Recent Developments in Coverage

Tarron Gartner-Ilai
Robert J. Witmeyer
Cooper & Scully, P.C.
900 Jackson Street, Suite 100
Dallas, TX 75202
214-712-9500
214-712-9540 (fax)
Tarron.gartner@cooperscully.com
Rob.witmeyer@cooperscully.com

Great Am. Ins. Co. v. Hamel
444 S.W.3d 780 (Tex. App. – El Paso 2014, writ granted)

* Great American insured Terry Mitchell Builders under 5 CGL policies from 1996 – 2001
* The last two policies contained an EIFS exclusion
* In 1998, TMB constructed a home for the Hamels after the original builder abandoned the project
* In 2000, the Hamels began to observe baseboards warping and staining on the exterior walls, later determined to be the product of water penetration

Great Am. Ins. Co. v. Hamel Cont'd…

* In 2005, the Hamels sued TMB for breach of contract, breach of warranty, negligence, violations of the RCLA and violations of the DTPA
* Great American refused to defend
* On May 19, 2005, the Hamels signed an agreement not to execute on any judgment against TMB in return for TMB's agreement to appear at trial, and not to seek a continuance
* On May 25, 2005, TMB executed a "Stipulations of Fact" as to its duties as a general contractor and that the construction deficiencies were honest oversights

Great Am. Ins. Co. v. Hamel Cont'd…

* Evidence admitted at trial indicated there was extensive damage due to water penetration from multiple sources
* TMB's representative testified that that a house with points of water entry could not be deemed to have been completed per the warranty
* The Hamels' expert testified as to the scope and extent of the various construction defects
* Judgment was entered in favor of the Hamels, including $50K for mental anguish
* TMB subsequently assigned its rights against Great American to the Hamels

Great Am. Ins. Co. v. Hamel Cont'd…

* Two experts (Yeandle and Nicholas) testified on the Hamels' behalf that the wood rot in the Hamels' home took place over an 18-24 month period of time between 1997-2002, during Great American's policy periods

* Yeandle testified that "none of the problems" with the Hamels' home was the product of the improper installation of EFIS

* Great American objected to the admissibility of the evidence on the basis that Yeandle and Nicholas were not microbiologists and that Yeandle's testing in 2002, 2003 and 2008 did not provide a foundation for determining when damage occurred

* Judgment was entered in favor of the Hamels

Great Am. Ins. Co. v. Hamel Cont'd…

* On appeal Great American argued that the judgment in the trial court was not binding under *State Farm Fire & Cas. Co. v. Gandy* because it was not the product of an "actual trial"
* The court held:
  * GA breached the duty to defend
  * there is no "actual trial" requirement where the insurer breaches the duty to defend
  * *Gandy* is limited to the specific facts of the case

Great Am. Ins. Co. v. Hamel Cont'd…

* As to the sufficiency of evidence the court held:
  * Both Yeandle and Nicholas were qualified to testify on the issue presented
  * The evidence presented was sufficiently reliable
* As to the duty to allocate the court held:
  * The Hamels had established that there was more than 10% and as much as 50% wood rot during GA's policy period and that the cost to repair would be the same after the 10% threshold was reached
  * Under *Am. Phys. Ins. Exch. v. Garcia* the Hamels were entitled to a single policy limit for a continuing injury that occurred over multiple policy periods

Great Am. Ins. Co. v. Hamel Cont'd…

* With regard to the Hamels' mental anguish claim the court held:
  * Mental anguish without physical injury is not "bodily injury" under a liability policy
  * Damages for "mental anguish" can be consequential to (i.e. "because of") "property damage" only where the injury to the property was intentional, malicious, **or grossly negligent**
  * Damages for "mental anguish" are not consequential to "property damage" based solely on negligence

Mid-Continent Cas. Co. v. Petroleum Solutions, Inc. 2016 WL 5539895 (Sept. 29, 2016)

