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TEXAS INSURANCE LAW UPDATE

SECOND QUARTER 2023

The Second Quarter of 2023 did not include any particularly pivotal insurance cases from the Texas Supreme Court; however, there are several noteworthy decisions from Texas federal courts, the Texas Supreme Court, and state appellate courts which may be relevant to your claims handling.

This quarterly update addresses court opinions in the following insurance coverage areas: Commercial General Liability/Excess/Umbrella; Personal and Commercial Auto; Professional Liability; Homeowners and Commercial Property; Motor Carrier; and General Matters

If you would like to discuss any of the cases below in more detail, please reach out to one of our team members at Cox PLLC.

COMMERCIAL GENERAL LIABILITY/EXCESS/UMBRELLA

FEDERAL COURT FINDS NO DUTY TO DEFEND INSUREDS UNDER LIQUOR LIABILITY EXCLUSION; HOWEVER, THE DUTY TO INDEMNIFY WAS DEFERRED UNTIL LIABILITY SUIT CONCLUDED

In *Mesa Underwriters Specialty Ins. Co. v. Whitfield & Breitigam Enters., LLC*,[1] the court determined that a CGL Policy's liquor liability exclusion applied to negate the insurer's duty to defend, however, the question of the insurer's indemnity obligation was deferred until the conclusion of the liability suit. Two insureds under the policy, named insured Whitfield & Breitigam Enterprises, LLC d/b/a End Zone Sports Bar & Grill ("End Zone") and William Whitfield ("Whitfield"), were sued (along with two other defendants) in Texas state court by Angela Trevino ("Trevino"). In the state court suit, Trevino alleges that she was injured when an all-terrain vehicle ("ATV") crashed during an event organized by Whitfield to promote End Zone and another bar, The Wildcatter Saloon ("Wildcatter").

The policy's liquor liability exclusion applied to insureds who "manufacture, sell or distribute alcoholic beverages."

Trevino, End Zone, and Whitfield argued that the liquor liability exclusion did not apply because Trevino's state-court pleading because it did not specifically allege "that intoxication caused or contributed to the alleged ATV accident or the alleged injuries." The Court disagreed. Trevino alleged that Daniel drank alcohol at the open bar during the event prior to operating the ATV. The court

held that "under Texas law, it can and must be inferred in these circumstances that alcohol impaired Daniel's ability to drive the ATV, even if that inference makes a coverage exclusion applicable" reaffirming that Texas courts have emphasized that the liquor liability exclusion "plainly and specifically negates coverage for liability arising out of the business of selling or serving alcohol." Accordingly, the fact that Trevino did not plead Daniel's particular level of intoxication did not remove the claims against Whitfield and End Zone from the reach of the liquor liability exclusion.

With regard to service of alcohol, Trevino, End Zone, and Whitfield argued that the liquor liability exclusion did not apply because Wildcatter served Daniel and End Zone did not. The Court found that argument unpersuasive considering the relationships that Trevino alleged between End Zone, Wildcatter, and Whitfield and the fact that the promotional event at which Trevino was injured was intended to jointly promote End Zone and Wildcatter. The court emphasized that the policy's liquor liability exclusion covers all insureds if any insured "may be held liable by reason of" the conduct described in the exclusion. Accordingly, the liquor liability exclusion covers both Whitfield and End Zone if Whitfield "may be held liable" in the state court suit for, while performing the duties of a manager or employee of End Zone, causing or contributing to Daniel's intoxication or furnishing alcoholic beverages to Daniel while Daniel was under the influence of alcohol. The court found that the pleading sufficiently alleged that Whitfield, while performing duties associated with his position as a manager or employee of End Zone, helped cause Trevino's injuries by causing or contributing to Daniel's intoxication or furnishing alcoholic beverages to Daniel while Daniel was under the influence of alcohol. Accordingly, the Court concluded that, under the facts alleged by Trevino and the reasonable inferences that flow from those facts, the liquor liability exclusion applied and there was no duty to defend Whitfield or End Zone under the policy.

With regard to the insurer's duty to indemnify under the policy, the court stated that under Griffin, the duty to indemnify is essentially decided by the eight-corners rule: "[T]he duty to indemnify is justiciable before the insured's liability is determined in the liability lawsuit when the insurer has no duty to defend and the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify."[2] The principle articulated in *Griffin* applies if "under the facts pled by the plaintiffs [in the underlying lawsuit] it would have been impossible for the insured defendant to show by extrinsic evidence that the loss fell under the terms of the policy." The Court was not convinced that this case fell within the scope of the *Griffin* doctrine. "Although the Court has concluded that Mesa does not have a duty to defend Whitfield and End Zone under the policy, the Court cannot say that it is impossible for extrinsic evidence to show that the ATV crash that injured Trevino falls under the policy's terms. Extrinsic evidence could, for instance, show that the relationships between End Zone; Wildcatter; Whitfield; Daniel; Trevino; and Whitfield & Pool, LLC—an entity whose connection to the incident is left unclear by Trevino's allegations—somehow bring Trevino's claims against Whitfield or End Zone within the scope of coverage." Thus, the court deferred ruling on the duty to indemnify until the conclusion of the liability lawsuit.

TEXAS SUPREME COURT AFFIRMS RULE THAT EXTRINSIC DOCUMENTS MAY BE INCORPORATED INTO A POLICY BY REFERENCE BUT ONLY IF THE REFERENCE IS CLEARLY MANIFESTED IN THE TERMS OF THE POLICY

Last April, in *Exxonmobil Corp. v. Nat'l Union Fire Ins. Co.*,[3] the Supreme Court of Texas again acknowledged the well-settled rule that extrinsic documents may be incorporated into a policy by

reference if the reference is clearly manifested in the terms of the policy and noted that the court has never strayed from the rule. The question before the court was whether the insurance policy incorporated the payout limits from an underlying service agreement. The relevant provision of the agreement (with all emphasis added) reads as follows:

> [Savage] shall carry and maintain in force at least the following insurances and amounts:
> . . . (2) its *normal and customary Commercial General Liability insurance coverage and policy limits or at least $2,000,000, whichever is greater*, providing coverage for injury, death or property damage resulting from each occurrence . . . . Notwithstanding any provision of an Order to the contrary, [Savage's] liability insurance policy(ies) described above shall: (i) *cover [Exxon] and Affiliates as additional insureds* in connection with the performance of Services; and (ii) be primary as to all other policies (including any deductibles or self-insured retentions) and self-insurance which may provide coverage.[4]

The relevant portion of National Union's umbrella policy provided that "'Insured means: . . . any person or organization, other than the Named Insured, included as an additional insured under Scheduled Underlying Insurance, but not for broader coverage than would be afforded by such Scheduled Underlying Insurance.'"[5]

National Union and the appellate court interpreted the disclaimer of broader coverage as incorporating the payment limits from the service agreement. However, the Texas Supreme Court disagreed for three reasons. First, the court noted the umbrella policy does not have any language regarding the service agreement's payout limit and it did not satisfy the court's precedent requiring a "clear manifestation" for incorporation by reference. Second, assuming *arguendo* the umbrella policy could be read to incorporate payout limits, the court noted it found no limits to adopt inasmuch as the service agreement provided for minimum amounts of insurance and not a maximum and concluding whether Savage had to buy as much insurance as it did was beside the point; rather, that Savage did obtain insurance was what mattered. Third, the court noted the primary policy had its own payout limits, the very reason for umbrella policies, and if the court was to interpret "broader coverage" to refer to payout limits and not to the risks and liability reached by the primary policy and not any others would render the umbrella policy meaningless.

