply to … any dishonest, fraudulent, criminal or malicious act, including fines and penalties resulting from these acts."

WOL Church initially submitted a claim for defense and indemnity before the state court of appeals issued its decision, but then withdrew the claim after the court did not award any fees. WOL Church and Brown thereafter submitted a second claim for defense and indemnity, which State Farm denied based on the allegations in the third amended decision and which it reaffirmed after the fourth amended petition was filed. After the parties entered into the agreed judgment, WOL Church made another demand for State Farm to indemnify Brown and WOL Church for the amount of the judgment and attorney's fees, which State Farm denied.

Brown and WOL Church initiated the coverage lawsuit against State Farm asserting claims of breach of contract, unjust enrichment, and bad faith. The district court granted State Farm's motion for summary judgment, holding in relevant part that State Farm had no duty to defend or indemnify Brown under the D&O Provision because Brown's action were not "directly related to the operations of" WOL Church.

On appeal, the Fifth Circuit reversed summary judgment, holding that State Farm had a duty to defend Brown because Cook alleged that Brown was liable for violating the Texas Election Code provisions that govern corporations, not individuals, based on his status as a director and, thus, based on the eight corners rule that applies to a duty to defend analysis Cook did allege that Brown's actions were "directly related to the operations of" WOL Church. In so holding, the Fifth Circuit also rejected the district court's interpretation that the D&O Provision only applied to the "typical" operations of a religious organization (and that such typical operations did not encompass political activities like the recall campaign), stating that the language of the policy concerned "the operations of *your* church," not a *typical* church and that it was improper for the district court to restrict coverage to what it deemed were the typical operations of WOL Church. The Fifth Circuit also held that the criminal acts exclusion did not preclude a duty to defend because one of Cook's allegations was that Brown's political action committee was "not a valid political committee under Texas or other law to support or promote any recall election effort in 2011" and that Brown and WOL Church thus "illegally operated a political committee … in violation of the Texas Election Code," which the court concluded was a potential violation of Section 253.096 of the Texas Election Code which does not specify that a violation of that provision is a criminal offense.

The Fifth Circuit also held that there was a genuine issue of material fact as to whether State Farm owed a duty to indemnify Brown, rejecting the trial court's conclusion that Brown's self-serving affidavit that the recall election was a ministry of the church could not serve as competent evidence as well as the district court's conclusion that the affidavit was nullified by Brown's prior inconsistent disclaimers on the WOL Church's website. Finally, the court held that State Farm failed to prove as a matter of law that the criminal acts exclusion foreclosed a duty to indemnify because the provisions that the state court of appeals found had been violated hinged criminality on whether the offenses had been committed "knowingly" and there was a genuine issue of material fact as to whether Brown's actions were intentional.

Extrinsic Evidence – Policy's Reference to Another Contract.

***AIG Specialty Ins. Co. v. Ace American Ins. Co.*, Civil Action No. 2:18-CV-16, 2019 WL 1243911 (S.D. Tex. March 18, 2019).**

Scope of coverage for purported additional insured required reference to Master Services Agreement between the parties, but court could only refer to the MSA to the extent required by the policy. Thus, regardless of whether the indemnity agreement in the MSA was enforceable, the MSA required that the named insured have the owner named as an additional insured on its liability insurance policies.

AIG Specialty Insurance Company ("AIG") brought suit against Turner Industries Group, LLC ("Turner") and Ace American Insurance Company ("Ace") seeking reimbursement of amounts paid in settlement and in defense of its named insured, Sherwin Alumina, LLC ("Sherwin"), in a personal injury case brought against Sherwin by one of Turner's employees. AIG's claims were based upon Turner's contractual obligations to indemnify Sherwin and have Sherwin named as an additional insured on its liability policies and Ace's obligations to Sherwin as an additional insured.

Sherwin entered into an MSA with Turner that required Turner to maintain control of the worksite and ensure that work was conducted in a safe manner. The MSA further provided that Turner agreed to indemnify Sherwin for certain claims that might be brought against Sherwin by Turner employees and to name Sherwin as an additional insured on Turner's insurance policies.

