Annual Survey

# of TEXAS Insurance Law 2024

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I. INTRODUCTION

The Texas Supreme Court recently answered the following certified question in the affirmative, "In an action under Chapter 542A of the Texas Prompt Payment of Claims Act, does an insurer's payment of the full appraisal award plus any possible statutory interest preclude recovery of attorney's fees?" The Court noted that the Texas Insurance Code prohibits an attorney's fees award when an insurer has fully discharged its obligations under the policy by paying the appraised amount plus any statutory interest.[1]

In a case where a school district sustained damage for two separate storms with multiple insurers, the Texas Supreme Court allowed an abatement, noting the pre-suit notice was inadequate because it failed to separately state the amount alleged to be owed by each insurer and for each claim arising from the two separate storms.[2]

The Fifth Circuit also addressed important *Stowers* issues in a bankruptcy case where the court allowed the bankruptcy trustee to claw back an earlier settlement that exhausted the policy limits,[3] and explored equitable issues when an excess carrier sued the primary carrier for failing to reasonably resolve the case.[4]

Texas courts are still hearing cases related to Covid, and continue to rule along with the nationwide cases that Covid caused loss to people, not property. Therefore, insurance coverage typically is not triggered.[5]

And the United State Supreme Court held that an insurer with financial responsibility for a bankruptcy claim is sufficiently concerned with the proceedings to be a "party of interest" that can raise objections to a reorganization plan.[6]

A. Automobile

A police officer was hit while driving her patrol car. Her damages exceeded the policy limit of the driver who hit her. She sought to collect under her uninsured/underinsured motorist (UM/UIM) benefits. Her insurer denied coverage under the policy's regular use exclusion, and the officer filed suit. The regular use exclusion reads:

> Coverage under this Part III [regarding UM/UIM benefits] will not apply: 1. to bodily injury sustained by any person using or occupying: * * * d. a motor vehicle that is owned by or available for the regular use of you or a relative.

The trial court determined on summary judgment that the regular use exclusion violated public policy. The insurer appealed the decision. The appellate court reversed stating that the burden of proving public policy warrants non-enforcement of the contract provision falls on the insured because she is the signatory who opposes the contract. The court noted the insured failed to show both how much she received in worker's compensation benefits and that she suffered financial loss. Therefore, the court said it could not conclude the insured met her burden or suffered any financial loss, or that the insurer's policy violates the state's interest in protecting motorists from financial loss. *Progressive Cty. Mut. Ins. Co. v. Freeman*, 694 S.W.3d 924 (Tex. App.—Houston [14th Dist.] 2024, no pet. h.).

B. Homeowners

An insureds' home was damaged by a tornado, and they notified their insurer. The insurer paid only a portion of the claim because the insurer maintained the tornado that struck the insured's home was subject to the "windstorm or hail deductible," which was $87,156. The insureds sued to recover the deductible arguing it should not have been withheld because the tornado that caused the damage was not a windstorm, therefore, the deductible should have been waived. The trial court granted the insurer's motion for summary judgment, and the insured's appealed. The insureds argued the term "windstorm" has more than one reasonable meaning, and, as a result, the windstorm and hail deductible is ambiguous. Media coverage referred to the event as a tornado, not a windstorm. Moreover, the dictionary definitions of windstorm and tornado are different. The appellate court held the term "windstorm" as used in the policy is reasonably susceptible to more than one meaning, and therefore is ambiguous. Therefore, the appellate court reversed the trial court's judgment and rendered judgment for the insureds of $87,156 in damages on their breach of contract claim. *Mankoff v. Privilege Underwriters Reciprocal Exch.*, No. 05-22-00963-CV, 2024 WL 322297 (Tex. App.—Dallas Jan. 29, 2024).

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1 *Rodriguez v. Safeco Ins. Co. of Ind.*, 684 S.W.3d 789 (Tex. 2024).

2 *In re The Lubbock Index. School Dist.*, 2024 WL 4575104 (Tex. 2024).

3 *Law Office of Rogelio Solis P.L.L.C. v. Curtis*, 83 F.4th 409 (5th Cir. 2024), cert. denied, ___ S. Ct. ___, 2024 WL 4426605 (mem. op.).

4 *Westport Ins. Co. v. Pa. Nat'l Mut. Cas. Co.*, 117 F. 4th 653 (5th Cir. 2024).

5 *Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, 2024 WL 3673544 (5th Cir. 2024); *Baylor College of Medicine v. XL Ins. Co. of Am., Inc.,* 2024 WL 438019 (Tex. App.—Houston [14th Dist.] 2024, no pet.).

6 *Truck Ins. Exch. v. Kaiser Gypsum Co., Inc., et al.*, 602 U.S. 268 (2024).

The Court noted that the Texas Insurance Code prohibits an attorney's fees award when an insurer has fully discharged its obligations under the policy by paying the appraised amount plus any statutory interest.

The homeowners' sprinkler system froze, and then leaked into their basement. They made a claim under their homeowner's policy for the damage. The Fifth Circuit affirmed the district court's summary judgment in favor of the insurer based on a water damage exclusion in the policy. The policy excluded water originating below ground as well as "flood, surface water." The opinion goes into considerable detail on the origin of the water, its travels and how that interplays with the exclusionary language. *Laur v. Safeco Ins. Co. of Ind.,* No. 23-10315, 2024 WL 2991196 (5th Cir. June 14, 2024).