Prior to *ExxonMobil*, the Houston Court of Appeals and Fifth Circuit had concluded that where extrinsic documents provided for a minimum limit of insurance required, the minimum amount was the limits extended to an additional insured and not the amounts of the policy. Notably, the requirement in the service agreement at issue in *ExxonMobil* required Savage to provide Exxon with insurance with "at least the following insurances and amounts: . . . (2) *its normal and customary Commercial General Liability insurance coverage and policy limits or at least $2,000,000, whichever is greater* …." The court emphasized the entire requirement regarding limits in its citation to same but did not analyze or provide any reasoning as to why the greater of the minimum suggested or the normal and customary language failed to provide a maximum. Here, the Court stated that even if it could read the umbrella policy as incorporating the service agreement, which it could not, it could find no policy limits to adopt as the service agreement provided for only minimum and not maximum amounts. Therefore, it appears that where an extrinsic document provides for minimum limits without expressing a

maximum, the Texas Supreme Court will likely conclude the limits are not clearly manifested in the policy terms.

PERSONAL AND COMMERCIAL AUTO

TEXAS SUPREME COURT ORDERS NEW TRIAL FOLLOWING COUNSEL'S ADMISSION OF RACE-BASED MOTIVATIONS IN JURY SELECTION AND OVERTURNS PAIN AND SUFFERING AWARD FOR A SURVIVAL CLAIM

In *United Rentals N. Am. Inc. v. Evans*,[6] United Rentals North America, Inc. ("United Rentals"), an equipment rental company, was transporting an oversized boom lift from its San Antonio branch to its Irving branch via an ordinary flatbed trailer. Due to its massive size, the boom lift required a special permit from the Texas Department of Transport, yet United Rentals did not obtain the same. United Rentals hired Bob West ("West") to transport the oversized boom lift, while Lares Trucking was hired to transport a smaller forklift. When Lares' driver, Valentin Martinez ("Martinez"), arrived to pick up the equipment in a conventional flatbed trailer, he told the United Rentals operations manager, Montez, that he was there to pick up the "boom," yet could not produce a bill of lading upon latter's request. Contrary to United Rental's policy, Montez failed to match the number on the bill of lading to the equipment. After securing the bill of lading number for the oversized boom lift from a United Rental's regional manager, Montez forwarded same to another United Rentals' employee, Nick Watts. Watts then drove the oversized boom lift onto Martinez' flatbed trailer, yet no one measured the load to notice that it was over 14.5 feet tall. Martinez departed with the oversized boom on the flatbread on morning of March 26, 2015. Later that same morning, West arrived at United Rentals San Antonio branch to pick up the boom lift in a special, lower "step-deck" trailer needed for oversized loads, at which time United Rentals' personnel realized that Montez had picked up the wrong load. However, evidence showed that no one at United Rentals contacted anyone regarding this mistake, and West was given the forklift to transport. West also testified that United Rentals should not have loaded the boom lift onto an ordinary flatbed trailer. As Martinez approached a construction zone in Salado on Interstate 35, there were multiple signs warning that the bridge was under construction and low, and that loads over 13 feet and six inches should exit before the overpass. Martinez did not exit and his trucks' cargo struck the overpass, causing two massive beams on the highway to collapse. Clark Davis ("Davis") was headed south on the highway in his pickup truck and one of the beams struck the hood of his truck and crushed it, causing Davis catastrophic injuries leading to his instant death. The Texas Department of Public Safety investigated the crash and concluded that the accident was caused by Martinez' error, including oversized load, driver inattention.

Davis's mother, Pamela Evans and Davis' son, Dominic Jones, (collectively "plaintiffs"), filed a survival claim on behalf of Davis' estate and a wrongful death action on behalf of themselves, against United Rentals, Lares Trucking, and Martinez. During jury selection, however, counsel for the plaintiffs stated that "[w]e know from our focus groups that the African-American female is the most favorable juror for this case for whatever reason."[7] The plaintiffs' counsel also exercised preemptory challenges to remove four white men and one Hispanic man from the jury panel. United Rentals' counsel struck five black males, two white females, and two white males. Both parties challenged each other's strikes

as improperly motivated. The district court sustained plaintiffs' challenge as to the two black females struck by defense. Ultimately, the jury consisted of four black women, one Asian woman, two Hispanic women, five Hispanic men, and no white jurors. The jury found United Rentals 30% liable, and United Rental was required to pay its proportion of the total damages awarded, including $1.5 million to Davis's estate for physical pain and mental anguish prior to his death. United Rentals appealed and the court of the appeals affirmed, after which United Rentals appealed to the Texas Supreme Court.

The Texas Supreme Court held that a new trial was needed because plaintiffs, via its counsel, stated a preference for black jurors, exercised its strikes in concert with the stated preferences, and the trial court did not remedy this issue before trial. In reaching its decision, the Texas Supreme Court recognized that, ordinarily, when presented with a "*Batson* claim" (i.e. a challenge that a party's preemptory challenge to a juror is improperly driven solely on basis of race), courts generally engage in a three-step analysis to determine whether the challenged strikes were purposefully discriminatory: 1) opponent of the preemptory challenge must establish a prima facie case of racial discrimination, 2) the burden then shifts to the striking party to present a race-neutral explanation for its challenge, and 3) the trial court must determine whether the party challenging the strike has proven purposeful racial discrimination.[8] However, relying on its prior decision in *Powers v. Palacios*,[9] the Texas Supreme Court noted that it was presented with a rare circumstance that included counsel's admission of a race-based motive in jury selection, and, therefore, decided to not engage in the three-step analysis to determine whether there was a successful *Batson* challenge. Instead, as it did in *Powers*, the court summarily reversed the judgment of lower courts and remanded for a new trial, noting that the counsel's admission on its own "established that opposing counsel had exercised a preemptory challenge discriminatorily."[10] The court also explained that it is not the mere expression of a racial preference in jury selection alone that requires reversal. Instead, it is the actual strike of a juror on basis of race. The court found that the strikes by plaintiffs' counsel of four white men from the jury panel and one Hispanic man was consistent with the announced racial preferences, warranting a new trial.

Furthermore, United Rentals argued that it owed no duty to Davis under Texas law and as such, the plaintiffs negligence claim should fail. However, the Texas Supreme Court disagreed, finding that the risk to innocent persons by loading an oversized boom lift for hauling on a trailer not suitable to carry same on an interstate highway is foreseeable for United Rentals, an entity that frequently moved heavy equipment on highways, and "had every reason to be well aware of the dangers of oversized loads."[11] As such, per the Texas Supreme Court, United Rental owed a duty to Davis and other drivers to refrain from negligently creating a dangerous situation on the highway. United Rentals also argued that, even if it owed a duty to Davis, there was no evidence that it breached said duty or that its negligence proximately caused Davis's injuries. The Texas Supreme Court, again, disagreed, finding that there was ample evidence showing otherwise. Noting the factual evidence and testimonies, the Texas Supreme Court held that a United Rentals employee loaded the oversized boom lift on an ordinary trailer, even though United Rentals knew that the ordinary trailer was not fit to carry to oversized boom lift. Also, United Rental's employees mishandled the BOL numbers that would have matched the boom lift to the proper trailer, yet even after realizing the mistake, the United Rentals' employees did not make any effort to fix the issue, and as such, United Rentals negligently allowed

oversized equipment to travel on a highway in an unsuitable trailer, creating a dangerous condition and proximately causing Davis's injuries.

Finally, United Rentals argued that evidence was insufficient to support the award of damages for mental anguish and physical pain suffered by Davis before death. Plaintiffs' accident-reconstruction expert testified that the beam that struck Davis fell to the ground in nine-tenths of a second, leaving no time for Davis to react. However, there was time, per the expert, for Davis to realize that the beam was falling. Plaintiffs argued that Davis's skull was not fractured, and because his autopsy did not reveal any injury to his vertebrae, blood could have continued to travel to his brain, allowing him to feel pain following impact. The medical examiner who conducted Davis's autopsy testified that he may or may not have been unconscious and there is no way to be certain regarding same. However, on this point, the Texas Supreme Court agreed with United Rentals, holding that just because there was time for Davis to anticipate the injury was not tantamount to Davis actually anticipating the injury. There was no evidence that Davis in fact saw the truck hit the overpass or saw the falling debris before it struck his vehicle. Therefore, even though evidence suggested that there was time for Davis to perceive the beams falling, there was no evidence to show that he actually did so. As such, the mental anguish damages awarded based on Davis's awareness of the impending injury were based strictly on speculation. Furthermore, as for conscious pain and suffering, the Texas Supreme Court noted that it was plaintiff's burden to prove that Davis retained consciousness after the impact, and therefore suffered pain. Because plaintiffs could not prove by preponderance of evidence that Davis actually suffered conscious pain and suffering, the Texas Supreme Court held that the evidence to support post-impact pain and suffering was legally insufficient.