* Mid-Continent insured PSI
* In 1992 PSI installed an underground fuel storage system
* In 2001 Head discovered a fuel leak
* PSI and MCC theorized that a flex connector manufactured by Titeflex caused the leak but could not conclusively prove it
* The expert who inspected the flex connector stored it at a laboratory
* The connector was lost when the laboratory was torn down in 2006
* In 2006 Head filed suit against PSI
* PSI filed a third party petition against Titeflex

Mid-Continent Cas. Co. v. Petroleum Solutions, Inc. Cont'd…

* In January of 2007 Head amended its pleadings to include claims against Titeflex
* Titeflex moved for a spoliation instruction against PSI
* In 2008 Head nonsuited its claims against Titeflex, Titeflex filed a counterclaim against PSI for indemnification of attorney's fees under Tex. Civ. Prac. & Rem. Code 82.002(a) (indemnity) and (g)(costs and attorney's fees)
* Titeflex offered to dismiss its counterclaims with prejudice if PSI dismissed its claims against Titeflex with prejudice
* PSI refused
* The trial court awarded Head damages in the amount of $1,131,321.26 and $91,500.00 in attorney's fees
* The trial court awarded Titeflex $382,334.00 in attorney's fees, $68,519.12 in expenses, and $12,393.35

Mid-Continent Cas. Co. v. Petroleum Solutions, Inc. Cont'd…

* 82.002 (a) A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.
* 82.002 (b) defines loss to include "reasonable attorney's fees" and costs
* 82.002 (g) A seller is entitled to recover from the manufacturer court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages incurred by the seller to enforce the seller's right to indemnification under this section.

Mid-Continent Cas. Co. v. Petroleum Solutions, Inc. Cont'd…

* The court held that there was coverage under the Policy for the fees in the Titeflex Judgment awarded pursuant to 82.002 (a) incurred in defense against Head's claims
* The court reasoned that the purpose of 82.002 (a) was to protect innocent sellers from litigation
* The court held that there was no coverage for fees attributable to Titeflex's defense against PSI claims or awarded pursuant to 82.002 (g)
* The court held that there was a triable issue of fact as to the segregation of attorney's fees between the two statutory provisions
* The court noted that the fees were relatively easy to segregate because 82.002 is triggered by the injured party's allegation against the innocent seller (i.e. Head's claim against Titeflex between January 30, 2007 and March 7, 2008, when Head nonsuited Titeflex)

Mid-Continent Cas. Co. v. Petroleum Solutions, Inc., 2016 WL 7491858 (Dec. 30, 2016)

* Mid-Continent argued that PSI's refusal to dismiss its claims against Titeflex with prejudice was a breach of the duty to cooperate
* Mid-Continent argued that the duty to cooperate encompasses the settlement of affirmative claims
* PSI argued that the duty to cooperate encompassed only defensive claims
* The court held that the issue of whether PSI breached the cooperation clause and whether Mid-Continent was prejudiced as a result were triable issues of fact

Mid-Continent Cas. Co. v. Petroleum Solutions, Inc., 2016 WL 7491858 (Dec. 30, 2016)

* The court held that Mid-Continent and PSI were in privity in the state court suit for purposes of determining whether Mid-Continent was estopped from litigating the segregation of fees awarded under 82.002 (a) and 82.002 (g)
* The court held that Mid-Continent was not estopped from litigating the segregation of fees because the issue was not litigated in the state court proceeding

Takeaways

* Attorney's fees awarded under a fee shifting statute are not "damages" because of "bodily injury" or "property damage" under a liability policy
* The damages are comparable to other forms of consequential damages (i.e. lost profits, diminution in value) are calculated independently "in ways different" from the direct damages covered by a CGL
* Attorney's fees that are part of a substantive or compensatory recovery scheme are "damages" because of "bodily injury" or "property damage"
* The duty to cooperate potentially requires the insured to settle affirmative claims where they are simply part of the overall defensive strategy of the case

Seger v. Yorkshire Ins. Co.
2016 WL 33832223 (Tex., June 17, 2016, reh'g den.)