This is an appeal from a summary judgement in favor of an insurer. The Fifth Circuit reversed. The insured's metal roof was damaged in a hailstorm. The insurance policy had an exclusion for cosmetic damage to the roof. The insured's expert testified that the damage was functional, which is a covered loss. The trial court excluded much of the expert's testimony but not his opinion on the functional damage. Also, he was deposed after the exclusion ruling, and the insurer did not renew its objections. The Fifth Circuit held that there was sufficient evidence through this expert to create a fact issue. *Horton v. Allstate Vehicle & Prop. Ins. Co.*, No. 22-20533, 2023 WL 7549507 (5th Cir. Nov. 13, 2023).

C. Commercial Property

A school district sent a pre-suit notice to multiple insurers for two separate storms. The demand did not distinguish between the insurers or the storms, but was just a single notice stating the amount to be owed was $20 million but that the damages ultimately sought at trial would be in excess of this amount as the investigation was not yet complete. After filing suit, the damages were listed between $100 million to $250 million. The insurers sought an abatement asserting the notice failed to comply with Texas Ins. Code section 542A. The trial court denied the abatement, but the court of appeals granted the abatement holding that the specific amount requirement of the statute was not met. The Texas Supreme Court noted the specific amount language only requires the notice assert a specific dollar amount, not that it must provide a fixed and final total sum that can never change. However, the Texas Supreme Court allowed the abatement for another issue — stating the notice was inadequate because it failed to separately state the amount alleged to be owed by each insurer and for each claim arising from the two separate storms. The Texas Supreme Court noted its decision should not be read as an approval of the court of appeals' construction of the statute's specific amount requirement. *In re The Lubbock Indep. School Dist.*, No. 23-0782, 2024 WL 4575104 (Tex. Oct. 25, 2024).

The Fifth Circuit affirms a summary judgment in favor of the insurer. This case follows a long line of Texas court decisions that deny coverage resulting from "physical loss" arising from Covid related claims. These policies cover business and related loss from physical damage. The courts (Texas and nationwide) have almost universally held that Covid caused loss to people, not to property, so this coverage is not triggered. *Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, No. 23-40453, 2024 WL 3673544 (5th Cir. Aug. 6, 2024).

This case is one other in a long line of cases that claim loss due to Covid. As with most other decisions in these disputes, the court finds no coverage. In this case, the appellate court focuses on the pollution exclusion that excludes losses from contaminants including "bacteria, virus or hazardous substances…." In holding that the exclusion applies, the appellate court finds no ambiguity in the exclusion and affirms the trial court's summary judgment in favor of the insurer. *Baylor College of Med. v. XL Ins. Co. of Am., Inc.,* No. 14-22-00145-CV, 2024 WL 438019 (Tex. App.—Houston [14th Dist.] Feb. 6, 2024, no pet.).

In a hail damage case, the insured's three-year-old roof started leaking after a hailstorm that produced one and a half inch hail. The insurer denied the claim alleging that previous damage had contributed to the loss and that the insured failed to produce evidence that segregated the covered loss (recent hail damage) from the uncovered loss (previous wear and tear caused by an earlier hailstorm). The district court agreed that the insured failed to meet this burden. The Fifth Circuit affirmed while noting that there were unanswered questions on concurrent loss that had previously been certified to the Texas Supreme Court (*Frymire Home Servs., Inc. v. Ohio Sec. Ins. Co.*, 12 F.4th 467, 472 (5th Cir. 2021); *Overstreet v. Allstate Vehicle & Prop. Ins. Co.*, 34 F.4th 496, 499 (5th Cir. 2022)). The Fifth Circuit found none of these questions present in the instant case. *Shree Rama, L.L.C. v. Mt. Hawley Ins. Co.,* No. 23-40123, 2023 WL 8643630 (5th Cir. Dec. 14, 2023).

A roofing company was sued for faulty construction that produced leaks over a several year period. First Mercury covered the insured for the first two years of the damage, then Colony picked up the coverage for the next two years. The case settled with both carriers contributing to the settlement but with a reservation of their rights against each other. This case ensued. Colony maintained that First Mercury was responsible for all the loss, or at least more than it paid in settlement of the claim. It sought contribution and/or subrogation. The opinion goes into detail on Texas law addressing the time of loss, citing *Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008) and other Texas Supreme Court decisions that address the issue. The Fifth Circuit focused on an endorsement contained in the First Mercury policy that eliminated language extending coverage for continuing losses which begin in the policy period. Finally, the court noted that in the subrogation claim, Colony stood in the shoes of the insured and that Colony produced no evidence segregating the covered losses from the uncovered losses. The court affirmed summary judgment in favor of First Mercury thereby denying both the contribution and the subrogation claims. *Colony Ins. Co. v. First Mercury Ins. Co.,* 88 F.4th 1100 (5th Cir. 2023).

II. AGENTS, AGENCY, AND VICARIOUS LIABILITY

A. Individual liability of agents, adjusters, and others

This case starts with significant flood damage to a marina. Unfortunately, the insurance policies did not provide the blanket coverage the marina had requested and did not fully cover the loss.

This case follows a long line of Texas court decisions that deny coverage resulting from "physical loss" arising from Covid related claims. These policies cover business and related loss from physical damage.

The insured marina sued its insurance agent for failing to procure the requested coverage. Two parallel cases proceeded. The marina sued its insurance agent in state court and won a thirteen million dollar plus judgment. *Ins. Alliance v. Lake Texoma Highport Marina, L.L.C.,* 452 S.W.3d 57 (Tex. App.—Dallas 2014, pet. denied).

