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TEXAS INSURANCE LAW UPDATE

FIRST QUARTER 2024

There were several noteworthy decisions from the Fifth Circuit and Texas state and federal courts handed down in the First Quarter of 2024 which may be relevant to your claims handling. Topics considered by the courts include, an insured's preclusion from recovering attorney fees where an insurer tenders full payment of an appraisal award and interest, procedures of insurers when adjusting auto claims per the Certificate of Title Act, analyzing duty to defend in light of Breach of Contract exclusion, that the definition of "windstorm" does not include "tornados," and further application of the "*Monroe*" exception which allows consideration of extrinsic evidence when determining duty to defend.

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.

RECENT VICTORIES FOR OUR CLIENTS

Cause No. 2022-25119-A; *Jennifer Suchan v. Homeowners of America Insurance Company ("HOAIC") and Kimberly Caspari*, filed in the 51st Judicial District Court of Harris County Texas. Cox PLLC's attorneys, Lisa Brindle Talbot, Jennifer Kelley, and Stephen Small obtained victorious results for a client HOIAC wherein the Court granted HOAIC's Motions for Summary Judgment (the "Motions") against HOAIC's insured and the plaintiff in the underlying lawsuit. The insured and the underlying plaintiff filed declaratory judgments arguing the Court should declare HOAIC's Homeowners' Insurance Policy with an endorsement that reduced the available limits of personal liability from $300,000 to $25,000 was not triggered by the allegations of the underlying lawsuit. HOAIC's endorsement stated that the reduction of the limits applied to any "**bodily injury or property damage *caused by any animal* or animals otherwise covered**" under the Policy (the "Animal Endorsement").

Although the underlying plaintiff argued that the insured's dog attacked her causing her to fall and sustain bodily injuries, the underlying plaintiff and the insured equally argued that the Policy's Animal Endorsement did not apply because: (1) the bodily injuries were not a result of the dog but rather a result of the insured's negligence; and (2) HOAIC failed to comply with the

Homeowners Bill of Rights ("BRHO") by providing the insured with a "written explanation" of the reduced coverage amount prior to issuing the Policy.

In the summary judgment briefing and again at an oral hearing before the Court, several arguments were made in support of HOAIC's Motions. First, we argued that the Policy's endorsement terms were directly within the ambit of the factual allegations asserted against the insured in the underlying lawsuit. Second, *but for* the dog's actions, the underlying plaintiff's bodily injuries never would have occurred. Third, the insured and the underlying plaintiff's reliance on the BRHO was completely unsupported. As to the latter argument, we focused on the fact that there was no Texas case law, rule or statute that authorized the Court to completely ignore the express and unambiguous terms of the Policy. In the absence of the same, the Court was required to uphold the terms of the Policy as it was a written contract between the parties. The Court agreed with HOAIC's arguments and granted both of HOAIC's Motions and denied the insured's Cross-Motion for Summary Judgment.

Civil Action No. 1:22-CV-0622-LY; *Security National Insurance Company ("SNIC") v. Stag Pools, LLC and The Cincinnati Specialty Underwriters Insurance Company ("CSU")*; In the Western District of Texas, Austin Division. Cox PLLC's attorneys, Lisa Brindle Talbot, Jennifer Kelley, and Stephen Small obtained victorious results for client CSU in a federal declaratory judgment action against a co-insurer of CSU's insured, Stag Pools. SNIC argued that it had no duty to indemnify and/or defend Stag Pools in an underlying liability lawsuit involving construction defects to a swimming pool. SNIC argued that the Silica or Silica-Related Dust Exclusion (the "Silica Exclusion") contained in SNIC's policies excluded coverage for the alleged defective construction and resulting property damage claimed by the underlying plaintiffs. As part of its arguments, SNIC attempted to rely upon the *Monroe* extrinsic evidence rule in the form of a pre-suit expert report claiming that the underlying petition had a "gap" that prevented the Court from determining the issue of coverage under SNIC's Silica Exclusion.

In response and on behalf of CSU, we argued that SNIC could not satisfy all of the elements of the *Monroe* rule as the expert report contradicted allegations directly asserted in the underlying petitions and did not conclusively resolve the issue of coverage before the Court. In its order, the Western District agreed with CSU's arguments and denied SNIC's Motion for Summary Judgment against CSU. The Court held that SNIC's reliance on the expert report did not provide conclusive evidence of coverage and the report was nothing more than opinion and not a conclusively proven fact of any kind.