* To constitute a valid *Stowers* demand the *insured* must establish that the claim is within the scope of coverage
  * Flips the burden of proof on policy exclusions
  * Establishing coverage is a **precondition** to recovery on a *Stowers* claim
* Judgment entered in trial court is insufficient evidence of damages in a case involving a post-answer default and subsequent assignment

U. S. Metals, Inc. v. Liberty Mutual Group, Inc.

U. S. Metals, Inc. v. Liberty Mutual Group, Inc. -- THREE ISSUES

* INCORPORATION THEORY
* "IMPAIRED PROPERTY" EXCLUSION
* IMPACT ON "RIP AND TEAR" COSTS

U. S. Metals, Inc. v. Liberty Mutual Group, Inc. (Cont'd) -- FACTS

* U.S. Metals, Inc. sold ExxonMobil approximately 350 stainless steel, weld-neck flanges for use in constructing non-road diesel units at its refineries.
* The units remove sulfur from diesel fuel and operate under extremely high temperatures.
* After the flanges were welded to the piping, they were covered with a special high temperature coating and insulation.
* In post-installation testing, several flanges leaked. Further investigation revealed that the flanges did not meet industry standards.

U. S. Metals, Inc. v. Liberty Mutual Group, Inc. (Cont'd) -- FACTS

* ExxonMobil decided it was necessary to replace the flanges to avoid the risk of fire and explosion.
* For each flange, this process involved stripping the temperature coating and insulation (which were destroyed in the process), cutting the flange out of the pipe, removing the gaskets (which were also destroyed in the process), grinding the pipe surfaces smooth for re-welding, replacing the flange and gaskets, welding the new flange to the pipes, and replacing the temperature coating and insulation.
* The replacement process delayed operation of the diesel units at both refineries for several weeks.

U. S. Metals, Inc. v. Liberty Mutual Group, Inc. (Cont'd) -- FACTS

* ExxonMobil sued U.S. Metals for $6,345,824 as the cost of replacing the flanges and $16,656,000 as damages for the lost use of the diesel units during the process.
* U.S. Metals settled with ExxonMobil for $2.2 million and then sought indemnification from its CGL carrier, Liberty Mutual.
* Liberty Mutual denied coverage.

U. S. Metals, Inc. v. Liberty Mutual Group, Inc. (Cont'd) -- FACTS

* U.S. Metals sued in federal district court to determine its right to a defense and indemnity under the policy.
* The court granted summary judgment for Liberty Mutual.
* On appeal, the Fifth Circuit certified to the Texas Supreme Court four questions that the court narrowed down to two issues.

U. S. Metals, Inc. v. Liberty Mutual Group, Inc. (Cont'd) -- TWO PRIMARY ISSUES

* (1) "Did the mere installation of the faulty flanges physically injure the diesel units when the only harm at that point was the risk of leaks? Or put more generally: is property physically injured simply by the incorporation of a faulty component with no tangible manifestation of injury?"
* (2) "Is property restored to use by replacing a faulty component when the property must be altered, damaged, and repaired in the process?"

U. S. Metals, Inc. v. Liberty Mutual Group, Inc. (Cont'd) -- PHYSICAL INJURY

* The parties disputed whether the installation of the faulty flanges ***physically injured*** the diesel units within the meaning of the CGL policy.
* The policy defines "property damage" in part as:

    a. ***Physical injury*** to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it.

U. S. Metals, Inc. v. Liberty Mutual Group, Inc. (Cont'd) -- INCORPORATION THEORY

* A thing whose use or function is diminished by the incorporation of a faulty component can fairly be said to be injured.
* The installation of the leaky flanges certainly injured the diesel units by increasing the risk of danger from their operation and thus reducing their value.
* But if that increased risk amounted to *physical* injury within the meaning of the CGL policy, then it is difficult to imagine a non-physical injury.

U. S. Metals, Inc. v. Liberty Mutual Group, Inc. (Cont'd) -- REJECTION OF INCORPORATION THEORY

* "We agree with most courts to have considered the matter that the best reading of the standard-form CGL policy text is that physical injury requires tangible, manifest harm and does not result merely upon the installation of a defective component in a product or system."