In the subsequent federal case, the insurance agent's primary and excess errors and omissions insurers sue each other as subrogees of the insurance agent. The insurance agent's primary carrier claimed that the excess carrier breached its contract to pay the excess amount of the judgment which the insured marina obtained against its insurance agent. The insurance agency's excess carrier sued the primary carrier claiming it breached its *Stowers* obligation in failing to settle within the primary policy limit. A jury found in favor of the excess insurer on the *Stowers* issue. The district court held that the *Stowers* breach was a defense to the breach of contract action against the excess insurer as a practical, if not legal, matter.

The Fifth Circuit disagreed with the district court on the *Stowers* defense but found the error harmless and affirmed the judgment. This case covers a multitude of issues related to the *Stowers* claim and the various offers made during the underlying litigation. In the dispute, there was also a collateral claim by the insurance agent against an insurance intermediary, and a counterclaim back against the insurance agent concerning contractual indemnity. The Fifth Circuit held that this dispute was unrelated to the *Stowers* claim and failing to address it did not preclude a valid *Stowers* demand. This case covers several other issues including equitable defenses asserted against the excess carrier, and the offset of the contract claim against the excess carrier's claim by the *Stowers* claim against the primary carrier. *Westport Ins. Corp. v. Pa. Nat'l Mut. Cas. Co*., 117 F.4th 653 (5th Cir. 2024).

III. THIRD PARTY INSURANCE POLICIES & PROVISIONS

A. Automobile liability insurance

The Fifth Circuit affirms summary judgment in favor of the insurer on an auto policy property damage claim. The issue is sales tax. The policy damage coverage included "applicable sales tax." The insurer paid the fair market value on a total vehicle loss but declined to pay the sales tax. The court held that since no sales tax was due on the loss payment, there was no applicable sales tax. This case makes an *Erie* guess on this issue and has not yet been cited by any Texas state opinion. *Taylor v. Root Ins. Co.,* 109 F.4th 806 (5th Cir. 2024).

IV. DUTIES OF LIABILITY INSURERS

A. Duty to defend

South by Southwest (SXSW) was cancelled during Covid. Some ticket holders asked SXSW to refund their purchases. SXSW declined, citing a no-refund clause in the terms and conditions of its ticket agreement. Instead, SXSW offered ticket deferrals and half-priced tickets to future festivals. Some accepted this offer, but others refused and filed a class action lawsuit. That suit resulted in SXSW paying $1 million to settle the litigation. SXSW notified its insurer of the litigation as soon as it was filed. Its insurer said it would not defend nor indemnify SXSW in the lawsuit. SXSW sued its insurer alleging breach of contract, breach of implied duty of good faith and fair dealing, and violations of the Tex. Ins. Code. Its insurer won on summary judgment where the court held the policy exclusions excused the insurer from defending or covering the litigation. SXSW appealed, holding the contract exclusion did not apply because the claims for unjust enrichment and conversion did not arise from contracts. The Fifth Circuit agreed. Additionally, the professional services exclusion did not apply because the source of liability and motivation for the underlying litigation was SXSW's failure to refund 2020 festival tickets, which is not a professional service. Therefore, the district court's entry of summary judgment for the insurer was reversed. *SXSW, L.L.C. v. Fed. Ins. Co.*, 83 F.4th 405 (5th Cir. 2024).

A car flew off the raceway injuring spectators at a drag racing event. The injured parties sued the event sponsor who looked to its insurer for a legal defense. The district court found the policy to be ambiguous and declared a duty to defend was owed. The Fifth Circuit reversed and remanded with directions to grant summary judgment on the duty to defend to the insurer. The Fifth Circuit found that the lower court used a piecemeal approach to interpreting the policy, and that when you instead applied every part of the policy simultaneously — the CGL declaration, the CGL form, and the CGL endorsements, the policy was not ambiguous. *Kinsale Ins. Co. v. Flyin Diesel Performance Offroad*, 99F.4th 821 (5th Cir. 2024).

B. Duty to indemnify

The insureds were sued for theft of Bitcoin. The insurer sued its insured for a declaratory judgment that it had no obligation to provide coverage under a homeowner policy or personal-umbrella policy. The district court granted summary judgment in favor of the insurer holding the insurer was not required to defend or indemnify the insureds in the underlying lawsuit. The policy required the insurer to defend and indemnify any claim against the insureds for damages based on an "occurrence" arising from negligent personal acts. The underlying lawsuit alleged only intentional acts. The court rejected the argument that a particular paragraph in the complaint should be interpreted as negligence citing to case law that there is a similar impossibility that a claim based on theft of property can be transformed into a negligence case. Therefore, the Fifth Circuit held the district court properly ruled there is no duty to indemnify. *Nationwide Mut. Ins. Co. v. Choi*, No. 23-20405, 2024 WL 2131515 (5th Cir. May 13, 2024).

With the underlying lawsuit still pending, two insurers, Farmers and Cincinnati, sought a declaration on their respective duties to indemnify the defendant in that lawsuit. The court analyzes Texas precedent, including *D.R. Horton-Tex., Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 744 (Tex. 2009) and *Farmers Tex. Cty. Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997) then holds that until the underlying lawsuit (*DeRouen v. Hidden Lakes Development Partners, L.P.*, Cause No. 2019-26660, pending in the 164th District Court of Harris County, Texas) is resolved, the issue of indemnification is not ripe. Consequently, the trial court lacked subject matter jurisdiction so the summary judgment in favor of Cincinnati was reversed. *Farmers Ins. Exch. v. The Cincinnati Ins. Co.,* No. 01-23-00387-CV, 2024 WL 3973432 (Tex. App.—Houston [1st Dist.] Aug. 29, 2024).