A HOUSTON APPELLATE COURT FINDS COVERAGE-REDUCING CLAUSE IN AUTO POLICY TO BE UNAMBIGUOUS, RULING IN FAVOR OF THE INSURER

In *Tex. Farm Bureau Mut. Ins. Co. v. Minchew*,[12] Minchew and her former boyfriend, Kaiser, were involved in a single-car accident when Kaiser drove his vehicle into a ditch. Minchew, a passenger in the car driven by Kaiser, suffered resultant injuries. Both Kaiser and Minchew were named insureds on a shared automobile insurance policy ("auto policy") issued by Texas Farm Bureau Mutual Insurance Company ("Texas Farm"), providing liability coverage with limit of $300,000 per person "'for bodily injury for which any covered person becomes legally responsible because of an auto accident.'"[13] The auto policy, however, limited the amount coverage to the statutory minimum of $30,000 per person per accident if the bodily injury was to a named insured. More specifically, the so-called "coverage-reducing" clause of the auto policy provided:

> [Texas Farm Bureau] does not provide Liability Coverage for you or any family member for bodily injury to you or any family member, except to the extent of minimum limits of Liability Coverage required by [the] Texas Motor Vehicles Safety Responsibility Act.[14]

The term "you" was defined in the auto policy to mean the named insured (i.e. Minchew and Kaiser). When a claim was filed requesting coverage for Minchew's bodily injuries, Texas Farm relied on the coverage-reducing clause and offered to settle Minchew's claims for $30,000.00 only as she was a named insured under the auto policy. Minchew rejected the said offer and filed a declaratory

judgment action against Texas Farm, arguing that the coverage-reducing clause did not apply to her. The matter was tried with the following facts stipulated between the parties: 1) Minchew was a passenger in the vehicle driven by Kaiser on the date of the accident; 2) Minchew and Kaiser shared the auto policy covering the car involved in the accident, 3) the auto policy provided liability coverage up to $300,000 per person, and 4) the policy defined "you" to mean the named insured, and (4) both Minchew and Kaiser were named insureds and, therefore, met the definition of "you" under the policy. Minchew argued that she was not a named insured under the policy but rather the claimant because she was the injured party asserting a claim for bodily injury against her co-insured, Kaiser, and therefore was invoking *Kaiser's* coverage. As such, because Kaiser sought coverage for his action in allegedly causing Minchew's injury, the named insured, for purposes of the coverage-reducing clause, was only Kaiser. Per Minchew, Texas Farm's interpretation allowed it to pick and choose either insured to plug in for each "you" in the clause to reduce coverage, rendering the clause ambiguous. Texas Farm, however, argued that the first "you" refereed to Kaiser because he was the named insured whose liability coverage was at issue, and the second "your" referred to Minchew because she asserted the bodily injury claim and met the definition of "your."

The trial court ruled in favor of Minchew, finding that the auto policy provided liability coverage of $300,000 per person for bodily injury, and the coverage-reducing clause did not apply to limit coverage. However, the Houston appellate court ruled in favor of Texas Farm, finding that the coverage-reducing clause was unambiguous and that the trial court erred by finding that said clause did not apply to Minchew's bodily injury claim; instead, liability coverage under the policy was limited to the statutory minimum of $30,000 for Minchew's claim.

Relying on a Dallas appellate court's similar interpretation of a coverage-reducing clause, the *Minchew* court noted that, contrary to the insured's contention, the definition of "you" does not refer only to an at-fault insured, such as Kaiser.[15] The court further held that the coverage-reducing clause was unambiguous, as the first "you" referred to the insured seeking liability coverage (i.e. Kaiser) while the second "you" referred to the named insured making a bodily injury claim (i.e. Minchew"). In addition, the court refused Minchew's request to be considered a third-party claimant rather than a named insured under the auto policy, stating that nothing in the auto policy language allows for a reasonable interpretation that Minchew is a third-party claimant rather than a named insured under the auto policy. Finally, the court also did not buy Minchew's argument of finding an implicit, common-law severability-of-interest clause in the policy which would ultimately lead to Minchew's desired result. Instead, the Houston appellate court noted the lack of authority in support of such a finding and refused to add clauses to or rewrite the auto policy.

It is worth noting that the *Minchew* court clearly explained that had the auto policy included a severability of insureds or separation of insureds clause, because Minchew was making a claim against Kaiser for causing her bodily injury, Kaiser's coverage would have been triggered under his separate policy, listing only him as a named insured and the coverage-reducing clause would not have applied to the "innocent" Minchew's claim for injury.[16] In other words, inclusion of a separation-of-insureds clause in the auto policy would have yielded the result the insured was looking for: $300,000 in liability coverage rather than $30,000.

PROFESSIONAL LIABILITY

FIFTH CIRCUIT COURT OF APPEALS HOLDS THAT CONTRACTUAL LIABILITY EXCLUSION DOES NOT BAR COVERAGE FOR FIDUCIARY DUTY CLAIM

In *Windermere Oaks Water Supply Corp., v. Allied World Specialty Insurance Company*,[17] Allied World Specialty Insurance Company ("Allied World") issued a WaterPlus Package Insurance Policy to Windermere Oaks Water Supply Corporation ("Windermere"). The policy, in general, provided Public Officials and Management Liability coverage. At issue here, the policy included an exclusion for contractual liability. This exclusion precluded coverage for "[d]amages," "defense expenses," costs or loss based upon, attributed to, arising out of, in consequence of, or in any way related to any contract or agreement to which the insured is a party or a third-party beneficiary, including, but not limited to, any representations made in anticipation of a contract or any interference with the performance of a contract."

In the underlying lawsuit, three individual members and partial owners of Windermere sued Windermere and various of its officials alleged that Windermere sold a valuable tract of land at Spicewood Airport to a commercial entity control by Windermere board member Dana Martin "for pennies on the dollar" (the "Underlying Lawsuit"). The Underlying Lawsuit alleged that Windermere "exceeded its powers" and the board of directors "exceeded their authority and breached their duties," specifically alleging various ultra vires acts committed in violation of Section 20.002(c) of the Texas Business Organizations Code. These included: the unauthorized conveyance of property; improper use of the cooperative's assets; improper disbursement of the cooperative's assets to benefit the directors; and failure to recover loss, as well as for breach of fiduciary duty. Plaintiffs subsequently sued Allied World for its failure to defend them in the Underlying Lawsuit. After both sides sought summary judgment on the issue of the duty to defend, the district court granted plaintiff's motion and denied Allied World's motion. Allied World subsequently sought entry of judgment under Federal Rule of Civil Procedure 54(b), which was granted, and Allied World appealed.

On appeal, Allied World argued that the broad language of the exclusion (i.e, based upon, arising out of, in any way related to) applied to preclude coverage and that the district court was wrong to decline its application to the facts of the Underlying Lawsuit. However, the Fifth Circuit, simply reasoned that: "'in the purported breach by . . . Plaintiffs of [their] fiduciary duties, by way of ultra vires acts and other misdeeds that gave rise to harm without regard to the ultimate contract.' These are claims that are 'established at law'—not by contract—and 'that could stand alone even if no contract ever existed.'" Thus, the court affirmed the determination of the district court.

It is worth noting that the court appears to have interpreted the contractual liability narrowly as only precluding coverage for liability "for" breach of contract, rather than broadly for liability for breach of contract "or in any way related to" a contract.