COMMERCIAL GENERAL LIABILITY/EXCESS/UMBRELLA

TEXAS FEDERAL COURT FURTHER EXPANDS UPON USE OF EXTRINSIC EVIDENCE TO DETERMINE DUTY TO DEFEND

In *LM Insurance Corporation vs. Nautilus Insurance Company*,[1] the Southern District of Texas analyzed the evolving jurisprudence surrounding Commercial General Liability (CGL) polices and the use of extrinsic evidence in assessing the duty to defend. The Court, building upon the precedent set forth in *Monroe,* utilized extrinsic evidence to determine that a duty to defend was indeed triggered, emphasizing *Monroe*'s holding that Texas law allows for the consideration of extrinsic evidence in coverage disputes when such evidence: (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. Additionally, the Court further expanded the duty to defend under CGL policies by adopting the reasoning put forth in Lancer determining that the phrase "resulting from" within an additional insured clause warrants a broad interpretation akin to "arising out of." Thereby joining *Monroe*'s evidentiary standards together with Lancer's interpretative guidance and broadening the scope of the duty to defend under CGL policies.

The *LM Insurance Corporation* lawsuit arose after Ranger Fire, Inc.'s ("Ranger") employee, Ramiro Morin, sued Blazer Building Texas, LLC ("Blazer") for injuries that Morin allegedly sustained while working for Ranger on a construction job for which Blazer was the general contractor. LM Insurance Corporation ("LMI") insured contractor Blazer. Nautilus Insurance Company ("Nautilus") insured subcontractor Blazer. It its summary judgment motion, LMI, argued that Nautilus had a duty to defend and indemnify Blazer in the underlying lawsuit. Nautilus argued that it had no duty to defend Blazer because the underlying lawsuit does not result from the work that Ranger performed for Blazer. Specifically, Nautilus claimed that Morin's pleadings did not specifically state that he was working for Ranger when he was injured. Instead, Morin's pleadings only alleged that he was working for a fire sprinkler installation contractor but did not mention Ranger by name. Thus, Nautilus argued that pursuant to the eight corners rule the duty to defend was not triggered.

However, the Court did not agree. Analyzing the duty to defend under Monroe, the District Judge concluded extrinsic evidence could be used to establish coverage despite the eight corners rule because the (1) specific identity of Morin's employer goes solely to an issue of coverage and does not overlap with the merits of liability; (2) the extrinsic documents submitted by the parties may be used to establish that Morin worked for Ranger because the fact that Morin worked for Ranger does not contradict any facts alleged in Morin's pleading; and (3) the fact that Morin worked for Ranger is conclusively established by the extrinsic documents. Thus, Court held that the extrinsic documents established that Morin worked for Ranger, and Nautilus had a duty to defend Blazer in the lawsuit pursuant to the Monroe factors.

Expanding the duty to defend even further, the Court then disagreed with Nautilus' argument that even if extrinsic evidence were considered to identify Ranger as the sprinkler installer that the underlying suit still fell outside of the scope of the additional-insured provisions of Ranger's CGL policy because there were no facts alleged in the underlying lawsuit implicating Rangers' work in connection with Morin's injuries. Analyzing the CGL policy language, which made Blazer an additional insured for claims or suits "resulting from" Ranger's work performed for Blazer, the Court agreed with LMI that the phrase "resulting from" is synonymous with the phrase "arising out of" as analyzed in other coverage cases decided under Texas law. Specifically, the District Judge concluded that the Texas Supreme Court has endorsed "a more liberal causation theory of additional insured provisions" in lieu of a "fault-based interpretations" that would "require proximate cause or legal causation". Thus, the Court held that Nautilus had a duty to defend Blazer under the additional-insured provisions of Ranger's CGL policy because in the underlying lawsuit Morin alleged that he was injured while walking through an apartment construction site that was "operated by and/or controlled by" Blazer and that he was on the site because he "was working for a fire sprinkler installation contractor" that the extrinsic evidence conclusively shown was Ranger.

The *LM Insurance Corporation vs. Nautilus Insurance Company* case indicates a shift towards a more nuanced approach in analyzing the duty to defend. This case illustrates the judicial willingness to integrate extrinsic evidence into the analysis, provided the stringent criteria set by the *Monroe* decision are met, ensuring that the evidence directly pertains to coverage issues without encroaching upon the merits of liability. Furthermore, the court's alignment with the broad interpretative stance on "resulting from" akin to "arising out of," as established in Lancer, marks a significant expansion in the application of additional-insured coverage. This harmonization of *Monroe*'s evidentiary standards with Lancer's interpretative guidelines signals an evolving landscape of insurance litigation, where courts are increasingly prepared to go beyond traditional confines in resolving disputes over coverage.

PERSONAL AND COMMERCIAL AUTO

TEXAS SUPREME COURT HEARD ORAL ARGUMENTS ON JANUARY 10, 2024 REGARDING CLASS CERTIFICATION IN CASE SEEKING DAMAGES FOR THE WRONGFUL DESIGNATION OF VEHICLE AS SALVAGE.

In *USAA Cas. Ins. Co. v. Letot*[12] the Dallas Court of Appeals affirmed a trial court order certifying a class action against USAA under Rule 42, TRCP. The court of appeals' opinion does not refer to the law governing USAA's standard operating procedure that is at issue in the litigation. On January 10, 2024, counsel for USAA Casualty Ins. Co. appeared before the Texas Supreme Court to argue for reversal of the trial court's class certification in an alleged wrongful designation of a vehicle as salvage case.