C. Settlements, assignments & covenants not to execute

An insured produced oil and gas off the African coast. Claims against the insured arose alleging misrepresentations of the oil content of two of its exploratory wells. Investors filed suit against the insured, who eventually filed for bankruptcy. The insured reached a settlement with the investors for $220 million, but agreed the investors would pursue the insured's rights under the insurers' policies. The insurer had refused to participate in the

litigation. The insurers argued that a covered loss had not occurred. The trial court agreed with the investors holding the insured's defense costs and settlement amounts constituted a "loss" under the policy. Liability insurance covers, "damage the insured does to others." The Texas Supreme Court concluded, "(1) the insureds suffered a loss under the policies, (2) the claimants can assert claims directly against the insurers, and (3) the settlement is not binding or admissible in the coverage litigation." Because the trial court abused its discretion by holding otherwise on the third issue, the Texas Supreme Court conditionally granted mandamus relief in part and ordered the trial court to vacate its order to the extent they rely on the holding that the settlement agreement is admissible and binding to establish coverage under the policies and the amount of any covered loss. *In re Ill. Nat'l Ins. Co.*, 685 S.W.3d 826 (Tex. 2024).

This case arose out of a car wreck in which multiple claimants received an apportioned, mediated settlement of a one-million-dollar commercial policy. GEICO settled its subrogation property damage claim with the same carrier for a leased car that was destroyed in the wreck. Two of the claimants sought to recover most of the proceeds of that settlement back from GEICO arguing that they were not made whole by the apportioned settlement for their injuries, arguing GEICO was not entitled to recover under equitable principles set forth in *Ortiz v. Great Southern Fire & Casualty Insurance Company*, 597 S.W.2d 242. In its grant of mandamus, the appellate court overturned the trial court's judgment and held that the contractual provisions of the policy controlled over equitable doctrines, and that GEICO was entitled to the reimbursement it received in the earlier settlement. There are numerous procedural twists and turns in the opinion involving notice and various motions unrelated to insurance law. *In Re Geico Indem. Ins. Co.,* No. 09-23-00403-CV, 2024 WL 2972775 (Tex. App.—Beaumont, Feb. 7, 2024).

V. THIRD PARTY THEORIES OF LIABILITY

A. Stowers duty & negligent failure to settle

This is an important case that adds a new wrinkle to the *Stowers* doctrine. Solis is an attorney who represented an injury claimant. The insured had a one-million-dollar policy which it tendered to Solis' client in response to a *Stowers* demand. A second claimant who was left out of the settlement forced the insured into involuntary bankruptcy. Curtis, the bankruptcy trustee sought to claw back the settlement into the bankruptcy estate. The bankruptcy court found in favor of the trustee, and the Fifth Circuit affirmed. In October, the U.S. Supreme Court denied certiorari. This opinion should be read in conjunction with *Texas Farmers Ins. Co. v. Soriano,* 881 S.W.2d 312 (Tex. 1994). The risk in this case did not fall on the insurance company but on the claimants and the insured. With multiple claimants and limited insurance, tread carefully. *Law Office of Rogelio Solis P.L.L.C. v. Curtis,* 83 F.4th 409 (5th Cir. 2024), cert. denied, ___ S.Ct. ___, 2024 WL 4426605 (mem. op.).

B. Suits by third parties

1. Suit as judgment creditor of insured

Martinez sued Nettleford who was insured. Nettleford made misrepresentations on his insurance application and refused to cooperate with the insurer. As a result the insurer refused to defend or indemnify Nettleford. Martinez made a *Stowers* demand on the insurer which it refused. Martinez took a default judgment against Nettleford and then a turnover of his action against Nettleford's insurer. The insurer sued Nettleford for declaratory judgment asserting that it owed nothing on the claim. Then the insurer took a default judgment against Nettleford which the appellate court held bound Martinez and defeated her action against the insurer. *Martinez v. SeaHarbor Ins. Agency L.LC.*, No. 05-23-00513-CV, 2024 WL 396630 (Tex. App.—Dallas Feb. 2, 2024).

VI. SUITS BY INSURERS

A. Rescission

An insured purchased a homeowner's policy for his home. During the policy period, a fire occurred at the home. After notifying the insurer of the loss, the insurer rescinded the policy stating that the insured had a prior conviction for insurance fraud that was not disclosed on his application for insurance. The insurer stated in a letter the misrepresentation rendered the policy void and that it would not have insured the home had the insured disclosed his prior insurance fraud conviction. The insured filed suit arguing there was no intentional or material misrepresentation. The trial court granted summary judgment for the insurer. On appeal the insured argued that whether a misrepresentation is material is a question of fact under the Tex. Ins. Code. The insurer argued there was ample evidence on the record, including the letter it sent the insured alleging the misrepresentation was material and its own statement that it "would have rejected this policy application but for the misrepresentation made in the policy." The appellate court held the insurer submitted its undisputed evidence establishing its affirmative defense, and the insured did not respond with evidence to dispute the facts as stated by the insurer. Therefore, summary judgment in favor of the insurer was proper. *Palma v. Allied Trust Ins. Co.*, No. 14-23-00063-CV, 2024 WL 3765821 (Tex. App.—Houston [14th Dist.] Aug. 13, 2024).