HOMEOWNERS AND COMMERCIAL PROPERTY

EASTERN DISTRICT OF TEXAS RULES FOR INSURER IN PROMPT PAYMENT DISPUTE

In *Morakabian v. Allstate Vehicle & Property Insurance Company*,[18] the Eastern District Court of Texas adopted the findings and conclusions of the magistrate judge that payment that exceeded the statutorily permitted amount for interest that Plaintiff could allege to be owed under the TPPCA foreclosed eligibility for statutory interest under the TPPCA and that payment of the appraisal award covered Plaintiff's claim under his insurance policy, leaving no remaining claim, eliminated Plaintiff's right to attorney's fees under the TPPCA.

Plaintiff filed a claim on his Allstate homeowner's insurance policy following storm damage to his property. Initially, the insurer refused the claim. Plaintiff filed suit in a Texas state court and the case was subsequently moved to the Eastern District of Texas. During the pendency of the suit, Plaintiff invoked his appraisal right and an appraiser and umpire determined Plaintiff was entitled to payment to which the insurer objected. The insurer subsequently paid Plaintiff two checks: $35,577.44 to cover the appraisal award and $4,699.00 to cover additional interest that Plaintiff could allege to be owed under the TPPCA. Plaintiff deposited both checks.

The remaining claim before the court was Plaintiff's Texas Prompt Payment of Claims Act ("TPPCA") claim. Recent amendments to the TPPCA altered the amount of damages available for any first-party claim under a policy providing coverage for real property arising from property damage cause by hail, wind, or rainstorm pursuant to Texas Insurance Code § 542A.001(2). While the parties agreed that the recent amendments applied to Plaintiff's claim, they disagreed as to the effect. The magistrate judge concluded Plaintiff lacked any cognizable claim for either statutory interest or statutory attorney's fees and the court concluded Plaintiff's objections lacked merit.

The magistrate judge determined the $4,699.00 exceeded the permitted interest available under the TPPCA and foreclosed Plaintiff's eligibility for statutory interest under the TPPCA. Plaintiff did not disagree; rather, he argued the insurer's "gratuitous" payment did not foreclose his ability to seek interest under the TPPCA. The Court was unpersuaded that a Houston Court of Appeals decision, in *Tex. Fair Plan Ass'n v. Ahmed*,[19] that an appraisal award plus a statutory interest payment did not vitiate a TPPCA claim because the action was not a Chapter 542A action and a different statutory framework was applied to calculate interest and attorney's fees. The court was further unpersuaded by a Southern District of Texas matter where that court held payment of an appraisal award plus interest by an insurer did not moot plaintiff's TPPCA claim noting that as to interest payments because that conclusion cut against the facts of the instant matter inasmuch as Plaintiff did not object that he was paid the maximum amount permitted by statute as calculated based off of the appraisal value and in fact accepted the payment and cashed the check. The court found to be more instructive decisions where the court concluded payment of an appraisal award plus interest mooted a party's TPPCA claim where there was not a dispute related to the amount of the claim or the amount of interest paid. The court further rejected Plaintiff's policy argument that the magistrate's construction of the law would lead to absurd results. Accordingly, the court found the magistrate correctly concluded the $4,699.00 payment foreclosed eligibility for statutory interest under the TPPCA and overruled Plaintiff's first objection.

Plaintiff's second objection was to the magistrate's conclusion that he was not eligible for attorney's fees because the method in which same is calculated necessarily results in zero dollars for attorney's fees. The magistrate concluded that Section 542A.007's amount to be awarded in a judgment to

damage to property referred to an unpaid policy benefit that no longer existed once the appraisal award had been paid in full and because there was no dispute Plaintiff's appraisal award had been paid in full, Plaintiff was ineligible for attorney fees. Plaintiff objected relying on two Texas Supreme Court decisions and a policy argument, none of which the court found persuasive.

The court first noted that neither the Texas Supreme Court nor Texas appellate courts have interpreted Chapter 542A and, therefore, the court looked to how the supreme court generally interprets statutes – looking to the statute's plain language and construing the statute as a whole. The court further noted that the plain language of Section 542A.007(a) is clear that payment of an appraisal award extinguishes the plaintiff's right to attorney's fees. 542A.007(a)(3)(A). The issue presented was what amount remains of Plaintiff's claim under his policy as that number would be used to calculate attorney's fees. Because the payment of the appraisal award covered his claim under his insurance policy, he had no remaining claim. In fact, Plaintiff had nonsuited his breach of contract claim, which was the only claim he brought to obtain damages for a claim under the policy.

The Eastern District of Texas noted the first supreme court case relied on by Plaintiff, *Barbara Technologies Corp. v. State Farm Lloyds*,[20] predated September 1, 2017 and did not apply to Section 542A.007. Even if *Barbara* was relevant, in that it recognized the possibility of a theoretical distinction between an undisputed and accepted appraisal amount and the amount of a claim under the policy, there was no evidence to conclude Plaintiff's claim was anything other than the appraisal amount. The other supreme court decision Plaintiff relied on, *JCB, Inc. v. Horsburgh & Scott Co.*,[21] held that inclusion of the word "unpaid" in the statute at issue did not apply to commissions already paid. Plaintiff argued that the lack of the work "unpaid" in Section 542A.007 means that "claim under the insurance policy means both paid or unpaid. The court disagreed and the lack of the term paid or unpaid did not change its analysis. Finally, the court rejected Plaintiff's invitation to ignore the plain text of the statute and adopt his idea of the legislative intent and would instead interpret and enforce the unambiguous provisions of the statute as written.

The court overruled Plaintiff's remaining objections as they all related to the first two and ordered the insurer's motion for summary judgment to be granted.

TWO MONTHS AFTER MORAKABIAN DECISION, DALLAS COURT OF APPEALS ALSO RULES FOR INSURER IN PROMPT PAYMENT DISPUTE

In *Rosales v. Allstate Vehicle & Property Insurance Company*,[22] the court found that where an insurer that pays the amount of the appraisal award and prepays the maximum amount of interest owed prior to a judgment and attorney's fees of zero as calculated under the Texas Prompt Payment of Claims Act ("TPPCA") formula, Plaintiff could not recover additional damages, interest or attorney's fees and that the insurer satisfied all of its TPPCA liability and was entitled to summary judgment.

Plaintiff filed a claim with Allstate for damage to his property from an October 2020 hailstorm. Two adjusters each determined the covered damage was less than Plaintiff's deductible and denied the claim. Plaintiff then filed suit in 2021, alleging breach of contract, bad-faith violations, and breach of the TPPCA and subsequently invoked the appraisal clause of his policy. The appraisers determined the cash value of the loss at $14,869.68 and the insurer issued payment for $11,751 for the full cash value of the award minus Plaintiff's deductible plus a check for $1,408 to cover additional interest that

Plaintiff could allege to be owed under the TPPCA. Like in *Morakabian*, Plaintiff did not dispute that the amount of the interest payment was sufficient under the TPPCA.

The insurer moved for summary judgment on Plaintiff's contract and bad faith claims, which Plaintiff did not challenge. As to Plaintiff's TPPCA claim, the insurer argued that because it had paid all that could be owed, Plaintiff was not entitled to a money judgment and because he was not entitled to a money judgment, Plaintiff had no right to recover attorney's fees under Chapter 542A of the Texas Insurance Code, which determines the amount of attorney's fees based on the money judgment. The trial court granted summary judgment in favor of the insurer without stating grounds for same and Plaintiff appealed the ruling on his TPPCA claim.

Under Chapter 542A, the amount of reasonable and necessary attorney's fees is reduced if the amount to be awarded in the judgment for the policy claim is less than the amount alleged to be owed. The insurer argued that since it paid the appraisal award plus an amount sufficient to cover statutory interest, there was no "amount to be awarded in the judgment" and, therefore, no liability for attorney's fees. Plaintiff countered that the insurer's "gratuitous" payment of statutory damages to avoid attorney's fees violated the Texas Supreme Court's ruling in *Barbara*. The court did not disagree that pursuant to one holding in *Barbara*, the payment of an appraisal fee alone does not preclude an insured's claim for interest and attorney's fees under the TPPCA. However, the court noted Plaintiff was asking the court to extend the holding in Barabara to find payment of an appraisal award plus any possible interest does not preclude a claim for attorney's fees under the TPPCA. Moreover, as noted by the Eastern District of Texas in *Morakabian*, the Dallas Court of Appeals pointed out that *Barbara* was not decided under Chapter 542A's statutory formula and was distinguishable.