A Turner employee brought suit against Sherwin as a result of injuries sustained on the job. Sherwin demanded a defense and indemnity from Turner and Ace. Turner and Ace denied the claim, contending that the indemnity provision in the MSA did not require Turner to indemnify Sherwin for its own negligence or gross negligence and that the indemnity provision violated the express negligence rule.

One of the defenses Ace raised in the coverage suit was based upon one of two additional insured endorsements -- Endorsement #27 – contained in the Ace policy. Ace contended that the additional insured endorsement was limited to the scope of Turner's indemnity obligation and that since Turner was not obligated to indemnify Sherwin for Sherwin's own negligence, Sherwin was not an additional insured under the Ace policy. The court disagreed.

Relying upon the Texas Supreme Court's recent decision in *Exxon Mobil Corporation v. Insurance Company of the State of Pennsylvania*, the court confirmed that it was only permitted to refer to the terms of another contract "to the extent required by the policy." 2019 WL 638992, at *9 (Tex. Feb. 15, 2019). The court then noted that the additional insured language in Endorsement #27 only required reference to the MSA to determine if Turner agreed to make Sherwin an additional insured prior to the date of loss. The Ace policy did not reference the MSA for any other purpose. Thus, the MSA was not fully incorporated into the Ace policy and Ace could not rely on any limitation in Turner's indemnity obligation to argue that Sherwin was not an additional insured. The court stated that "[t]he fact that the carrier's obligation to provide insurance to an additional insured might exceed the scope of the named insured's liability is a risk taken when the carrier fails to reference the terms of the outside contract for purposes of determining the scope of liability."

Thus, the court granted AIG's motion for summary judgment in part, to the extent that

Sherwin is an additional insured under the Ace policy (through Endorsement #27) and that AIG, as Sherwin's subrogee, could pursue Ace for amounts owed under the Ace policy.

Delay in Invoking Appraisal does Not, by Itself, Waive Right to Appraisal.

***Ford v. United Property & Casualty Insurance Company*, No. 3:18-CV-00182, 2019 WL 1243871 (S.D. Tex. Mar. 18, 2019).**

Plaintiff Benjamin Ford's home sustained damage in Hurricane Harvey. His insurer, United Property & Casualty Company ("United"), offered a cash settlement for the amount United estimated the claim to be worth. Ford rejected United's offer and sought re-inspection of his home. After the second inspection, United increased its offer more than fourfold. Ford rejected the offer again, and United invoked its right to appraisal. When Ford sent United a pre-suit notice under the Texas Deceptive Trade Practices Act, United again invoked its right to appraisal. After Ford sued, United sought leave to file a motion to compel appraisal. The district court granted leave, and United moved to compel appraisal.

The court held that delay does not, by itself, waive a party's right to invoke appraisal. Waiver of the right to invoke appraisal requires affirmative conduct in circumstances that induce the other party to believe that compliance with the right to appraisal is not desired or would have no effect if performed, and prejudice if waiver is later invoked.

Turning to the facts of that case, the court held that United's delay (232 days after suit was filed) in filing a motion to compel did not affirmatively demonstrate its intention to forego appraisal when it had, on three prior occasions, sought to invoke appraisal. The court further noted the Texas Supreme Court's observation in *In re Universal Underwriters of Texas Insurance Co.*, 345 S.W.3d 404, 412 (Tex. 2011), that it would be difficult to see how prejudice could ever be shown by mere delay in the context of an appraisal provision that gives both insured and insurer equal rights to invoke appraisal.

Amount in Controversy for Diversity Jurisdiction.

***Horton v. Allstate Vehicle & Prop. Ins. Co.*, 5-19-CV-00140-FB-RBF, 2019 WL 1552494 (W.D. Tex. Apr. 9, 2019).**

A federal district court in the Western District of Texas, San Antonio division denied an insured's motion to remand, holding that the amount in controversy was met even though an initial demand letter regarding property damage to the insured's home did not allege over $75,000 in damages.