B. Indemnity & contribution

This case involves insurance but only tangentially. The dispute arises out of indemnification language in an oil well Master Service/Sales Agreement (MSA). The MSA was between the oil well operator and a consultant. The agreement called for mutual indemnification with an insured amount of "at least 5 million dollars." Both parties were insured for more, the oil well operator for a lot more. The court held that the amount of insurance was irrelevant to the indemnification agreement and that the MSA set both the floor and the ceiling at five million dollars. The court also discusses the interplay with the facts of this case and the Texas Anti-Indemnity Act (Tex. Ins. Code. Chapter 151). *Century Sur. Co. v. Colgate Operating, L.L.C.,* 116 F.4th 345 (5th Cir. 2024).

C. Subrogation

An explosion occurred at a plywood mill killing one employee and injuring three others. Workers' compensation benefits were provided to all claimants by the employer's insurance carrier. Third-party negligence claims were brought against several defendants who designed and manufactured the sander system that caused the explosion. At trial, the jury apportioned responsibility between the employer at 65% and the remainder between the third-parties. All the claimants except one stipulated that prior settlements exceeded the total damages awarded by the jury, and that a take-nothing judgment should be entered as to their claims. As to the remaining party, in the court's final judgment, that claimant received almost $650,000. The claimants asserted that the insurer's right to recovery was obviated by the "employer responsibility offset" contained in Texas Labor Code Section 417.001(b). The insurer argued this offset did not apply to the amounts received by the claimants and therefore, it was still entitled to reimbursement of benefits paid. Because the

offset exceeded the insurer's lien amount, the trial court ruled that the insurer's lien was wiped out and that the claimants would receive an additional offset for any future benefits paid.

On appeal, the insurer argued the reduction of its subrogation interest set out in Section 417.001(b) based on the jury's finding that the employer was 65% liable for the explosion did not apply to the funds received by the claimants as pretrial settlements. The appellate court noted that this issue appeared to be one of first impression for Texas courts. The appellate court examined both Section 417.001(b) of the Labor Code and Section 33.012(b) of the Texas Civil Practice and Remedies Code, giving effect to both, to determine the applicability and proper calculation method for the employer responsibility offset. The appellate court stated:

> Yoking the amount of the subrogation interest reduction to the dollar amount by which the trial court reduces the judgment award to claimant specifically "based on the percentage responsibility… attributable to the employer" give effect to that intent — the compensation insurer is barred from recouping that money that, absent the tortious conduct of its insured, the claimant would have received as damages in the trial court's judgment.

This interpretation resulted in reversing the trial court's judgment and holding that the employer responsibility offset did not apply to reduce the insurer's subrogation interest as to benefits paid to the settling claimants, and that those settling claimants were not entitled to any judgment offset against past or future benefits paid to them by the insurer. As to the remaining claimant, the trial court correctly determined that claimant was entitled to an offset against the insurer's subrogation lien but erred in determining the amount of that offset. *Old Republic Ins. Co. v. Morris, et al.*, No. 12-23-00292-CV, 2024 WL 4350334 (Tex. App.—Tyler Sept. 30, 2024).

VII. DAMAGES & OTHER ELEMENTS OF RECOVERY

A. Statutory additional damages

This case is an appeal from summary judgment in the insurer's favor. The issue is one of statutory construction, and is summarized in the court's opinion as follows:

> On appeal, Miracle Auto asks us to determine whether it must be licensed under chapter 2303 of the Texas Occupations Code as a vehicle storage facility to be entitled to compensation, under subsection 2303.156(b) of the Texas Occupations Code, for storing the insured's vehicle.

The court answers "yes" and affirms the trial court's judgment. The lack of a license was fatal to the insured's right to recover under the Code. *Miracle Auto., Inc. d/b/a Miracle Body & Paint v. Geico Cty. Mut. Ins. Co.,* 696 S.W.3d 713 (Tex. App.—San Antonio 2024, no pet.).

B. Attorney's fees

After a tornado hit an insured's home, he notified his insurer. The insurer inspected the home and determined the damages. The insured notified the insurer he believed the damage amount was insufficient, and never heard from the insurer. The insured filed suit. More than a year after the insured filed suit, the insurer invoked the appraisal provision in the policy. The insurer then paid the amount determined by the appraiser. The insured argued he was still entitled to attorney's fees under the Texas Prompt Payment of Claims Act (TPPCA). The district court granted the insurer's motion for summary judgment, holding that under Tex. Ins. Code Section 542A.007(a) the insured was not entitled to attorney's fees. The insured appealed.

The Fifth Circuit certified the following question to the Texas Supreme Court: "In an action under Chapter 542A of the Texas Prompt Payment of Claims Act, does an insurer's payment of the full appraisal award plus any possible statutory interest preclude recovery of attorney's fees?" The Texas Supreme Court recently answered that question in the affirmative. It held that, "[S]ection 542A.007 of the Insurance Code prohibits an award of attorney's fees when an insurer has fully discharged its obligations under the policy by voluntarily paying the appraised amount, plus any statutory interest, in compliance with the policy's appraisal provisions." The Texas Supreme Court affirmed the district court's judgment. *Rodriguez v. Safeco Ins. Co. of Ind.*, 684 S.W.3d 789 (Tex. 2024).