U. S. Metals, Inc. v. Liberty Mutual Group, Inc. (Cont'd) -- PERVERSE RESULT

* Had ExxonMobil been negligent or reckless by not testing the flanges and an explosion had resulted, U.S. Metals would not be denied coverage for the damages to persons and property for want of physical injury. But because ExxonMobil was careful and cautious, U.S. Metals is not entitled to indemnity for the costs of remedying the installation of the faulty flanges.
* Nevertheless, the court thought the text of the policy was clear and concluded that ExxonMobil's diesel units were not physically injured merely by the installation of U.S. Metals' faulty flanges.

U. S. Metals, Inc. v. Liberty Mutual Group, Inc. (Cont'd) --

WHAT WE (THINK WE) KNOW

* "Physical injury" requires tangible, manifest harm and does not result merely upon the installation of a defective component in a product or system.
* Exclusion M precluded coverage for the loss of use of the diesel units because they were restored to use by replacing the flanges.
* Exclusion K precluded coverage for damages to the flanges themselves, and U.S. Metals did not seek indemnity for those damages.

U. S. Metals, Inc. v. Liberty Mutual Group, Inc. (Cont'd) -- BUT WAIT . . . .

* "But the insulation and gaskets destroyed in the process were not restored to use; they were replaced. They were therefore not impaired property to which Exclusion M applied, and the cost of replacing them was therefore covered by the policy."
* The court concludes these "rip and tear" costs are covered because these items were physically injured (i.e., "property damage").

U. S. Metals, Inc. v. Liberty Mutual Group, Inc. (Cont'd) -- WHAT THIS MEANS GOING FORWARD

* **If There Is Covered Property Damage, Rip And Tear Expenses Are Almost Certainly Covered.**
* In *Lennar Corp. v. Markel American*, 413 S.W.3d 750 (Tex. 2013), a homebuilder made a claim for the cost to repair its homes that had been damaged because of EIFS siding that had been installed on the homes. *Id.* at 751.
  - There, the court awarded the costs Lennar incurred to determine the areas of the homes that had water damage were covered. *Id.* The court noted the importance that Lennar was seeking these "because of" damages for only houses that suffered covered "property damage," by stating, "We are not confronted with a situation in which the existence of damage was doubtful. Markel concedes that each of the 465 homes for which Lennar sought to recover remediation costs was actually damaged."
  - Indeed, Lennar removed forty-eight homes that had not incurred covered property damage from its proof at trial.

U. S. Metals, Inc. v. Liberty Mutual Group, Inc. (Cont'd) -- WHAT THIS MEANS GOING FORWARD

- ***If There is No Covered Property Damage, Rip and Tear Expenses Covered?***

* For example, what if the insured is a concrete subcontractor who provides bad concrete that results in the spalling of a home's foundation and no damage to other property. Subsequent ripping up/destroying the bad concrete is necessary and causes damage to other items (e.g., rebar, plumbing, electrical). What now?
* The "your product" and/or "your work" exclusions (Exclusion K and L) would likely preclude coverage to the insured for the costs to repair/replace the insured's concrete.
* But how about the expenses incurred getting to and removing the uncovered "property damage," such as the destroyed rebar?
* These "rip and tear" expenses should not be permitted to create coverage when coverage for repairing the uncovered "property damage" would not otherwise exist. The insuring agreement grants coverage for "because of" damages, but only if there is "'property damage' ***to which this insurance applies***."

U. S. Metals, Inc. v. Liberty Mutual Group, Inc. (Cont'd) -- **ISSUES NOT ADDRESSED**

* When Does Property Damage for Rip and Tear Occur?
* Is Rip and Tear an Occurrence?
* Is Rip and Tear a Fortuitous Event?
* Application of Exclusion (a)

Patton v. Mid-Continent Casualty Co., 2016 WL 3900799 (S.D. Tex.—Houston 2016)

* Mid-Continent issued insurance policies to Black Diamond Builders, LLP
* The policies applied only to "bodily injur[ies]" or "property damage" if the injuries or damage was caused by an "occurrence" taking place in the "coverage territory."

Patton v. Mid-Continent Casualty Co., 2016 WL 3900799 (S.D. Tex.—Houston 2016) (Cont.)