The case arose from a 2009 collision between Letot and USAA's insured that, according to USAA's adjuster, damaged Letot's 1983 Mercedes. USAA's adjuster determined that while the value of the vehicle was $2728, the cost of repair came to $8859. USAA declared the vehicle a "total loss" and tendered Letot checks totaling $2738.02 to Letot. Letot objected to the vehicle valuation, and her lawyer returned the checks and demanded that USAA pay $10,700 in damages. USAA declined to do so.

As its standard practice when totaling a vehicle, within 3 days of tendering payment of Letot's claim, USAA filed an owner retained report with TXDOT pursuant to 43 TAC § 217.83(c), which prescribes a procedure by which an owner of a salvage or non-repairable vehicle retains the vehicle. Under § 217.83(a), a vehicle is deemed salvage or non-repairable if the cost of repairs exceeds the market value of the vehicle. Market value is determined from publications commonly recognized by the automotive or insurance industries to establish values, or, if the entity determining the value is an insurance company, by any other procedure recognized by the insurance industry, including market surveys, that is applied in a uniform manner. Similarly, cost of repairs must be determined using a manual of repair costs or other instrument generally recognized and used in the automotive repair industry, or an estimate of actual cost of the repair parts and labor costs by using hourly rate and time allocations that are reasonable and commonly assessed in the repair industry in the community in which the repairs are performed.

USAA followed this procedure, declared the vehicle unsalvageable, and sent Letot a check. Since USAA did not acquire ownership or possession of the vehicle (in which case USAA would have to apply for a non-repairable or salvage vehicle title), it filed an owner retained report as required by § 217.83(c). This subsection provides that when an insurance company pays a claim on a non-repairable or salvage vehicle and does not acquire ownership, the company shall submit to TXDOT before the 31st day after the date of the payment of the claim, a report stating that the company has paid a claim and has not acquired ownership or possession of the vehicle. When it receives the report, TXDOT places a notation on the vehicle record to prevent registration and transfer of ownership prior to the issuance of a salvage or non-repairable vehicle title. All of that happened in this case as prescribed by law, as nearly as we can ascertain from the court of appeals' opinion.

The class representative alleges that USAA (1) failed to notify her that it filed owner retained reports subsequent to paying claims for non-repairable or salvage vehicles, (2) failed to notify her of the consequences that an owner retained report would have on her title, (3) improperly filed an owner retained report before Letot had accepted payment of the claim, and (4) illegally converted her title in the vehicle by filing the report. She further sought class certification for all similarly situated vehicle owners for which USAA had filed owner retained reports within 3 days of paying claims. The trial court certified the class on the basis of a common issue of whether "USAA's uniform practice of filing Owner Retained Reports prior to paying claims improperly meant it improperly and intentionally asserted rights in Letot's property." However, nowhere in the court of appeals' opinion is there any discussion of what was "improper" about USAA's conduct in the first place or what "rights in Letot's property" USAA asserted. The court of appeals focused solely on the propriety of USAA's "uniform practice" of filing owner retained reports on totaled vehicles as justifying class certification, brushing aside USAA's argument that at best each conversion claim should be tried individually because in every case except Letot's nobody has ever complained about it. Undoubtedly, if the class certification holds up, it will put the company under intense pressure to settle the case, but it is hard to see why it would change standard practice when nothing in the law appears to prohibit it. If the problem here is the law upon which USAA's procedures are based, then the obvious remedy is to ask the Legislature to change it.

This case will likely have ramifications on how insurance companies proceed with claims under the Certificate of Title Act and how a vehicle is classified following an accident. The Texas Supreme Court has not issued its holding on this matter yet, but we will continue to watch this case and provide updates if there are further developments.

PROFESSIONAL LIABILITY

5TH CIRCUIT COURT OF APPEALS HOLDS THAT "BUT-FOR CAUSATION" IS NOT THE CORRECT ANALYSIS FOR DETERMINING THE APPLICATION OF THE BREACH OF CONTRACT EXCLUSION

In *SXSW, L.L.C. v. Fed. Ins. Co.*,[3] the 5th Circuit Court of Appeals held that the trial court erred by granting summary judgment in favor of Federal Insurance Company ("Federal") because the policy's breach of contract exclusion did not expressly exclude coverage.

In 2020, the City of Austin cancelled the "South by Southwest" music festival ("SXSW"). Rather than refund ticket holders, SXSW, citing a no-refund clause in the terms and conditions of its tickets, offered ticket deferrals and half-price tickets to future festivals. Some, but not all, ticket holders accepted the offer. On April 24, 2020, two ticket holders (the "Bromley Plaintiffs") filed a class action lawsuit against SXSW asserting claims for breach of contract, unjust enrichment, and conversion (the "Bromley Complaint"). SXSW tendered the complaint to Federal on April 27, 2020. Federal issued SXSW Entity Liability Coverage that provided loss on account of a Claim first made against the Organization during the policy period. Federal responded that it would neither defend nor indemnify SXSW for the *Bromley* lawsuit based, in pertinent part, on the Contract exclusion. On October 6, 2021, SXSW sued federal in federal court seeking a declaration that Federal owed coverage for the *Bromley* lawsuit. The *Bromley* lawsuit was settled in February 2022 for approximately $1 million.