Plaintiff Veronica Horton submitted a property damage claim to Allstate Vehicle and Property Insurance Company ("Allstate") in connection with hail damage to her home. After having an allegedly "improperly trained and/or supervised" inspector sent out to the property, Allstate denied the claim. In response, Plaintiff's homeowner's insurance sent Allstate a demand letter, claiming a total of $28,384.28 in damages. The demand letter only referred to the Plaintiff's potential causes of action under the Texas Insurance Code and did not include any damages with regard to the Plaintiff's potential Texas Deceptive Trade Practices Act ("DTPA") claims, which permit the recovery of treble damages. However, the letter advised that the settlement offer of $28,384.28 represented "a tremendous savings to Allstate given its

potential exposure under the Texas Insurance Code."

Notwithstanding, no settlement was reached and Plaintiff sued Allstate, the inspector, and the company the inspector worked for in a Bexar County state district court for breach of contract, breach of the common law duty of good faith and fair dealing, unfair settlement practices, violation of Texas Prompt Payment Act ("PPA"), various violations of the DTPA, and fraud. Plaintiff sought actual damages, attorney's fees, treble damages, 18% interest under the PPA, and other costs.

Allstate elected to accept any and all liability for the actions of the inspector and removed the action to federal court, with the consent of the other defendant—the inspection company. Allstate claimed diversity jurisdiction, alleging that it was an Illinois corporation with its principal place of business in Illinois, that the other defendant was a citizen of Alabama, and that the Plaintiff was a Texas citizen. Plaintiff filed a Motion to Remand arguing that Allstate failed to carry its burden to show that the amount in controversy exceeded $75,000.

The court held that it was facially apparent from the state court Petition that the claim exceeded $75,000. In the Petition, Plaintiff alleged that the cost of repair to her damaged property was $19,764.43 and that in addition to mental anguish damages, attorney's fees and 18% interest under the PPA, Plaintiff was also seeking treble economic and mental-anguish damages pursuant to the DTPA. The court considered that all of the above-mentioned damages were included in the amount-in-controversy calculation and, thus, the case reached the requisite amount required for diversity jurisdiction by a preponderance of the evidence.

Even assuming that the Plaintiff would not recover *any* mental-anguish damages and would only recover minimal attorney's fees, it was facially apparent from Plaintiff's Petition that the jurisdictional threshold was met based on the nature of the Plaintiff's claims, the types of damages sought, the alleged property damage, and "applying common sense."

Whether Subpoena Alleges a "Wrongful Act."

***Oceans Healthcare, L.L.C. v. Illinois Union Ins. Co.*, 4:18-CV-00175, 2019 WL 1437955 (E.D. Tex. Mar. 30, 2019).**

A federal district court in the Eastern District of Texas, Sherman Division, held that per the policy, the duty to advance defense costs was not subject to the "eight corners rule" and that although a subpoena alleged a wrongful act, coverage for the claim was nonetheless excluded.

On February 26, 2015, a *qui tam* lawsuit was filed under seal in a Louisiana federal district court, alleging that Oceans Healthcare, LLC ("Oceans") knowingly and recklessly submitted false and fraudulent claims for payment to Medicare/Medicaid. The Office of the Inspector General Department of Health and Human Services ("OIG") issued a subpoena pursuant to an investigation it was conducting, demanding documents created, revised, or in effect during January 1, 2008 and August 27, 2015. Oceans reported the OIG subpoena to Illinois Union Insurance Company ("IUIC"), the company that issued Oceans a claims-made, no-duty to defend, indemnity package policy. The policy was described as a "run-off" policy because it only covered "claims" first made during the policy period that alleged "Wrongful Acts" committed prior to the "run-off date" of December 12, 2012. The policy also provided

for the advancement of defense costs if the claims were covered.

On September 10, 2015, IUIC's claims administrator denied Ocean's claim, stating that based on the information provided, it did not appear that a "claim" as defined by the policy, had been made against Oceans. Accordingly, Oceans responded to the subpoena and incurred over $1 million by retaining in-house counsel, outside counsel, and expert witnesses.

The *qui tam* complaint against Oceans was unsealed on August 3, 2017, and Oceans notified IUIC of the complaint the next day. A little over 10 days later, IUIC's new claims administrator responded to the claim by denying coverage. That same day, the *qui tam* action against Oceans was dismissed.