* The policies contained an exclusion for property damage occurring on a "particular part of real property on which [Black Diamond] or any contractors or subcontractors working directly or indirectly on [Black Diamond's] behalf [were] performing operations, if the 'property damage' [arose] out of those operations." *Id.* at MCC 000051 (Residential Contractor Extension A Endorsement). They also contain an exclusion for "'Property damage' to 'your work' arising out of it and included in the 'products-completed operations hazard.'"

Patton v. Mid-Continent Casualty Co., 2016 WL 3900799 (S.D. Tex.—Houston 2016) (Cont.)

* The Pattons initiated an arbitration claim against Black Diamond in December 2010. Black Diamond was the builder or general contractor of the Pattons' house. The Pattons alleged that their house was damaged due to significant differential movement of the foundation of the house.
* Black Diamond conceded that the house was damaged but disagreed regarding the method and cost of repair. The arbitrator found that both design and construction errors led to the damage to the residence and that Black Diamond's "failure to build the house slab/foundation to the elevation shown on the plans" prevented drainage away from the structure.

Patton v. Mid-Continent Casualty Co., 2016 WL 3900799 (S.D. Tex.—Houston 2016) (Cont.)

* The arbitrator awarded the Pattons $2,935,944.00 in damages plus $4,962.50 for arbitration fees and expenses.
* Plaintiffs attempted to collect the judgment from Mid-Continent, which they contend is obligated under the policies to pay the judgment

Patton v. Mid-Continent Casualty Co., 2016 WL 3900799 (S.D. Tex.—Houston 2016) (Cont.)

* The arbitrator acknowledged that Black Diamond's "actions seriously affected the work of other contractors on the project (including both subcontractors of [Black Diamond], and the separate contractors hired by [the Pattons])." However, in discussing the damages he considered, the arbitrator did not discuss the pool at all. He discussed only lifting the *house*.

Patton v. Mid-Continent Casualty Co., 2016 WL 3900799 (S.D. Tex.—Houston 2016) (Cont.)

* He then determined that the costs to "repair *the house* were more than the market value of the *home*" and decided to calculate damage based on the unrepaired value of the home less the value of the underlying land. *Id*. (emphasis added). The fact that he does not discuss the cost or method of repairing the pool at all and specifically states that the pool was being considered in companion litigation makes it clear that the award was for the damage to the house only.

Patton v. Mid-Continent Casualty Co., 2016 WL 3900799 (S.D. Tex.—Houston 2016) (Cont.)

* The court held there was no coverage based upon application of the two exclusions precluding coverage for Black Diamond's work – the house.

Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes, 2016 WL 4486650 (Tex.App.—Dallas 2016)

* Between 1998 and 2002, Vines-Herrin, a residential builder, purchased four consecutive CGL policies from the Insurers, each providing coverage for a period of one year. Great American issued the first two policies, and Mid-Continent issued the second two policies.

Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes, 2016 WL 4486650 (Tex.App.—Dallas 2016) (Cont.)

* In 1998 or 1999, during Great American's policy periods, Vines-Herrin built a residence in Plano, Texas. In May 2000, Vines-Herrin sold that residence to Emil Cerullo. Cerullo began noticing problems with the house almost immediately. The problems included water not draining from the courtyard, doors not closing properly, damages to sheetrock and baseboards, cracks in the ceiling, a window sinking into the frame, and finally, in 2002, the roof and the ceiling began to sag.

Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes, 2016 WL 4486650 (Tex.App.—Dallas 2016) (Cont.)

* In January 2003, Cerullo sued Vines-Herrin alleging various construction defects caused him damages. Vines-Herrin demanded the Insurers provide it a defense under the terms of the CGLs. They both denied there was any coverage and refused to defend Vines-Herrin. Vines-Herrin then brought suit seeking a declaration that the Insurers owed it a duty to defend and a duty to indemnify.

Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes, 2016 WL 4486650 (Tex.App.—Dallas 2016) (Cont.)