An insured was involved in two car accidents. After recovering from injuries sustained in the first accident, the insured was hit again. The insured settled with the driver in the second accident, and then turned to her own insurer for reimbursement for additional damages beyond the driver's policy under her UM/UIM policy.Prior to her second accident, her medical records showed that her pain was much better after treatment for the first accident. The insured sued her insurer for the remaining damages. The jury awarded the insured her damages and attorneys' fees. The insurer appealed, and the appellate court held that the evi-

dence was factually sufficient to support the award of past medical expenses. Moreover, the court stated the trial court cannot reduce the lodestar calculation of attorney fees based on the existence of a contingency agreement. The appellate court affirmed the trial court's judgment holding the damages and attorneys' fees were appropriate. *Allstate Fire & Cas. Ins. Co. v. Yarum*, No. 05-22-01004-CV, 2024 WL 3963861 (Tex. App.—Dallas Aug. 28, 2024) (mem. op.).

The sole issue addressed in this opinion is the lack of a jury question regarding attorney's fees. The insured sued her insurer on a declaratory judgment action. The insurer made a jury demand, and the case was tried to a jury. No evidence on attorney's fees was presented and no question was submitted to the jury. Post verdict, the insured asked the court to award attorney's fees and presented evidence at the hearing on the amount which the court awarded. The insurer filed its objection stating that the issue was waived because it was not presented to the jury at trial. The appellate court agreed, holding the insured had waived the issue of attorney's fees by not requesting a jury finding citing Tex. R. Civ. Proc. 279. *Allstate v. Harper,* No. 03-23-00635-CV 2024 WL 4575701 (Tex. App.—Austin Oct. 25, 2024).

The insured sued his UM/UIM carrier after he was injured in a car accident, and had recovered partially from the driver who caused the accident. The jury awarded an amount to be paid under the underinsured motorist policy that was less than the UM/UIM insurer's pre-suit settlement offer. The trial court rendered judgment, awarding the insured an additional $823 under his UIM policy, and $20,000 in attorney's fees under the Uniform Declaratory Judgments Act. The insurer appealed arguing the attorney's fees incurred by the insured were not necessary. The Texas Supreme Court has made clear that an injured party must first obtain a judgment establishing the injuring party's liability and status as an underinsured motorist before the UM/UIM carrier is legally obligated to pay UIM benefits. Because it was necessary for the insured to seek a declaration establishing his entitlement to UIM benefits, the appellate court affirmed holding that the trial court did not abuse its discretion when it awarded the insured's attorney's fees. *State Farm Mut. Auto. Ins. Co. v. Valdez*, 690 S.W.3d 712 (Tex. App.—San Antonio 2024, pet. denied).

This case follows *State Farm v. Valdez* and affirms $50,000 in attorney's fees on a $75,000 judgment after insured turned down a $100,000 offer from the insurer. *Farmers Tex. Cty. Mut. Ins. Co. v. Barr,* No. 09-22-00321-CV, 2024 WL 2340792 (Tex. App.—Beaumont May 23, 2024).

VIII. DEFENSES & COUNTERCLAIMS

A. Breach of policy condition by insured

This case affirms a summary judgment in favor of the insurer on a freeze damage claim. The issue is an endorsement that requires the insured to "maintain protective devices… including a sprinkler system." The court treated this endorsement as a policy condition and placed the burden on the insured to produce evidence in response to a no evidence motion for summary judgment. The insurer argued that had the insured properly "maintained" the sprinkler system it would not have froze. Since the insured failed to address the no evidence issue, the court affirmed the trial court's judgment. A petition for review has been filed in the case. *Madhu Lodging Partners L.P. v. AmGuard Ins. Co.,* No. 02-23-00379-CV, 2024 WL 2760482 (Tex. App. - Fort Worth May 30, 2024, pet. filed).

B. Limitations

After an insured's home was damaged in a hurricane, she filed a claim with her insurer. The insured invoked the appraisal process and also sued her insurer. An appraiser issued an award, which the insurer paid. The insured non-suited her claims without prejudice two days before trial and then filed another suit in district court. The trial court granted the insurer's motion for summary judgment and rendered judgment that the insured take nothing on her claims. The appellate court held the insured's claims, whether based on alleged policy breaches or statutory violations, accrued no later than February 19, 2019, when her counsel sent a letter that showed she was aware that the insurer's conclusion as to the amount of the loss was substantially different from her own. Whether under a two or four-year statute of limitations, this suit in July 2023 was untimely. Therefore, the appellate court sustained the trial court's judgment of summary judgment in favor of the insurer. *Galvan v. RVOS Farm Mut. Ins. Co.*, No. 13-23-00498-CV, 2024 WL 3963908 (Tex. App.—Corpus Christi Aug. 28, 2024).

C. Other defenses

A roofing contractor that was not a licensed public adjuster was sued by a dissatisfied customer for violating Tex. Ins. Code section 4102. In turn, the roofing contractor sued the Texas Department of Insurance to invalidate Texas' licensing and dual-capacity regulations, alleging the statutes relating to public adjusters in the Texas Insurance Code sections 4101 and 4102 violated free speech and due process rights guaranteed by the First and Fourteenth Amendments of the United States Constitution. The roofing contractor was a professional contractor that provided roofing services to residential and commercial customers. The contractor was not licensed as a public adjuster but claimed to have extensive experience in facilitating settlement of insurance claims. Under the law, a person may not serve in a dual role - as both contractor and adjuster - in connection with property subject to an insurance claim or falsely advertise an ability to do so.