Oceans then filed suit against IUIC alleging breach of contract and Texas Insurance Code violations. Oceans also requested attorney's fees based on IUIC's denial of coverage of the OIG subpoena. IUIC answered and counterclaimed, asserting, among other things, that the OIG subpoena was not a claim for a "Wrongful Act." IUIC filed a motion for judgment on the pleadings on this issue and Oceans filed its own Motion for Judgment on the Pleadings in response.

The parties did not dispute that the OIG subpoena was a demand, which left the court to determine whether the demand was a request for monetary or non-monetary relief, which would make the demand a "claim." Because the failure to respond to the subpoena could result in civil liability for Oceans, the court held that the subpoena was "undoubtedly a demand for something due" and, thus, constituted a request for non-monetary relief.

In next determining whether the "claim" was for a "Wrongful Act," the court held that because the subpoena requested documents in connection with an investigation into possible False Claims Act violations, the subpoena contained all of the information that a court would find tantamount to alleging a wrongful act against Oceans and, thus, the OIG subpoena was in fact a "claim" for a "Wrongful Act."

Moving on to whether IUIC had a duty to defend or advance defense costs, the court noted that the plain language of the policy anticipated the use of extrinsic evidence in determining a duty to advance defense costs and, thus, displaced the "eight corners" rule. Ultimately, the court held that there was no duty to advance defense costs because the subpoena sought documents dated both before and after the run-off date of December 27, 2012, implying that the "wrongful acts" were alleged to have occurred both before and after the run-off date. Thus, the plain language of the run-off exclusion, which precluded coverage for any claim alleging or arising out of a "wrongful act" or "interrelated wrongful act" taking place in whole or in part after the run-off date, barred any obligation for t IUIC to advance defense costs under the policy.

No Improper Joinder Where Insurer Accepts Responsibility for its Adjuster Under Texas Insurance Code § 542A.006 After the Adjuster is Joined, Even if the Plaintiff can no Longer Recover Against the Adjuster.

***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).**

River of Life Assembly of God, a church, brought suit against its insurer, Church Mutual Insurance Company ("Church

Mutual"), and insurance adjuster, Jim Turner Harris, in state court alleging the defendants mishandled its property damage claim. Church Mutual timely elected responsibility for Harris pursuant to Section § 542A.006 of the Texas Insurance Code, requiring the court must dismiss all claims against the agent with prejudice. Church Mutual then removed the case to federal court, arguing there was complete diversity because Harris was improperly joined.

The United States District Court for the Western District held joinder was proper under the circumstances and ordered the case remanded while acknowledging other district courts in the same circuit have held otherwise. The court reasoned that the issue of improper joinder must focus on whether the non-diverse defendant was properly joined when joined, not solely on the possibility of recovery against that defendant.

River of Life had properly joined Harris as a defendant when it first filed suit, and Church Mutual did not elect responsibility until more than two months thereafter. Because Harris was properly joined the "voluntary-involuntary" rule applied – which makes a non-removable case removable only pursuant to a voluntary act of the plaintiff – and the court remanded the case back to state court.

An Insured's Broker Is Not an Insurer's Agent for Notice Purposes, and an Insurer Is Prejudiced as a Matter of Law if Notice is Provided After Settlement has Concluded.

***Bobwhite Rentals, LLC v. Nat'l Liab. & Fire Ins. Co.*, No. H-18-1330, 2019 WL 1557178 (S.D. Tex. Feb. 12, 2019).**

This case arises out of National Liability & Fire Insurance Company's ("National") refusal to pay a settlement claim because Bobwhite Rentals, LLC ("Bobwhite) did not notify National of the claim or the settlement until more than one year later. On March 6, 2015, a fire on Bobwhite's premises damaged a storage tank owned by one of its customers, XTO Energy. On the same, day Bobwhite reported the claim to its insurance broker. On April 30, 2015, Bobwhite unilaterally agreed to pay XTO Energy $50,000 for damage to its property. On June 16, 2016, Bobwhite's broker reported the fire and loss to National.

The District Court for the Southern District held that Bobwhite's insurance broker could not and should not be considered National's agent for notice purposes. Regarding the settlement with XTO Energy, the court ruled that National was prejudiced as a matter of law by the unilateral settlement because National was not notified of the settlement until a year after the settlement was reached.

Contractual Liability Exclusions – Breach of Contract Required, Not Mere Existence of Contract.