The court noted that the insurer paid the appraisal award and an amount sufficient to cover statutory interest and because the award is binding as to the maximum amount of property damage no amount to be awarded for the Plaintiff's claim under the policy and, because the amount of any award in a TPPCA judgment stood at zero dollars, and attorney's fees are a multiple of that amount, an award of attorney's fees would necessarily be zero. Moreover, the court noted the existence of damages for interest does not affect calculation of attorney's fees under Chapter 542A as attorney's fees under Chapter 542A depend on damages awarded for a policy claim and not by statute.

The court concluded the insurer had satisfied all of its TPPCA liability and cited several federal district court decisions that supported its reading of Chapter 542, including *Morakabian*. However, the court noted courts in Texas are not unanimous regarding the issue. The Dallas Court of Appeals was also unpersuaded by the only state court opinion by the Houston Court of Appeals, in *Ahmed*, that an insurer's payment of an appraisal award plus statutory interest did not entitle the insurer to summary judgment on a TPPCA claim and that because Ahmed was not decided under the new 2017 Chapter 542A, it was distinguishable. The court noted that the various rationales for holdings that payment of the appraisal award and statutory interest will not defeat a claim for attorney's fees are generally based on (1) that prepayment of such damages in an impermissible attempt to unilaterally settle the matter and (2) perceived unfairness of permitting a party to zero out on factor of the damage equation by eliminating another variable on which it depends and preventing a party from pursuing attorney's fees. The court with those courts and disagreed that payment of all possible liquidated damages creates an involuntary, unilateral settlement of claims but is instead an effort to extinguish any underlying obligation. Moreover, the court reasoned that under Texas contract law, mitigation of

damages by the plaintiff before trial is required and defendants are encouraged to pay what the defendant owes in order to avoid litigation.

THE FIFTH CIRCUIT AFFIRMS INSURER IS ENTITLED TO SUMMARY JUDGMENT WHERE THE INSURER DEMONSTRATED A GENERALIZED MOLD CLAIM WAS PRECLUDED BY THE POLICY'S MOLD EXCLUSION

In *Buchholz v. Crestbrook Insurance Company*,[23] the Fifth Circuit found that while the district court incorrectly applied the Texas insurance coverage burden-shifting framework, the court affirmed that Crestbrook was entitled to summary judgment because Crestbrook demonstrated that a generalized mold claim was excluded under the policy and the insureds failed to meet their burden of showing an exception to the mold exclusion brings the claim back within coverage under their policy.

Clay and Lindsay Buchholz insured their ten-thousand-square-foot house in Austin, Texas, with Crestbrook Insurance Company ("Crestbrook"). Their policy with Crestbrook included "Biological Deterioration or Damage Clean Up and Removal" coverage. The crux of the appeal was whether the optional mold coverage the Buchholzes purchased in their Crestbrook policy, which provided $1.6 million in mold damage insurance, covered a generalized mold loss. In April 2019, the Buchholzes discovered a widespread mold infestation in their home. The Buchholzes submitted six claims to Crestbrook, which paid $745,778 of the losses on five of the claims, but denied a generalized claim for mold growing in the Buchholzes' walls and heating, ventilation, and air conditioning system. Crestbrook sent a reservation of rights letter regarding the sixth claim for general mold growth and mold in the HVAC system.

The Buchholzes retained MLAW Forensics, Inc., to investigate the cause of their mold infestation and the conclusion was that "discrete leaks and a 'global' issue due to interruption or restriction of the moisture vapor drive drying process" caused the mold and more specifically, the house's HVAC system was "[i]mproperly designed or configured and non-functional," which resulted in "elevated moisture content[]" and subsequent mold growth. Crestbrook denied the mold claim stating workmanship and construction issues were discovered with the HVAC system, wall paint, paneling, and trim and that the policy included exclusions for biological deterioration or damage; a defect or inadequacy in design; workmanship; construction; materials; weather conditions or dampness; and gradual or sudden loss due to a mechanical breakdown. Therefore, Crestbrook concluded the biological deterioration or damage additional limited coverage would not apply to the claim.

The Buchholzes subsequently sued Crestbrook alleging Crestbrook breached its insurance contract and violated the Texas Insurance Code, seeking a declaratory judgment that the Crestbrook policy covered their mold claim. The magistrate judge in the Western District of Texas concluded the Buchholzes failed to show there was a "covered cause of loss" as required by the mold coverage in their policy and recommended the court rule in Crestbrook's favor and the magistrate judge's report and recommendations were adopted by the court. The Buchholzes appealed.

The Fifth Circuit noted that the magistrate judge correctly set forth the Texas insurance dispute burden-shifting framework wherein she concluded that the Buchholzes submitted the policy is an all risk policy that covered all risk of accidental direct physical loss unless an exception applied and skipped the essential step that the mold damage was caused by a covered cause of loss and noting

until the Buchholzes show the mold resulted from a covered lost, the burden does not shift back to Crestbrook to show an exclusion applies and because the Buchholzes did not meet this burden, the district court did not need to address whether an exclusion applied.

In its motion for summary judgment, Crestbrook argued that the mold coverage is independent coverage from the all-risks coverage and, therefore, the Buchholzes must show the mold loss fell within the terms of the mold coverage. According to Crestbrook, the Buchholzes need to establish a “covered cause of loss” to trigger the mold coverage. However, the Fifth Circuit noted that both Crestbrook and the district court glossed over the important step of determining what is a “covered cause of loss.” The Fifth Circuit concluded the district court erred in its application of the Texas insurance burden-shifting scheme and that the mold coverage provisions do not define “covered cause of loss” and the term is open to more than one reasonable interpretation and, therefore, ambiguous. The Fifth Circuit therefore adopted the Buchholzes reasonable interpretation of the meaning of “covered cause of loss” to mean “any cause of loss resulting in accidental direct physical loss” except those excluded under the policy and concluded the district court erred in finding mold damage was not a direct physical loss.

However, the Fifth Circuit acknowledged that Crestbrook did not contend the mold damage was not a direct physical loss; rather, Crestbrook argued it was an excluded loss. Accordingly, the Fifth Circuit noted that the magistrate judge’s report and recommendation should have concluded the Buchholzes suffered a direct physical loss covered under the policy and then completed the burden-shifting analysis regarding the parties’ arguments regarding exclusions and exceptions to same. By failing to do so, the magistrate judge incorrectly applied Texas insurance law. However, despite the error, the Fifth Circuit agreed with the ultimate judgment. Applying the Texas insurance burden-shifting framework, the Fifth Circuit agreed with Crestbrook that the mold exclusion barred coverage for the Buchholzes’ claim.

Under the Texas insurance dispute framework, the Fifth Circuit noted the Buchholzes must first show a direct physical loss as required under their all-risk policy and then Crestbrook could identify any exclusions to coverage of that loss. There was no dispute that the claim involved a direct physical loss. Because the mold exclusion is dispositive in Crestbrook’s favor, the Fifth Circuit focused on how the exclusion precluded coverage for the Buchholz’s claim. The policy excluded coverage for loss to any property resulting directly or indirectly from biological deterioration or damage, except as provided by the policy’s mold coverage. The Buchholzes’ theory is that water within the walls of the home caused the mold. However, generalized water intrusion as such is not a loss covered by the policy when its primary effect was to cause a fungal infestation. To reason otherwise would gut the mold exclusion. To classify water intrusion as a covered peril underlying a generalized mold claim, the Buchholzes needed to identify "something more substantial than" excess water within their walls. The Buchholzes showed they suffered a mold infestation, nothing more. Accordingly, the Buchholzes did not show that their mold coverage served as an exception to the mold exclusion and, therefore, their generalized mold claim was excluded by the terms of their policy.