In the declaratory judgment action, SXSW moved for partial summary judgment and Federal moved for summary judgment on all of SXSW's claims. The magistrate judge concluded that the loss was initially covered but ultimately precluded by the policy's professional services exclusion. SXSW appealed.

The Federal policy's breach of contract exclusion precluded coverage for loss "based upon, arising from or in consequence of any liability in connection with any oral or written contract or agreement to which an Organization is a party . . . ." Federal argued that the exclusion applied because SXSW contracted with the ticket holders and but for the contracts, there would have been no basis for the *Bromley* lawsuit. SXSW argued that the proper focus was on the phrase "liability in connection with … any contract" and thus the focus should be on whether the *claims* in the complaint alleged liability under a contractual obligation. SXSW reasoned that while the *Bromley* Complaint included a cause of action for breach of contract, the plaintiffs also brought claims for unjust enrichment and conversion which did not arise from contract. The court found that SXSW's reading was reasonable. Because the plaintiffs could have asserted their claims of unjust enrichment and conversion even absent a contract between them, at least those claims survived the breach of contract exclusion.

HOMEOWNERS AND COMMERCIAL PROPERTY

TEXAS SUPREME COURT HOLDS THAT PAYMENT BY INSURER OF THE FULL APPRAISAL AWARD PLUS POSSIBLE STATUTORY INTEREST UNDER CHAPTER 542A OF THE TEXAS PROMPT PAYMENT ACT PRECLUDES RECOVERY OF ATTORNEY'S FEES

In *Rodriguez v. Safeco Insurance Company of Indiana*,[4] the Texas Supreme Court unanimously resolved a split in Texas state and federal decisions when the court confirmed that where a claim is governed by Chapter 542A of the Texas Prompt Payment of Claim Act ("TPPCA"), if an insurer tenders full payment of an appraisal award and potential interest that may be due under Chapter 542A, the insured is precluded from recovering its attorney's fees.

As we noted in our Third Quarter 2023 newsletter, *Rodriguez v. Safeco Ins. Co. of Indiana*, involved a tornado claim under a homeowner's policy. A tornado damaged Mario Rodriguez's home in May 2019 and there was a disagreement as to the amount owed by Safeco to Rodriguez and

Rodriguez ultimately filed suit against Safeco, alleging unfair settlement practices violations of Section 541 and delayed payment violations of Section 542 of the Texas Insurance Code.

Subsequently, Safeco invoked the policy's appraisal provision and an appraisal panel determined that the replacement cost of the damage to the home was $36,514.52. Safeco then paid Rodriguez $32,447.73, which Safeco claimed was the actual cash value of the appraisal award less Rodriguez's deductible, the applicable policy limits, and Safeco's prior payment. Safeco paid Rodriguez an additional $9,458.40, which allegedly represented the maximum possible penalty interest penalty that could be due under the TPPCA. Safeco then moved for summary judgment Safeco's payment of the appraisal award plus interest foreclosed Rodriguez's claim for attorney fees under the TPPCA, which the trial court granted, and Rodriguez appealed.

The supreme court looked to the plain language of the statute to answer the question. The court noted the mathematical calculation described by Chapter 542A,007(a)(3) is detailed, but not unclear or ambiguous. Further, the court observed a problem arises at the first step of the formula when the statutory formular is applied to Rodriguez's case:

> Because the insurer has already paid all amounts owed under the insurance policy plus any possible statutory interest, there is not and never will be an "amount to be awarded in the judgment to the claimant for the claimant's claim under the insurance policy."[5]

As there is no amount to be awarded, and based on the statutory calculation, the court reasoned that in Rodriguez's cases and others like it, "there will never be a non-zero amount of permissible attorney's fees under the formula described in section 542A.007(a)(3).[6]

Rodriguez and supporting amici contended the Texas Legislature could not have intended Safeco's interpretation of the statute and that same will lead to abusive and unfair practices by insurers. The court responded that rather than speculating about whether the Legislature intended recovery of attorney's fees to be unlikely or impossible, it would stick with the principle that courts are expected to follow the Legislature's instructions as written and here, the Legislature required use of a mathematical formula that results in zero attorney's fees in certain cases. Thus, the court noted that if the Legislature does not like consequences of such instructions, it has the right to change them, which policyholder advocates will likely pursue.