The Texas Department of Insurance prevailed at the trial court on a motion to dismiss, holding the First Amendment was inapplicable because the challenged laws regulated professional conduct, not speech, and the roofer failed to state a void for vagueness claim under the Fourteenth Amendment's Due Process Clause. The appellate court reversed and remanded. The Texas Supreme Court agreed with the trial court that the statute targets non-expressive commercial activities not speech and held, "any incidental impact on speech is not sufficient to bring the First Amendment into play." Additionally, the Texas Supreme Court

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stated the roofing contractor's form contract recited the definition of a public adjuster, even though the contractor is not a public adjuster. Therefore, the facial vagueness claim fails as a matter of law. The Texas Supreme Court reversed the court of appeals' judgment and rendered judgment dismissing the roofing contractor's case. *Tex. Dep't of Ins. v. Stonewater Roofing, Ltd. Co.*, 696 S.W.3d 646 (Tex. 2024).

IX. PRACTICE & PROCEDURE

A. Parties

An insurer was the primary insurer for companies that manufactured and sold products containing asbestos. Two of those companies filed bankruptcy after facing thousands of asbestos-related lawsuits. A reorganization plan was filed. The insurer was contractually obligated to defend each covered asbestos personal injury claim and to indemnify the debtors for up to $500,000 per claim. The insurer argued the plan exposed it to millions of dollars in fraudulent claims because the plan did not require the same disclosures for insured and uninsured claims. The district court confirmed the plan, and the Fourth Circuit affirmed. The Bankruptcy Code allows any "party in interest to raise and be heard on any issue" in Chapter 11 Bankruptcy. The appellate court concluded the insurer was not a "party in interest" because the reorganization plan was "insurance neutral," meaning the plan neither increased nor impaired the insurer's rights under the insurance contract. The United States Supreme Court held an insurer with financial responsibility for a bankruptcy claim is sufficiently concerned with the proceedings to be a "party in interest" that can raise objections to a reorganization plan. *Truck Ins. Exch. v. Kaiser Gypsum Co., Inc., et al.*, 602 U.S. 268 (2024).

B. Jurisdiction

The trial court granted the insurer's motion to dismiss based on *forum non conveniens* which was in turn based on a forum-selection clause in the insurance policy. The insured appealed arguing that the forum-selection clause applied only to contract disputes and not to extra-contractual violations. The forum-selection clause designated the British Virgin Islands as the proper forum.

The appellate court affirmed the trial court's ruling. The appellate court reasoned that the tort claims were based on the contract which was subject to the forum-selection language so consequently fell under that provision. The opinion notes the distinction between forum-selection and choice of law provisions in the policy but implies that the ruling would be the same with regards to both. *Havercombre Ventures Ltd. v. Spheric Assurance Co. Ltd.*, No. 05-24-00220-CV, 2024 WL 4763277 (Tex. App.—Dallas Nov. 13, 2024).

C. Pleadings

The issues in this case are more procedural than insurance related. The homeowners sued their insurer for a fire loss to their home. The property damage limit in the policy was enhanced by an endorsement that increased the loss limit by 25% to a total of $168,750. The insurer paid just over $163,500 for the loss. The homeowners asserted a loss exceeding the policy limit and sued. The trial court found the homeowner's response to the insurer's no evidence motion for summary judgment was conclusory and vague and granted the motion. The appellate court also found the same faults with the homeowner's appellate brief and affirmed the judgment. *Wills v. USAA Gen. Indem. Co.,* No. 01-22-00304-CV, 2023 WL 8459498 (Tex. App.—Houston [1st Dist.] Dec. 7, 2023, no pet.).

D. Discovery

This case arises out of a water damage claim under a homeowner's policy. From the record, it appears the insurer made multiple payments on the claim. Still, the trial court's ruling on the insurer's motion for summary judgment was mainly supported by the insured's failure to respond to requests for admission. The insured complained of the court's reliance but never moved to withdraw her response. The appellate court held that the deemed admissions supported the ruling and affirmed the judgment. *Januzi v. Am. Modern Prop. & Cas. Ins.*, No. 12-24-00016-CV, 2024 WL 4002075 (Tex. App.—Tyler Aug. 29, 2024, no pet.).

E. Experts

A lightning strike damaged the insured's property. The insurer made some preliminary payments on the claim, then refused further payment. The insured obtained a favorable jury verdict and the insurer appealed, arguing that expert testimony was required to prove the damage. The insured offered no expert testimony at trial. It was hotly disputed whether lightning had struck the house at all. The insurer's expert testified that there were no recorded lightning strikes within a half mile of the house. The insured offered lay testimony about scorch marks and appliances that quit working after the strikes. They also produced an extensive list of personal electronic items that were destroyed by the strike. The appellate court agreed that lay testimony was sufficient to show a power surge from a lightning strike was possible and that plugged-in appliances that worked before the strike and quit working right after the strike were likely damaged. The appellate court disagreed that lay testimony was sufficient to prove the complexity of damage the insured was claiming for many of the listed items. Because the evidence was sufficient for some, but not all, of the claimed items, the appellate court reversed and remanded, rather than reversing and rendering. *State Farm Lloyds v. Hilmi*, No. 02-23-00491-CV, 2024 WL 4377494 (Tex. App.—Fort Worth Oct. 3, 2024).