Although the Fifth Circuit concluded the district court incorrectly applied the Texas insurance coverage burden-shifting framework, it further concluded Crestbrook was still entitled to summary judgment because it demonstrated a generalized mold claim was excluded under the policy.

CALIFORNIA FEDERAL DISTRICT COURT HOLDS THAT TEMPERATURE MONITORING LOGS ARE EVIDENCE OF FOOD ITEMS ARRIVING IN DAMAGE CONDITION UNDER A CARMACK ACTION

In *AGCS Marine Insurance Company v. Kool Pak, LLC*,[24] the Central District of California considered a Carmack subrogation action initiated by an insurer against a carrier for damages to a shipment of clam chowder. In this case, AGCS Marine Insurance Company ("AGCS") insured Ivar's, Inc. a Seattle-area restaurant chain and food manufacturer. Ivar's tendered a consignment of 1,250 cases of packaged clam chowder to Kool Pak, LLC, a common interstate motor carrier, for transportation by road from Ivar's in Washington, to a Costco in California. When Ivar's tendered the chowder to Kool Pak, it was refrigerated at a temperature of 35.7°F and otherwise in good condition. Kool Pak issued a bill of lading agreeing to transport the chowder in a refrigerated trailer at a temperature between 33°F and 40°F.

When Kool Pak attempted to deliver the chowder to Costco at the destination. Based on the activation of the time temperature indicator ("TTI") and Kool Pak's own temperature logs, the temperature within the refrigerated trailer demonstrated that the chowder had exceeded 40°F for over four hours cumulative during the course of transport. Kool Pak's own trailer temperature log demonstrated that the chowder was subjected to temperatures exceeding 40°F for over ten hours cumulative. Upon delivery, Costco rejected the shipment because the increase temperature had caused an unsanitary condition under FDA guidelines relating to the prevention of botulism. Ultimately, AGCS indemnified Ivar's and initiated this action under the Carmack amendment seeking recovery for the amount it paid to indemnify Ivar's for this loss.

In response to this action, Kool Pak moved for summary judgment on the grounds that AGCS failed to establish a prima facie case under the Carmack Amendment, Ivar's failed to mitigate its damages, and that Ivar's damages were limited to the cost of manufacturing replacement chowder and transportation costs. The Carmack Amendment is a part of the Interstate Commerce Act and provides the exclusive cause of action for interstate shipping contract claims. Courts have held that the Carmack Amendment limits a carrier's liability under an interstate bill of lading to the actual loss or injury to the property caused by the carrier. To establish a prima facie case of liability under the Carmack Amendment, a shipper must show 1) delivery in good condition, 2) arrival in damaged condition, and 3) the amount of damages. Kool Pak argued that AGCS failed to establish the second element, proof of arrival in damage condition by asserting that the temperature logs were not sufficient to establish the chowder was actually damaged.

Specifically, Kool Pak asserted that under Carmack, Ivar's was required to test the temperature of the chowder packages on arrival to prove they were actually damaged. The Court was not persuaded by Kool Pak's argument and cited to the evidence provided by AGCS, including expert testimony which detailed the FDA's reasoning in providing such strong guidance for the safe handling and transport of seafood products to prevent food-borne illnesses. Ultimately, the Court held that temperature logs were sufficient evidence of the clam chowder arriving in a damaged condition. Accordingly, the Court denied Kool Pak's motion for summary judgment on this issue by citing to the express language of the bill of lading stating that temperatures in excess of 40°F were not acceptable and that it was

"undisputed fact" that the chowder was subjected to temperatures in excess of 40°F for more than ten hours cumulative over a forty-four-hour period of transport.

Kool Pak also asserted that Carmack required a shipper to salvage any unadulterated portion of the shipment. Essentially, Kool Pak contended Ivar's should have attempted to sell some portion of the chowder. The Court quickly dismissed of this argument on the grounds that Kool Pak's position that attempting to salvage or resale the chowder which had been exposed to temperatures capable of cultivating food-borne illnesses including botulism was not only unreasonable, but it was also immoral.

Kool Pak's final argument was that under Carmack, Ivar's damages should be limited, as a matter of law, to the cost of manufacture of the replacement chowder, plus transportation costs that Ivar's provided to Costco. Kool Pak argued that allowing Ivar's to recover the invoice value of the damaged shipment would award it a windfall in the form of double profit. The Court was also unpersuaded by this argument on the grounds that Kool Park failed to show that Ivar's was paid for the original shipment, that the existing chowder stock would not have been otherwise sold, and Kool Pak failed to show that Ivar's could not have sold and earned profit on two batches of unharmed product.

This case demonstrates that courts are likely to hold that adhering to food safety protocols are sufficient grounds for surviving a summary judgment challenge for failing to establish a prima facie Carmack action. Accordingly, this case demonstrates the importance of obtaining expert testimony to clearly establish the necessity for rejection of a shipment of potentially contaminated food to support the insurer's action when pursuing a subrogation action under Carmack.

ILLINOIS FEDERAL DISTRICT COURT UPHOLDS THAT A POST-ACCIDENT AMENDMENT TO A POLICY IS NOT VALID IN A COVERAGE DISPUTE AND APPLIES A STRICT INTERPRETATION THAT THE MCS-90 IS NOT APPLICABLE TO A PURELY INTRASTATE TRIP

In *Artisan & Truckers Casualty Company v. Dollar Trees Stores, Inc.*,[25] the Northern District of Illinois considered a coverage dispute regarding a motor carrier policy containing an MCS-90 endorsement. The dispute arose out of an underlying action when an employee was injured while attempting to make a delivery utilizing an auto that did not qualify as an "insured auto".

In this case, Ljupka Logistics, Inc., ("Ljupka") was a motor carrier of property for hire. On August 1, 2018, Ljupka executed a Broker/Carrier Agreement with Defendant U.S. Xpress, Inc. ("USX"). In late August of 2018, USX as a broker arranged for Ljupka to deliver a perform a freight delivery for Dollar Tree Stores, Inc.'s stores. USX brokered the shipment to Ljupka which, in apparent violation of its contract with USX, assigned the load to another trucking company, Defendant GLS Group LLC ("GLS"). Ljupka's owner, Frosina Gjorgjevska, was married to GLS's owner and sole member, Zoran Gjorgevski.

GLS dispatched the load to Elliott McCoy. McCoy drove Zoran's tractor—a 2007 Volvo—to a warehouse in Joliet, Illinois, to pick up the shipment. The Dollar Tree job was what is known in the trucking industry as a "drop and hook" operation—the freight Ljupka (and, by further assignment, GLS) was responsible for transporting was pre-loaded onto a trailer supplied by USX prior to McCoy's arrival. The job called for McCoy to deliver freight to three Dollar Tree stores, all located in Illinois. Upon arrival, at the first location, McCoy was injured by falling boxes when the trailer was opened by a Dollar Tree manager

opened the trailer's rear doors. Eventually, McCoy filed a negligence suit against Dollar Tree, USX McCoy, Dollar Distribution, Ljupka, and GLS.

In response, Artisan & Truckers Casualty Company ("Artisan") initiated a case against its insured Ljupka. Artisan sought to clarify two things: (1) whether, it has a duty to defend Ljupka, or any other Defendant, against McCoy's claims; and (2) whether it bears an obligation to indemnify any Defendant for liability they might ultimately be found to have incurred for McCoy's injuries. The Artisan Policy language was clear in that it only extended coverage for liability arising out of the ownership, maintenance, or use of an "insured auto." The Policy established a vehicle was an "insured auto" if: (1) it was shown on the policy's declarations page, (2) qualified as an "additional auto", (3) qualified as a "replacement auto", or (4) qualified as a "temporary substitute auto".