***Mt. Hawley Ins. Co. v. Huser Constr. Co., Inc.*, CV H-18-0787, 2019 WL 1255756, at *1 (S.D. Tex. Mar. 19, 2019).**

A federal district court in Houston, Texas granted summary judgment in favor of an insurer, holding that it had no duty to defend its insured because of the Breach of Contract Exclusion in a commercial general liability policy.

Mr. Hawley Insurance Company ("Mt. Hawley") filed a declaratory action against its insured, Huser Construction Company, Inc. ("Huser"), seeking a declaration that it had no defend or indemnify Huser in an underlying construction defect lawsuit. Huser was hired as a general contractor to construct an apartment complex. The court noted that Huser contracted to build the project in a

good and workmanlike manner and also to staff the job with subcontractors who were knowledgeable in their respective trades.

Although Mt. Hawley agreed that the underlying lawsuit was a "suit" for "property damage," the parties disputed whether the property damage "arose directly or indirectly" out of a breach of contract as to be excluded by the Breach of Contract Exclusion. The court underscored that the petition alleged that Huser breached its contract, or in the alternative, negligently supervised and staffed the project. The court observed that Huser's contract with the owner imposed upon Huser a duty to supervise and staff the project with adequate subcontractors and that the petition alleged that Huser's failure to hire and supervise qualified contractors directly resulted in the "property damage" claimed in the underlying lawsuit. The court therefore held that the facts and allegations in the underlying lawsuit made clear that the "property damage" at issue "arose directly or indirectly" from Huser's alleged breach of contract.

In so holding, the court explained that the Breach of Contract exclusion does not render coverage illusory because it does not reach every claim against an insured whose work is contractual in nature. Instead, the court held that the exclusion requires a *breach* of contract, not merely the *existence* of a contract. The court stated that the purpose of the Breach of Contract Exclusion was to limit the coverage afforded by the policies. Because the court concluded that the allegations in the underlying lawsuit were at least incidentally related to Huser's breach of contract, not merely to the existence of the contract, the court held that Mt. Hawley had no duty to defend Huser. For the same reasons, the court held that there was no duty to indemnify.

Making and Reporting Claims – When is There Enough Information?

Cause No. 4:17-CV-0278-Y; *Landmark Ins. Co. v. Lonergan Law Firm, PLLC & Gaylene Rogers Lonergan v. Christopher Dillon Snell, Brian Lockhard, Impromptu Communications, LLC, Todd Crain & James L. Springer Jr.*; in the U.S. District Court for the Northern District of Texas, Fort Worth Division.

A federal district court in the Northern District of Texas granted summary judgment in favor of an insurer on the basis of inadequate notice of a claim, holding that the inclusion of a claim supplement in a renewal application failed to trigger the insurer's duty to defend and indemnify.

Attorney, Gaylene Rogers Lonergan ("Lonergan"), notarized the signature page of the assignment agreement of an escrow account reportedly containing approximately $5,000,000 and attested that she witnessed the escrow agent sign the agreement in her presence. Additionally, Lonergan notarized the assignment of property rights to $14,000 in proceeds from a real estate transaction involving property located on Coombs Creek Drive in Dallas, Texas. Both the escrow account and the real-estate transaction were put up as security interests for a $4.6 million loan that was provided to N&J Enterprises ("N&J") for the purchase of an investment property. The loan funds were disbursed but N&J failed to make payment on the loan. In an attempt to enforce their rights under the aforementioned security interests, the lenders discovered that the escrow account never held more than $500 and that the escrow agent's name was the alias of a career criminal with prior felony convictions for fraudulent investments in Texas and Oklahoma. Moreover, the lenders discovered

that Lonergan had never actually witnessed the agent sign the escrow agreement in her presence.

The lenders also learned that Lonergan suspected that N&J held no rights to the property at the time it assigned its rights to the lenders, but never conveyed that information. With all security interests proven fraudulent, the lenders attempted to enforce their rights under the deed of trust on the original property subject of the loan and initiated foreclosure proceedings. However, the lenders soon discovered that Lonergan had inaccurately described the property in the deed and, thus, the lenders were only able to recover approximately $2,900,000 of the $4,600,000 loan. Moreover, the lenders discovered that Lonergan overlooked that N&J's appraisal of the property was more than ten times its actual value.