With its decision in *Rodriguez*, the supreme court answered a question of importance to both the plaintiffs' bar and insurance companies. It remains to be seen how the Fifth Circuit moves forward based on the supreme court's answer. Hopefully, the supreme court's decision will promote efficient and effective resolution of insurance disputes involving storm claims.

SPLIT DALLAS COURT OF APPEALS HOLDS THE TERM "WINDSTORM" IS AMBIGUOUS AND DOES *NOT* INCLUDE DAMAGE CAUSED BY A TORNADO

In *Mankoff v. Privilege Underwriters Reciprocal Exch.*,[7] a divided Dallas Court of Appeals panel reversed the decision of the trial court finding the policy's Windstorm and Hail Deductible applied to damages resulting from a tornado reasoning that the undefined term "windstorm" was subject to

more than one reasonable interpretation and the insured's interpretation that "windstorm" did not include a tornado was reasonable.

In 2019, a tornado damaged the Mankoffs' home. The fact that a tornado struck the Mankoffs' home was not in dispute; what was in dispute was whether it was EF-1 or EF-2 tornado and whether the winds were 110-125 mph or 111-135 mph. The Mankoffs filed a claim with their insurer for almost $750,000 in damages. The Mankoffs' homeowners insurance policy was subject to a "Windstorm and Hail Deductible" for 2% of the dwelling coverage limit per covered loss which amounted to $87,156. The policy included a $25,000 base deductible which was waived for covered losses other than a windstorm, hail, or earthquake. The insurer paid the claim less the windstorm deductible and the Mankoff's filed suit seeking a declaration that the deductible did not apply because the tornado was not a windstorm and arguing, therefore, their deductible was waived. The trial court granted the insurer's motion for summary judgment and on appeal, the Mankoffs argued "windstorm" has more than one reasonable meaning. Accordingly, the Mankoffs argued the Windstorm or Hail Deductible was ambiguous and did not apply because their home was damaged by a tornado and not a windstorm. The insurer argued the term is unambiguous and applied to the tornado damage to the Mankoffs' home. The majority of the Dallas Court of Appeals panel agreed with the Mankoffs.

The Mankoffs' policy did not define the term "windstorm." In the underlying lawsuit, both the Mankoffs and the insurer offered examples of the meaning of "windstorm." The Mankoffs relied on an Encyclopedia Britannica definition that noted while tornados and cyclones produce wind damage, same were usually classified separately as well as expert testimony that windstorms are classified differently from tornados in the meteorological profession. In addition, the Mankoffs cited media coverage of Dallas weather events classifying tornados separately from windstorms as well as noting that Texans, the media, and meteorologists describe windstorms and tornados as distinct perils. Further, the Mankoffs relied on the Texas Insurance Code noting insurers are permitted to sell separate policies for tornados and windstorms and a selection of statutory references separately listing "windstorm" and "tornado."

The insurer argued the term "windstorm" was not ambiguous and that Texas history showed "windstorm" encompassed weather events such as tornados. However, the majority reasoned that in the cases relied on by the insurer, the parties did not dispute claims for tornado damage in policies covering windstorm damage and/or the courts did not analyze the term "windstorm" or whether it was ambiguous. In addition, the insurer argued the plain meaning of windstorm is a storm with strong winds that include tornados relying on various dictionary definitions including two that described tornados as violent windstorms and a thesaurus that included "windstorm" as a synonym of tornado. Further, the insurer noted that tornados are categorized by wind speed by the National Weather Service. The majority opinion concluded that the definitions provided by both parties were reasonable and concluded the term "windstorm" was ambiguous, noting that the trial court should have adopted the construction of the term argued by the Mankoffs, and therefore, reversed the trial court's judgment granting the insurer's motion for summary judgment.

Justice Emily Miskel dissented noting neither "tornado" nor "windstorm" are defined by the policy at issue. She further noted that there was nothing in the Mankoffs' policy indicating the insurer intended to define the term "windstorm" in technical, meteorological terms and that insurance

policies are to be interpreted according to the plain meaning of undefined terms. In fact, she noted that courts may not look to extrinsic evidence to prove an ambiguity.

She reviewed various dictionary definitions of "windstorm" and "tornado" and found that while not all definitions for "tornado" used the term "windstorm," definitions for tornado are consistent inasmuch as a key feature of a tornado is violent wind. As to the statutes cited by the majority, Justice Miskel concluded that the listing of tornado and windstorm separately may imply they are not identical, it does not mean that a tornado cannot be interpreted as a subtype of a windstorm "just as not all rectangles are squares, but all squares are rectangles."[8] Moreover, Justice Miskel noted that in several cases cited by the insurer, that the insurers paid tornado losses under windstorm policies. Rather, the insurer argued that "the absence of case law defining whether a tornado is a windstorm shows a common understanding that 'windstorm' includes tornados."[9]

Justice Miskel further noted that she wished the policy defined the terms and acknowledged that the Texas Legislature has implied windstorms and tornados are separate weather events; however, the damage in the matter was caused by wind and that based on the plain meaning of the terms, she concluded that a windstorm includes various kinds of windstorms including tornados.