Artisan moved for summary judgment that because the 2007 Volvo tractor trailer involved in the McCoy accident was not an "insured auto" under any of these four definitions, Artisan had no duty to defend or indemnify any Defendant. However, resolution of this issue was complicated by the fact that mere hours after the accident, Zoran successfully amended the policy to add the 2007 Volvo to the policy's declaration. The record does not clarify how Zoran, who neither owned nor worked for Ljupka, had the authority to amend the policy. Nevertheless, he managed to do so, however, at the time of the amendment Zoran did not notify anyone that the 2007 Volvo had, just hours before, been involved in the McCoy accident.

In opposing Artisan's motion for summary judgment, USX's sole argument turns on the post-accident amendment of the Ljupka declarations page to specifically cover the Volvo. USX's argument was simple—the plain language of the policy, as amended, listed an effective date of August 29, 2018, and does not reflect a specific time of day the change is effective. Accordingly, USX argued this created at least a genuinely disputed issue of fact whether the policy amendment was effective at the time of the McCoy accident. USX contended that the contract itself did not answer—at least as a matter of law justifying the entry of summary judgment—the question whether the amendment was intended to apply retroactively to events occurring on August 29, 2018, but prior to execution of the amendment. The Court was not persuaded by this argument and argued that the declarations page disputed this argument because it unambiguously stated that "changes shown above will *not* be effective prior to the *time the changes were requested*." The Court reasoned that the "changes" to which this provision referred include, changes to "[t]he auto coverage schedule"—in other words, the addition of the 2007 Volvo. Accordingly, the Court determined that Artisan did not have any obligation to defend or indemnify any part in the lawsuit because the Volvo did not qualify as an "insured auto" under the policy at the time of the accident.

In addition, USX attempted to argue that an MCS-90 endorsement to the policy could potentially apply to afford coverage for the lawsuit. USX maintained that evidence demonstrated that McCoy and GLS regularly engaged in interstate commerce and the fact that the Broker-Carrier Agreement specifically provided for the transportation of interstate and foreign commerce, it is at least in dispute whether the McCoy accident took place in interstate commerce, such that the MCS-90 endorsement would apply. The Court disagreed citing to a January 2023 opinion from the 7th Circuit Court of Appeals that held the MCS-90 endorsement only applies when an accident occurs during an interstate journey to deliver freight or during the taking of an ancillary step related to such a journey. Accordingly, the Court held that the relevant unit of analysis in ascertaining whether a carrier is operating in interstate or

foreign commerce is the itinerary of the carrier's route at the time of the accident. In the present case, it was undisputed that McCoy's trucking activities on the date of the incident were exclusively within Illinois. Therefore, the Court held that the MCS-90 endorsement did not apply to this case.

This case demonstrates that courts are reluctant to accept an argument that a post-accident revision of a policy could create coverage. In addition, this case demonstrates the importance of researching the local jurisdiction’s viewpoint on the type of analysis a court will utilize when determining to determine if an MCS-90 endorsement in a motor carrier policy is triggered.

TEXAS FEDERAL DISTRICT COURT HOLDS THAT MOTOR CARRIER AND GARAGE POLICIES DO NOT APPLY TO AFFORD COVERAGE FOR CLAIMS ALLEGEDLY ARISING OUT OF THE INSURED’S NEGLIGENT INSTALLATION OF A CUSTOMER’S TIRE AT THE CUSTOMER’S RESIDENCE

In *Argonaut Midwest Insurance Company v. Phill Thweatt Wrecker Serv., Inc.*,[26] the Western District of Texas considered a coverage dispute arising from the alleged negligent installation of a tire. The facts alleged in the underlying petition stated that in October 2019, Michael Palmer was driving his Mazda 3 in the rain when he lost control of the car and struck Danny Krumnow and Matthew Jones. Krumnow was severely injured as a result of the accident and Jones succumbed to his injuries. The pleadings in the underlying lawsuit detail that shortly before the accident, Palmer ordered a replacement wheel and directional tire to replace his damage front right tire. Palmer had the tire mounted on the replacement wheel and called AAA Texas, LLC (“AA”) to have the tire installed. It was further alleged that AAA retained Phil Thweatt Wrecker Service, Inc. (“Thweatt”) to install the tire at Palmer’s house. Finally, it was alleged that Thweatt installed the directional tire in the wrong direction. It was alleged that the accident occurred as a result of the improper installation causing Palmer's Mazda to hydroplane.

Given these accusations, Argonaut Midwest Insurance Company (“Argonaut”) and Colony Insurance Company (“Colony”) sought declarations holding that Argonaut had no duty to defend or indemnify Thweatt or AAA under a motor carrier policy it issued to Thweatt. Similarly, Colony asserted that it had no duty to defend or indemnify AAA under a garage policy it issued to Thweatt.

The scope of Argonaut’s motor carrier policy issued to Thweatt afforded coverage for a bodily injury caused by an accident resulting from the ownership, maintenance, or use of a covered “auto”. The policy provides three classes of covered "autos": (1) specifically described autos; (2) hired autos only; and (3) non-owned autos only. Specifically described autos were only those autos described in the declarations. Hired autos included only those autos Thweatt leased, hired, rented or borrowed. Non-owned autos included only those autos Thweatt did not own, lease, hire, rent, or borrow that were used in connection with his business. Argonaut argued and the Court agreed that Palmer's Mazda 3 was not a covered auto because it did not fall under any of these categories of covered autos. Accordingly, the Court found that Argonaut did not have the duty to defend or indemnify Thweatt for this loss.

In addition, Argonaut argued that it did not owe a duty to defend or indemnify AAA because it was not an insured under the policy. The Policy defined "Insureds" to include Thweatt for any covered "auto;" anyone else while using a covered "auto" owned, hired, or borrowed by Thweatt with exceptions; the owner or anyone else from whom Thweatt hired or borrowed a covered "auto" that was a "trailer"

while the "trailer" was connected to another covered "auto;" the lessor of a covered "auto" that was not a "trailer" or any "employee," agent, or driver of the lessor while the "auto" was leased to Thweatt; and anyone liable for the conduct of an "insured" described above. The Court concluded that based on the facts alleged in Plaintiffs' pleadings, AAA did not fall under any of these categories of potential insureds. Accordingly, the Court found that under the Argonaut policy, Argonaut did not have the duty to defend or indemnify AAA for this loss.

Colony issued a garage policy to Thweatt. Colony was actively defending Thweatt under the garage policy in the underlying lawsuit. However, similar to Argonaut, Colony argued that AAA did not qualify as an insured under the garage policy. The garage policy's definition of insured was limited to include: Thweatt for any covered "auto;" anyone else while using with Thweatt's permission a covered 'auto' Thweatt owned, hired or borrowed; anyone liable for the conduct of an 'insured' described above but only to the extent of that liability; and Thweatt's 'employee' use of a covered 'auto' that Thweatt did not own, hire or borrow in his business or personal affairs. The Court concluded that based on the plain language of the pleadings, AAA was not an "insured" because it did not fall under any of these categories. Accordingly, the Court held that Colony did not owe any obligation to defend or indemnify AAA under the garage policy.

This case demonstrates that Texas courts are not willing to expand coverage under motor carrier and garage policies to include allegations that are the result of negligent acts of the insured that occur outside the maintenance, use, or ownership of a covered vehicle. Accordingly, this case underscores the importance of thoroughly analyzing the policy terms and the underlying pleading to clearly establish that the underlying lawsuit concerns a risk or conduct by the named insured that is outside the scope of coverage afforded by these types of policies.

OTHER NOTEWORTHY AND GENERAL INSURANCE LAW CASES

TEXAS SUPREME COURT FINDS AN ARBITRATION PROVISION BINDING AGAINST SUBSEQUENT PURCHASER UNDER THE DOCTRINE OF DIRECT-BENEFITS ESTOPPEL

Lennar Homes of Texas Land & Construction Ltd. v. Whiteley,[27] arose from an interlocutory appeal and concerned whether a subsequent purchaser of a home was required to arbitrate claims against the builder for alleged construction defects. In the trial court, the builder's motion to compel arbitration was granted, and the builder joined two subcontractors in the arbitration, asserting that they owed it defense and indemnity obligations. After the arbitrator issued an award in favor of the builder, the builder and purchaser filed cross-motions to confirm and to vacate the award, disputing whether the subsequent purchaser was bound by arbitration clauses in the builder's purchase-and-sale agreement with the original purchaser and in its deed to that purchaser. The trial court vacated the award against the subsequent purchaser, and it made no ruling regarding whether to vacate the award against the subcontractors, who were not yet before the court. The court of appeals affirmed.