F. Class Actions

A driver made a third-party claim against an insurer for damage sustained to her 1983 Mercedes-Benz after an accident involving the insurer's insured. The insurer determined the car was a total loss, and sent the driver checks for the pre-collision value along with lost vehicle use. The driver sent the checks back. Before the insurer was notified if the driver would accept its offer, the insurer told TXDOT that the driver's car was salvage. The driver had invested considerable time and resources into restoring her car and disagreed with the value the insurer determined. However, TXDOT sent her a letter notifying her the insurer had reported that it paid her claim and advised her the registration for the car was no longer valid. Nearly two years later the insurer represented to TXDOT that it had filed the report in error because the damage to the car was not sufficient to classify the car as a salvage motor vehicle. The driver sued and filed a motion for class certification. Following court order, the insurer reviewed more than 500 claims and determined no person during a five year period disputed whether their vehicle was a total loss or rejected the total loss payment made to them by the insurer. The trial court and appellate court approved the class, with the class definition as all claimants to whom the insurer sent a check to and within three days filed a report with TXDOT. The Texas Supreme Court granted a petition for review and held the predominance requirement could not be met as it is clear that substantial variation exists among the class regarding standing. Moreover, the class lacks typicality as the driver's set of facts are atypical because hers was a restored vintage car. The Texas Supreme Court reversed the appellate court's class certification order and remanded the case to the district court on

the driver's individual claim for damages. *USAA Cas. Ins. Co. v. Letot*, 690 S.W.3d 274 (Tex. 2024).

G. Appraisal

The trial court denied the insurer's motion to compel appraisal on a storm damage claim holding that the insurer had waived appraisal. The appellate court disagreed and issued mandamus compelling appraisal. The court noted that the policy stated that any waiver of the policy terms must be in writing and that the insured could not show prejudice by the delay in requesting appraisal. *In re Surechoice Reciprocal Ins. Exch.,* NO. 01-24-00367-CV, 2024 WL 4776218 (Tex. App.—Houston [1st Dist.] November 14, 2024).

Homeowners passed away in their home, and there was delay in discovering them. Their relative handled managing the estate, and notifying the insurer of the claim. The relative contracted with the recommended provider to remediate the property, but disagreement arose regarding the damage amount. The relative invoked the mandatory appraisal clause, and both parties chose their own appraiser. The two appraisers agreed on the damage amount, which was less than what the insurer had already paid. The insurer filed for summary judgment on the ground that the appraisal award barred a claimed breach of contract, which the trial court granted. The relative appealed, resulting in a reversal of the decision based on mistake. The relative's appraiser's loss amount failed to calculate remediation efforts performed before his inspection. Construing the evidence in a light most favorable to the relative, the appellate court concluded that a factfinder could reasonably infer that the appraiser misinterpreted the scope of his task. Therefore, the appellate court reversed the trial court's ruling in favor of the insurer. *Dalton v. Republic Lloyds*, No. 07-22-00308-CV, 2023 WL 8270247 (Tex. App.—Amarillo Nov. 29, 2023, mem. op.).

This case involved a hail damage claim. In its initial evaluation, the insurer found the covered damage to the roof to be $8,800. It issued a check for that loss minus deductibles. It issued supplemental payments after that based on additional inspections and reports. The insured invoked the appraisal clause in the policy, and an appraisal award of around $96,000 resulted. The insurer refused to pay the award citing coverage issues. After suit was filed, the insurer paid the difference between the appraisal award and its previous payments as well as interest and attorney's fees. It then moved for summary judgment, which the trial court granted. The appellate court affirmed the judgment despite the insured's claim that the payment came too late to excuse the insurer from Tex. Ins. Code violations. Relying heavily on *Rodriguez v. Safeco Ins. Co. of Ind.*, 684 S.W.3d 789 (Tex. 2024), the appellate court found that the insurer was not obligated to pay the award "on demand." It also rejected insured's independent injury claim based on the increased cost of repair resulting from the delay. *Knopp v. State Farm Lloyds*, No. 05-22-00749-CV, 2024 WL 3579432 (Tex. App.—Dallas July 30, 2024).

H. Motions for summary judgment

An insurer sought mandamus after its motion for summary judgment was denied in a water damage case. The appellate court denied mandamus without explanation. The appellate record shows only the petition for mandamus, no response to the petition and a denial of emergency relief. *In re Homeowners of Am. Ins. Co.,* No. 01-24-00697-CV, 2024 4292185 (Tex. App.—Houston [1st Dist.] Sept. 26, 2024).

XI. OTHER ISSUES

A. Sanctions

The trial court granted certain motion for sanctions filed by real party in interest and the plaintiff, and found the defendant had acted in bad faith and ordered him to pay plaintiff's counsel up to $88,240 within a short amount of time and before final judgment. Before the orders were signed, the defendant opposed requiring payment of sanctions before the final judgment on the grounds that doing so would prevent litigation from going forward. The trial court signed the orders requiring payment to plaintiff's counsel before final judgment. None of the orders explained why ordering defendant to pay the amounts ordered before final judgment did not preclude the insurer's access to the courts. Mandamus was granted, and the appellate court concluded the trial court abused its discretion by ordering the defendant to pay the plaintiff's attorney fees prior to final judgment without making express written findings concerning why the monetary sanctions did not have a preclusive effect on the insurer's access to the courts. *In re State Farm Mut. Auto. Ins. Co.*, No. 05-24-00229-CV, 2024 WL 3912369 (Tex. App.—Dallas Aug. 23, 2024).

B. Receivership

This case involves the priority of a claim in a receivership plan under Tex. Ins. Code section 443.301. Mine Safety objected to the receiver's designating its claim as a "late filed non policy claim." This opinion goes into detail on the procedures surrounding the receivership and the processing of claims. In the end, the appellate court affirmed the trial court's findings and rulings. While the opinion has a narrow application, it is a must read for any practitioner with a similar claim. *Mine Safety Appliance Co., L.L.C. v. Prime Tempus, Inc.*, No. 03-23-00321-CV, 2024 WL 4750758 (Tex. App.—Austin Nov. 6, 2024).

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