As noted by Justice Miskel, the analysis by the majority risks creating further ambiguities. This decision serves as a reminder that while a term may appear plain and unambiguous, it may be advisable to include definitions in policy forms to avoid conflicting interpretations and a finding of an ambiguity by a court.

MOTOR CARRIER

ILLINOIS FEDERAL DISTRICT COURT'S PRIORITY OF COVERAGE ANALYSIS RESULTS IN TWO COMMERCIAL AUTO POLICIES THAT WOULD NORMALLY CONSTITUTE EXCESS POLICIES TO EQUALLY SHARE IN RESPONSIBILITY FOR DEFENSE AND LIABILITY OBLIGATIONS ON A PRO RATA BASIS

The case of *Great West Cas. Co. v. Nationwide Agribusiness Ins. Co.*,[10] arises from a fatal vehicular accident, involving a tractor-trailer. The subject tractor was owned by Deerpass Farms Services, LLC ("DFS"), but it was leased to a related entity Deerpass Farms Trucking, LLC ("DFT"). The trailer connected to the tractor was owned by Conserv FS, Inc. ("Conserv"), but was also leased to DFT. At the time of the accident, the tractor was being operated by a DFS employee, Robert Fisher. Mr. Fisher was also considered to be an agent of DFT while operating the vehicle. Nationwide Agribusiness Insurance Co. ("Nationwide") issued a commercial auto liability policy to Conserv. Great West Casualty Co. ("Great West"), insured DFT under a commercial auto liability policy. Interpretation of both policies was conducted under Illinois law. The main issue before the Court focused upon resolution of conflicting other insurance provisions to determine if either policy was the primary policy.

The other insurance clause of the Nationwide policy stated that the Nationwide policy is "[e]xcess while it is connected to a motor vehicle you do not own." Accordingly, the Court found that the Nationwide policy was an excess policy because the covered "auto" under this policy, the trailer, was connected to a vehicle that was owned by another entity, DFS.

With regard to the Great West policy, the other insurance clause included language which stated, "this Coverage Form provides primary insurance for any covered 'auto' you own and excess insurance for any covered 'auto' you do not own." Accordingly, the Court held that under this provision the Great West policy would also constitute an excess policy because the tractor was hired or borrowed from DFT by another motor carrier, DFS. However, the Great West policy also included another clause which stated, "this Coverage Form's Covered Autos Liability Coverage is primary for any liability assumed under an "insured contract". The policy defined "insured contract" as:

> that part of any other contract or agreement pertaining to your business... under which you assume the tort liability of another to pay for "bodily injury" or "property damage" to a third party or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement...

Therefore, the Court had to examine the Interchange Agreement between Conserv and DFT to determine if it constituted an "insured contract". The Interchange Agreement contained an indemnity provision under which DFT agreed to:

> indemnify, defend and hold harmless [Conserv] . . . from and against any and all claims, lawsuits, causes of action, judgments, expenses, fines, cost [sic], losses, penalties, damages, liabilities and reasonable attorneys' fees for bodily injury (including injury resulting in death) and loss of or damage to property (collectively, "Losses") arising out of or released to [DFT's] use, operation, maintenance, possession, or Interchange of [Conserv's] Equipment.

Based on this language, Nationwide attempted to argue that the Great West policy was primary because Conserv was not alleged to have been negligent in any way with respect to the underlying matter; thus, DFT's liability, if any, is liability assumed under the indemnity provision in the Interchange Agreement. However, the only claim against Conserv in the underlying lawsuit consisted of an assertion of vicarious liability for the alleged negligence of Fisher, DFT's agent—not for Conserv's own alleged negligence. Accordingly, the Court held that any liability assumed by DFT under the Interchange Agreement was not for Conserv's liability, but rather DFT was simply indemnifying Conserv for its own negligence. Therefore, the Interchange Agreement did not constitute an "insured contract" and the Great West policy would also be classified as an excess policy.

Given it was determined that both policies constituted excess policies, the Court held that since there was no primary policy, then under Illinois law, the excess provisions of the other insurance clauses would effectively cancel each other out and both Nationwide and Great West would share responsibility for liability and defense costs in a proportion respective to their policy limits.

This case illustrates that even simple motor vehicle accidents can result in complex priority of coverage issues. Therefore, when faced with potentially conflicting other insurance provisions,

insurers should remain cognizant if there is language in one or more of these provisions which relies on the interpretation of contract documents to resolve priority of coverage issues.

NEVADA FEDERAL DISTRICT COURT FINDS A FOLLOW-FORM EXCESS POLICY POTENTIALLY AFFORDED COVERAGE FOR POLLUTION REMEDIATION COSTS WHEN REQUIRED BY STATUE OR REGULATIONS DESPITE POLLUTION EXCLUSION

In *Brad Hall & Assocs., Inc. v. RSUI Indem. Co*,[11] the Federal District Court of Nevada utilized a plain language analysis to hold that a pollution exclusion contained in a follow-form excess policy could potentially afford coverage for remediation expenses for certain types of fuel leaks resulting from a motor vehicle accident if the remediation was required by statutory or regulatory requirement.