In relevant part, the Texas Supreme Court held that the subsequent purchaser was bound by the arbitration clause in the purchase-and-sale agreement under the doctrine of direct-benefits estoppel. The Court reasoned that direct benefits estoppel, in general, requires nonparties to an

agreement containing an arbitration provision to arbitrate claims if liability arises from a contract with an arbitration clause, but not if liability arises from general obligations imposed by law. Here the Court found that the purchasers claims arose from the agreement requiring arbitration because: (1) the implied warranties at issue were "as much a part of the writing as the express terms of the contract," although they are imposed by the operation of law because the obligation still arises from the contract and thus becomes part of the contract; and (2) although the mere fact that the claims would not have arisen but-for the written agreement is not enough to establish equitable estoppel, the purchaser's claims shared "more than a but-for relationship with the purchase agreement." Specifically, although liability arose in part from the general law, *nonliability* arose from the terms of the express warranties described in the purchase agreement. Additionally, some of the potential liability arose from whether certain disclosures were adequate to waive implied warranties, which required reference to the purchase agreement. Accordingly, the Court held that the subsequent purchaser was bound by the arbitration agreement.

WESTERN DISTRICT OF TEXAS CONSIDERS EXTRINSIC EVIDENCE OF A TOLLING AGREEMENT

In *Twin Vill. Mgmt., LLC v. Federal Insurance Company Chubb Group. of Insurance Company*,[28] a Western District Court of Texas magistrate judge found that extrinsic evidence of a tolling agreement was permissible evidence under Texas Supreme Court's prior precedent.

Plaintiffs alleged that Arthur J. Gallagher Risk Management Services, Inc. and Arthur J. Gallagher & Co. (collectively "Gallagher") presented to TVM Management, LLC ("TVM") a professional liability insurance proposal offering "Executive Package" coverage though Federal. Federal issued the policy for the period September 15, 2018 to September 15, 2019. WCP Group GC, LLC ("WCP"), Huntington Creek Capital IV, LLC, Huntington Creek Capital VI, LLC, and Huntington Creek Capital VII, LLC ("HCC VII") were affiliates of Plaintiff TVM. The Directors & Officers liability provision of the Policy covered "Insured Persons," with a $2 million limit of liability. In 2019, shareholders of TVM, WCP, and GCC filed several derivative lawsuits in Texas state court against Plaintiffs, alleging breach of fiduciary duty, fraud, and negligence. TVM notified Federal and Chubb of the underlying suits and requested a defense. Mathew Dewey, a claim examiner with Chubb NA Financial Lines Claims, told TVM that "Chubb will provide a defense subject to the Policy terms and conditions." Dewey stated, however, that coverage was unavailable for WCP and HCC VII because they "are not Insureds under the Policy," and thus would need to determine a proper allocation for defense costs.

On March 21, 2021, counsel for Federal and Chubb sent TVM a supplemental coverage letter proposing that Federal would provide a "one-third allocation toward covered Defense Costs" based on the findings that : (1) WCP Fund was not an Insured, so none of its defense costs or loss can be allocated to the Policy; (2) the allegations against the Stanleys implicated their actions in their capacities as executives solely for WCP Fund, so these claims and the Stanleys' defense costs were not covered by the Policy; and (3) a duty to defend may be triggered for TVM, which would be entitled to 100% of its Defense Costs under the Allocation Provision of the Policy. Plaintiffs did not respond to the proposed allocation and instead sued Federal, Chubb, and Gallagher. In pertinent part, Plaintiffs alleged bad faith, fraud, violation of the Texas Deceptive Trade Practices Act, violation of Texas Insurance Code Chapter 541, unjust enrichment, and negligence against Gallagher. Each defendant filed a motion to dismiss.

In pertinent part, Gallagher argued that Plaintiffs' claims against it should be dismissed as untimely because the claims were time barred. Plaintiffs were apparently aware of the events giving rise to their claims before March 9, 2020, but did not file suit until October 31, 2022. Plaintiffs did not dispute this but argued that their claims were not time barred because Gallagher entered into an agreement to toll the statute of limitations until October 31, 2022. Gallagher did not dispute the validity of the tolling agreement but argued that (1) the Court could not consider it because Plaintiffs failed to mention the agreement in their Complaint, and (2) it was irrelevant because "Plaintiffs' Complaint made no mention of any dates" so "the Court cannot ascertain what, if any, claims were tolled by the agreement." The Court disagreed, relying on *Monroe*, reasoning that "a court may consider such evidence if it '(1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved'" Because the existence of a tolling agreement between the parties was consistent with the pleadings, and because Gallagher did not contest the agreement's validity, the Court considered the tolling agreement in deciding this motion and concluded that Gallagher did not sustain its burden to show that the two-year statute of limitations barred Plaintiffs' claims.

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[1] No. 4:22-CV-580, 2023 U.S. Dist. LEXIS 54705, 2023 WL 2719466 (S.D. Tex. March 30, 2023).
[2] *Farmers Texas County Mutual Insurance Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997) (emphasis removed).
[3] 2023 Tex. LEXIS 316 *; 66 Tex. Sup. J. 622; 2023 WL 2939596 (April 14, 2023).
[4] *Id.* at *2-3 n.1.
[5] *Id.* at *6.
[6] No. 20-0737, 2023 Tex. LEXIS 405 * (Tex. 2003).
[7] *Id*. at *14.
[8] *Id*. at *11.
[9] 813 S.W.2d (Tex. 1991).
[10] *United Rentals*, supra, at *12 (citing *Powers,* supra, at 491).
[11] *Id*. at *20.
[12] No. 01-21-00330-CV, 2023 Tex. App. LEXIS 3196* (Tex. App. Houston [1st Dist.] May 11, 2023).
[13] *Id*. at *2.
[14] *Id*.
[15] *Id*. at *14 (citing Kidd v. State Farm Mut. Auto. Ins. Co., No. 05-16-01387-CV, 2018 Tex. App. LEXIS 2620 at *1 (Tex. App. Dallas- April, 12, 2018, pet den.).
[16] *Id.* at *23.
[17] 67 F.4th 672 (5th Cir. May 8, 2023)
[18] No. 4:21-CV-100-SDJ, 2023 U.S. Dist. LEXIS 55320 (E.D. Tex. 2023).
[19] 654 S.W.3d 488, 489-90 (Tex. App.—Houston [14th Dist.] 2022, no pet.).
[20] 589 S.W.3d 806 (Tex. 2019).
[21] 597 S.W.3d 481 (Tex. 2019).
[22] No. 05-22-00676-CV, 2023 Tex. App. LEXIS 3315 (Tex. App.—Dallas May 16, 2023, no pet. h.).
[23] 65 F.4th 766, 769 (5th Cir. May 9, 2023).
[24] No. 2:22-CV-02775-ODW, 2023 U.S. Dist. LEXIS 64621, WL 2916552 (C.D. Cal. April 12, 2023).
[25] No. 20 C 290, 2023 U.S. Dist. LEXIS 90263, WL 3601734 (N.D. Ill. May 23, 2023).
[26] No. 6:22-CV-509-ADA-JCM, 2023 U.S. Dist. LEXIS 74373, WL 3132057 (W.D. Tex. April 12, 2023).
[27] No. 21-0783, 2023 Tex. LEXIS 407 (Tex. May 12, 2023).

[28] No. 1:22-CV-01111-ADA, 2023 U.S. Dist. LEXIS 106589 (W.D. Tex. June 19, 2023).