Landmark American Insurance Company ("Landmark") insured Lonegran under a professional-liability insurance policy from May 2014 to Spring 2017. Lonergan renewed her policy yearly by completing an application that Landmark would review prior to renewal. The application included a question asking "if a professional-liability claim or suit has ever been made against the applicant's firm or predecessor firm within the last five years." The application indicated that if this was the case, the attorney was required to complete a claims supplement listing and describing those claims. For both the 2015 and 2016 claim periods involved in this case, Lonergan filed a supplement in April 2015 and 2016 when applying to renew her policy.

Lonergan was sued by the aforementioned lenders in July of 2015 for breach of contract, negligence, and negligent misrepresentation. Lonegran was served with process on August 4, 2015. Because the lawsuit had not been initiated as of the 2015 policy's issuance, Lonergan did not report the lawsuit in her claim supplement from April 2015. However, Lonergan reported the matter to Landmark in her April 2016 claim supplement. On June 9, 2016, the thirty-day claim reporting deadline for the 2015 policy expired while the lawsuit progressed. Lonergan sent Landmark a letter seeking coverage of the lawsuit on March 12, 2017. Landmark denied coverage of Lonergan's claim, asserting that the request was not made during the 2015 policy and that Lonergan failed to provide a copy of the petition and summons which violated the policy's notice conditions. Landmark then filed a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify Lonergan concerning the claims brought by the lenders in the state court lawsuit, in which a judgment was entered on December 11, 2017.

Landmark filed a motion for summary judgment in the declaratory judgment action arguing that Lonergan only reported the claim on March 12, 2017 when she transmitted a letter to Landmark demanding coverage in connection with the lawsuit, attaching a state-court order compelling mediation. Taken as true, Lonergan would not have properly reported the claim under the 2015 policy whose reporting deadline expired on June 9, 2016. The court agreed that Lonergan did not properly or timely report the claim. The court reasoned that the lender's allegations would potentially amount to viable claims under the 2015 policy's provisions. Further, because the policy was a claims-made-and-reported policy, the court considered that the insurer must be notified of claims during the policy period to receive coverage.

To constitute a "claim" under the policy, the court explained that a request for defense and indemnity must amount to "a written demand

for monetary or non-monetary relief." Because Lonergan's claim supplement contained no assertion of a legal or procedural right, but merely contained a concise synopsis of the underlying dispute sufficient to apprise Landmark of its subject-matter and progress, the court did not consider the submission sufficient to satisfy the definition of a "claim" per the 2015 policy's own terms. Instead, the court held that Lonergan's claim supplement was nothing more than an informal communication to Landmark about an "incident, occurrence, or offense that may *reasonably be expected to result in a claim."* The court also underscored that Lonergan did not forward any suit papers along with her policy application that would have conveyed that she was attempting to transmit more than a synopsis of the underlying lawsuit. Thus, the court held that Lonergan was not entitled to a defense or indemnify.

Criminal Indictment Absent a Remediation Order is Not a Claim.

***Waste Mgmt., Inc. v. AIG Specialty Ins. Co.*, 4:16-CV-03676, 2019 WL 1409661 (S.D. Tex. Mar. 28, 2019)**

This insurance dispute stemmed from a single pollution event which resulted in three different legal battles with the federal government: 1) a consent order entered into between the insured ("Waste Management") and the EPA; 2) a criminal indictment brought by the Department of Justice; and 3) a civil complaint filed by the DOJ. AIG refused to provide Waste Management with a defense against the criminal indictment under its claims-made policy because the indictment did not constitute a "claim"—*e.g.* "a written demand...seeking a remedy on the part of the insured for loss".

Waste Management argued that AIG owed it a duty to defend for two alternative reasons, either: 1) that the "claim" submitted encompassed all three parallel matters which arose from the same events, and that if AIG owed a duty to defend any of the suits, it owed a duty to defend all of them; or 2) even if the court were to look solely at the indictment, the indictment constituted a "claim" because the criminal charges alleged therein *could* result in an order requiring clean up or restoration, which may fall under the definition of a claim.