This case arises out of two separate and distinct fuel spills that were the result of the same motor vehicle accident. At the time of the accident, an eighteen-wheeler owned by Teton Petroleum Transport, LLC ("Teton") was hauling two trailers containing fuel. The Teton vehicle was involved in an accident that resulted in property damage, bodily injury, and two separate fuel spills that occurred on opposites side of the highway. The first spill was the 18-wheeler's fuel, the second fuel spill was from the tankers it was hauling. The primary level of insurance for Teton was a business automobile coverage policy issued by Zurich. The excess layer was a follow-form policy issued by RSUI Indemnity Company ("RSUI").

On the day of the spill, Teton immediately retained remediation contractors to provide emergency response to remediate the fuel spill. Teton also hired a contract to perform groundwater monitoring for several months thereafter. Two days following the accident, the Nevada Division of Environmental Protection ("NDEP") notified Teton that under the Nevada Administration Code it "may be required" to perform cleanup activities and that it "should make every effort to assess the site and conduct cleanup as quickly as possible". Teton's total cleanup and remediation costs ultimately exceeded $4 million.

Zurich accepted coverage for the property damage and bodily injury resulting from the motor vehicle accident. The Zurich policy provided coverage for "covered pollution cost or expense" which the policy defined as "any request, demand, order or statutory or regulatory requirement that any 'insured' or others" test, monitor, or clean up pollutants; or a claim or suit by a governmental authority for damages because of testing, monitoring, or cleaning up a pollutant." However, the policy contained a pollution exclusion which did not cover the fuel spilled from the tankers. However, the pollution exclusion had an exception that it did not preclude coverage for remediation costs for "fuels that are needed for or result from the normal electrical, hydraulic, or mechanical functioning of the covered 'auto'…". Accordingly, Zurich accepted coverage for the remediation costs from the fuel spillage from the tractors on grounds that it constituted a "covered pollution cost or expense" that was necessary to operate the vehicle. The covered damages exhausted the Zurich policy, but Zurich maintained that the pollution exclusion did not cover the resulting remediation costs as a result of the fuel spilled from the tankers.

After the exhaustion of the Zurich policy, there were still outstanding clean-up costs. As a result, RSUI took the position that its policy did not cover either the spill from the tractor or the spill from the trailer as a result of an endorsement entitled "Total Pollution Exclusion – With Collision/Upset Exception" contained in the RSUI policy. This pollution exclusion stated it did not provide coverage for:

> 1. Any liability which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.
>
> 2. Any loss, cost or expense arising out of any:
>
> > a. Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; or
> >
> > b. Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of "pollutants."
> >
> > However, insofar as coverage is afforded by the [Zurich policy], for the full limits shown therein, paragraph 1. of this exclusion does not apply to any liability arising out of the collision or upset of a motor vehicle.

Teton argued that the exception at the end of the exclusion created coverage under the excess policy that was broader than Zurich's policy because that paragraph states that the pollution exclusion does not apply to "any liability" arising out of the collision or upset of a vehicle. The Court rejected this argument on the grounds that an exclusion simply negates the application of the exclusion contained in paragraph 1. The Court noted that it would be unreasonable to interpret this exception creates a coverage obligation for RSUI that would be broader than the coverage provided under the Zurich policy. Accordingly, the fuel spill from the tanks being hauled by Teton would not be considered covered under the RSUI policy since there was no coverage under the Zurich policy. However, there remained an open question if the remediation costs associated with the fuel spill from the tractor were afforded coverage under the RSUI policy.

Teton argued that coverage for the cleanup costs from the fuel spilled from the tractor would not be precluded by paragraph 2 because the liability associated with the cleanup costs was not triggered by a "governmental demand" to clean up the fuel. Instead, Teton retained contractors to remediate the spill before it had received the letter from the NDEP. Teton argued that the Zurich policy provided coverage for the tractor fuel spill because as noted above, it constituted a "covered pollution cost or expense". However, the RSUI pollution exclusion only precluded costs "arising from a request, demand, or order to clean up a pollutant." It did not preclude coverage for costs arising from a

statutory or regulatory requirement to clean up. The Court noted that based on a plain language analysis, the RSUI pollution exclusion precluded costs for remediating the fuel spillage if the costs arose from a request, demand, or order, but it did not preclude remediation costs arising from a statutory or regulatory obligation. The Court did not ultimately determine if the remediation costs from the tractor spill would be covered under the RSUI policy because there was additional briefing required to determine if Teton was required by Nevada's Administrative Code to perform the remediation.

This case reinforces how the courts' plain language analysis of a follow-form excess policy is not just limited to the terms and provisions of the excess policy itself. Therefore, when faced with an obligation as an insurer of a follow-form excess policy, it is important to compare the terms of the excess policy with the underlying primary to determine if there are any potential deviations in the language which could alter the excess insurer's indemnity exposure.

OTHER NOTEWORTHY CASES AND GENERAL INSURANCE LAW CASES

TEXAS FEDERAL COURT HOLDS THAT EXTRINSIC EVIDENCE THAT DID NO CONSLUSIVELY ESTBALISH THE COVERAGE FACTS TO BE PROVED PRECLUDED APPLICATION OF MONROE EXCEPTION TO THE EIGHT CORNERS RULE

In *LMS Ins.*,[12] the Federal Court for the Northern District of Texas, Dallas Division, held that a single line of deposition testimony that referred to the date of delivery of construction components did not "conclusively" establish when the project was substantially completed.

Esteban S. Alvarez ("Mr. Alvarez") filed a lawsuit in state court (the "State Action") for severe injuries he allegedly sustained when a dumpster gate fell on him while he was working as a security guard at The Plaza at Preston Center on January 23, 2019. Mr. Alvarez named multiple defendants, including Rogers-O'Brien Construction Company, Ltd. ("Rogers") and Red Steel Company ("Red Steel"), Cincinnati Insurance Company's ("Cincinnati") insured. Rogers was the general contract in charge of the construction site. Red Steel "provided labor materials and equipment to manufacture and install the dumpster gates which failed and injured him. Cincinnati insured Red Steel under a policy with a coverage period of July 1, 2018 to July 1, 2019. The policy contained an endorsement, "Contractors' Commercial General Liability Broadened Endorsement," which provided for completed operations coverage for additional insureds. Red steel and Rogers had entered into a subcontract pursuant to which Red Steel was required to Named Rogers an additional insured for two years following substantial completion of the project. Plaintiff, LMS Insurance Company ("LMS") insured Rogers and tendered the underlying suit to Cincinnati, which Cincinnati denied on the basis that Rogers "ceased to be an additional insured in 2016," apparently relying on extrinsic evidence. LMS filed a declaratory judgment action seeking a determination that Cincinnati had a duty to defend Rogers based upon an eight corners analysis.

In analyzing the underlying petition, the Court disagreed that whether Rogers was an additional insured could not be determined by the pleadings, although it did not include any allegations as to when the project was completed. Nevertheless, the court considered whether

extrinsic evidence could be considered as to this issue. The Court noted that there were three criteria for determining whether extrinsic evidence may be considered: the evidence (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. The Court found that the third criteria—conclusively establishing the coverage fact to be proved—was not satisfied. In particular, the court found that Cincinnati relied on the following testimony:

> Q (attorney): Do you know how long it was after this delivery on October 31, 2012, before the support posts had been placed in the ground and the concrete had cured sufficiently for Compass Steel to perform the actual erection?
>
> A (Mr. Owen): I do not.

The court stated, "on that single page Defendant cites, there is no testimony to the effect that Red Steel did not perform any work on the gates after that date" and reasoned that "'[T]his testimony merely refers to the date a specific delivery of materials was made; it does not in any way 'conclusively establish' the date the work was completed or even substantially completed … This testimony most certainly does not "conclusively establish" the coverage fact to be proved which is whether Rogers was an additional insured under the Red Steel Policy and, therefore, entitled to a defense in the State Action. The Court will not infer, assume, or otherwise read anything into this testimony, which is the only way this extrinsic evidence could conclusively establish whether Rogers was covered as an additional insured." Therefore, the Court concluded that LMS was entitled to summary judgment on its claim for Cincinnati's duty to defend.

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[1] 2024 U.S. Dist. LEXIS 46933 *; 2024 WL 1185122 (S.D. Tex. March 18, 2024).
[2] *USAA Cas. Ins. Co. v. Letot*, No. 22-0238, 2023 Tex. LEXIS 970, at *1 (Sep. 29, 2023).
[3] 2024 U.S. App. LEXIS 6771(5th Cir. March 21, 2024).
[4] No. 23-0534, 67 Tex. Sup. Ct. J. 263, 2024 Tex. LEXIS 93 (Feb. 2, 2024).
[5] *Id.* at *6.
[6] *Id.* at *6-7.
[7] No. 05-22-00963-CV, 2024 Tex. App. LEXIS 594 (Tex. App.—Dallas Jan. 29, 2024, no pet. h.).
[8] *Id.* at *32.
[9] *Id.* at *34.
[10] No. 23 C 2178, 2024 U.D. Dist. LEXIS 4386 (N.D. Ill. Jan. 9, 2024).
[11] No.2-23-cv-00213-APG-DJA, 2024 U.S. Dist. LEXIS 15100, 2024 WL 325278 (D. Nev., Jan. 26, 2024).
[12] 2024 U.S. Dist. LEXIS 15851(N.D. Tex. Jan. 20, 2024).