As to the first contention, the Court held that AIG's duty to defend the parallel civil suit:

> do[es] not give rise to a duty to defend against the federal government's abundant arsenal in all of its various facets… [If] a court [were] to weld together multiple different administrative, criminal, and potential civil proceedings into a single purported "claim" […] [s]uch a practice would turn the eight-corners rule into a twelve-or sixteen-corners rule[…]
>
> While the criminal proceedings may ultimately have an impact on future civil claims through some form of collateral estoppel… that does not mean AIG must defend a criminal case in which the government does not make a Claim.

As such, AIG's duty to defend against the criminal indictment would be determined by the allegations within the indictment alone.

As to the second contention, the Court held that Waste Management was once again requesting it to go outside of the four-corners of the indictment because the indictment itself made no mention of remediation—or any other remedy—but merely charged Waste Management with crimes. The Court noted that, while an insurer owes a duty to defend if the facts in the complaint *potentially* state a claim, a court cannot violate the eight corners rule in search of such a possibility. As such, "the alleged 'potential' for a remediation order does not transform a criminal indictment barren of such a demand into a Claim[.]"

The Independent Injury Rule is Alive and Well – Failure to Plead Injury Independent of Policy Benefits

***Garcia v. Liberty Mut. Ins. Co.*, CV H-17-1587, 2019 WL 1383011, (S.D. Tex. Mar. 27, 2019) (adopting in full magistrates order, 2019 WL 825883).**

In this case, insured-homeowners brought suit against their carrier for breach of contract and violations of the Texas Insurance Code arising out of a property damage claim. The Court held that the carrier complied with the policy's appraisal provisions and dismissed the insureds' breach of contract claims. Notwithstanding this dismissal, the insureds argued that pursuant to *USAA Texas Lloyds Company v. Menchaca*, 545 S.W.3d 479 (Tex. 2018), they should be able to maintain their extra-contractual claims even in the absence of a valid breach of contract claim.

In response, the Court stated that:

> Contrary to Plaintiffs' contentions, [t]he independent injury rule is alive and well, as reiterated by the Texas Supreme Court in its recent *Menchaca* [II] opinion.

Having determined that the insureds failed to plead any allegations of an injury independent of the policy benefits—and that those benefits were properly provided via the appraisal process—the Court dismissed the insureds' extra-contractual claims.

Tax Refunds Are Not Claims or Losses.

***In re Texas Ass'n of Pub. Sch. Prop. & Liab. Fund*, -- B.R. --, SA-18-5017-RBK, 2019 WL 989643 (W.D. Tex. Mar. 1, 2019)**

This suit arose out of Texas Association of Public Schools Property and Liability Fund ("TAPS") decision not to defend White Deer ISD ("White Deer") in a state-court tax-suit. In the underlying suit, the state court determined that White Deer had failed to follow a newly enacted state constitutional amendment when collecting taxes and owed a refund to the plaintiff. In order to avoid the sovereign immunities ban on collecting monetary damages against a governmental entity, the plaintiff in the underlying litigation specifically alleged that she was only seeking injunctive relief—not monetary damages. The policy only provided coverage for qualifying "claims" (a suit seeking "monetary damages" for a "wrongful act") or a qualifying "loss" (*e.g.* "damages and settlements").

In the subsequent coverage dispute, the Court held that TAPS had no duty to indemnify White Deer for the tax suit because the sole remedy sought by the plaintiff was a tax refund which could not be classified as a "claim" or "loss" under the policy. Instead, the Court held that a tax refund was analogous to the remedy of disgorgement (which Texas courts have repeatedly held are not damages subject to indemnification) and

that the "refund of illegally acquired tax funds" was nothing more than the "restoration of ill-gotten gain, not damages under Texas law."

Moreover, the Court also held that the underlying suit could not be classified as a qualifying "claim" because the suit was not necessitated by any "wrongful act". After reviewing the definition of "wrongful act" under the policy, the Court applied the contract interpretation principal of *ejusdem generis*, which holds that when words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation. In the TAPS policy, every one of the "laundry list" items referred to an employment act or decision. Because the tax suit was in no way similar to any of the specifically enumerated items, the Court held that it did not fit into the type of actions which were considered "wrongful acts" under the TAPS policy and, thus, there was no "claim."