* Meanwhile, Cerullo's suit proceeded. During the pendency of that action, Vines-Herrin reiterated its request that the Insurers provide it a defense, to no avail. Then, in 2006, in order to avoid a costly jury trial, Vines-Herrin and Cerullo agreed to arbitrate the dispute. Before doing so, Vines-Herrin attempted to obtain the Insurers' input. They both refused to take any position. Vines-Herrin nevertheless notified the Insurers of the arbitration hearing and invited them to attend, but they declined.

Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes, 2016 WL 4486650 (Tex.App.—Dallas 2016) (Cont.)

* Following an evidentiary hearing, the arbitrator found in favor of Cerullo and awarded him $2,487.507.77 in damages. After the arbitrator entered its award, Cerullo and Vines-Herrin entered into a settlement agreement in which Cerullo agreed not to confirm the arbitration award in exchange for an assignment of Vines-Herrin's claims against the Insurers.

Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes, 2016 WL 4486650 (Tex.App.—Dallas 2016) (Cont.)

* Under the CGL, the insurer agrees to pay those sums the insured becomes legally obligated to pay "because of" property damage to which the insurance applies. The insurance applies to property damages only if (1) the property damages are caused by an occurrence and (2) the property damages occur during the policy period. An "occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. "Property damage" means "physical injury" to tangible property, including all resulting loss of use of that property

Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes, 2016 WL 4486650 (Tex.App.—Dallas 2016) (Cont.)

* With respect to property damage, Cerullo testified he moved into the house in May 2000 and, within a week, noticed problems with the house. For example, water would not drain from the courtyard area and doors would not shut properly. Cerullo testified that around Thanksgiving 2000, he noticed windows in the master bathroom area looked like they were sinking. He also testified it appeared the master bathroom area was sinking into the stucco. In 2001, cracking occurred in other rooms.

Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes, 2016 WL 4486650 (Tex.App.—Dallas 2016) (Cont.)

* In *Don's Building*, the Supreme Court adopted what is known as the "actual injury" approach in determining when property damages occur during the CGL's policy period.
* Relying on the CGL's definition of property damages as "physical injury" to property, the Supreme Court held property damages occur at the time property suffers actual physically injury, not when property is exposed to conditions that later cause physical injury or when property damages become manifest.

Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes, 2016 WL 4486650 (Tex.App.—Dallas 2016) (Cont.)

* [T]he Insurers do not challenge whether Vines-Herrin showed the property damages were caused by an "occurrence." Instead, their complaints are directed entirely to whether Vines-Herrin showed property damages occurred during the applicable policy periods.
* Great American provided coverage to Vines-Herring during the entire period the house was constructed until the time damages first manifested. As a consequence, "actual damages must have occurred during the coverage provided by Great American." *Id.* at 173. Therefore, as the court previously held, Great American owed Vines-Herrin a duty to indemnify.

Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes, 2016 WL 4486650 (Tex.App.—Dallas 2016) (Cont.)

* With respect to Mid-Continent's duty to indemnify, the trial court specifically referenced Cerullo's testimony regarding when he noticed his windows in the pool area starting to bow and his ceiling and roof starting to sag. According to the Insurers, the trial court's findings reflect it applied the wrong legal standard in determining when property damages occur under the CGL and specifically that trial court applied the defunct "manifestation rule" rather than the "actual injury rule."

Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes, 2016 WL 4486650 (Tex.App.—Dallas 2016) (Cont.)

* The court rejected the Insurer's argument. According to the court in *Don's Building*, the Supreme Court expressly recognized that when damages are not latent (i.e. are visible) the actual injury rule and the manifestation rule are, for all practical purposes, the same.
* Cerullo testified he noticed cracks in ceilings, his windows begin to bow, and his ceilings beginning to sag during Mid-Continent's policy periods.
* Therefore, the evidence was legally sufficient to show Mid-Continent's duty to indemnify was triggered.

Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes, 2016 WL 4486650 (Tex.App.—Dallas 2016) (Cont.)

* Next was the issue of allocation. Vines-Herrin presented no evidence allocating the damages the arbitrator awarded to the specific policy period in which they occurred. According to the Insurers, Vines-Herrin's failure to do so entitles them to rendition of a take-nothing judgment.
* The court disagreed.

Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes, 2016 WL 4486650 (Tex.App.—Dallas 2016) (Cont.)

* However, the court held that the trial court's findings do not support a judgment against both Great American and Mid-Continent, jointly and severally, for the entire arbitration award. The trial court's judgment reflects that it did not base its judgment on a finding of a single occurrence that caused damages to property over multiple policy periods. Rather, it found separate occurrences, each of which caused damages in a single policy period.

Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes, 2016 WL 4486650 (Tex.App.—Dallas 2016) (Cont.)

* We agree with the Insurers that they were not required to indemnify Vines-Herrin for property damages caused by occurrences and damages, both of which occurred outside their respective policy periods. Therefore, we again reverse the trial court's judgment and remand to the trial court to determine the amount of indemnification.

Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes, 2016 WL 4486650 (Tex.App.—Dallas 2016) (Cont.)

* The Insurers also asserted they are entitled to rendition of a take-nothing judgment because an arbitration award does not constitute a legal obligation to pay damages. The insurers were obligated to pay sums Vines Herrin became "legally obligated to pay" as damages because of property damages caused by an occurrence.
* According to the Insurers, because the arbitration award was never confirmed, Vines-Herrin never became "legally obligated" to pay damages to Cerullo.

Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes, 2016 WL 4486650 (Tex.App.—Dallas 2016) (Cont.)

* The court reject the Insurers' argument. The term "legally obligated" is not defined in the policy. However, the term is not limited to obligations that are immediately enforceable and subject to execution as a judgment. It includes obligations established in a judgment, as well as obligations created by settlement agreements and statutes.
* Because a trial court is required to confirm an award absent grounds for vacatur, the court concluded an arbitration award constitutes a legal obligation to pay the award.

Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes, 2016 WL 4486650 (Tex.App.—Dallas 2016) (Cont.)

* Finally, the Insurers assert the court should render judgment against Vines-Herrin because the arbitration award was not entered after an "actual trial" or a fully "adversarial trial." *See State Farm Fire & Cas. v. Gandy*, 925 S.W.2d 696, 700-01 (Tex. 1996).
* Vines-Herrin was forced to defend itself at its own expense. To avoid a costly trial, Vines-Herrin and Cerullo agreed to arbitrate. Before Vines-Herrin did so, it attempted to confer with the Insurers. The Insurers refused to provide any input, insisting there was no coverage. The Insurers cannot now complain about how Vines-Herrin defended itself and its decision to arbitrate.

Colony Ins. Co. v. Adsil, Inc., 2016 WL 4617449 (Tex.App.—Houston 2016)

* Adsil is the manufacturer of a coating product that is used to prevent air conditioning units from corroding. This product was used on air conditioning units owned by the Calallen Independent School District ("CISD").
* Colony urged that it has no duty to defend Adsil because its insurance policy with Adsil contains an exclusion for claims "arising directly or indirectly out of the installation, service or repair of "your product(s)" performed by independent contractors or subcontractors of an insured. . . ."

Colony Ins. Co. v. Adsil, Inc., 2016 WL 4617449 (Tex.App.—Houston 2016) (Cont.)

* Colony alleges that CJO was a contractor for Adsil, that CJO applied Adsil's product to the air conditioning units at issue in the underlying lawsuit, and that the claims against Adsil arose out of this application. Given the broad interpretation of "arising out of" under Texas law, Colony argues that the exclusion in their policy relieves them of their duty to defend Adsil, even if "other allegedly negligent acts by Adsil or others contributed."

Colony Ins. Co. v. Adsil, Inc., 2016 WL 4617449 (Tex.App.—Houston 2016) (Cont.)

* In response, Adsil referred to a cross-claim filed against Adsil by Weathertrol which states that Weathertrol contracted directly with CJO. As a result, Adsil argues, Adsil was simply a supplier — a situation that falls outside of Colony's subcontractor exclusion.

Colony Ins. Co. v. Adsil, Inc., 2016 WL 4617449 (Tex.App.—Houston 2016) (Cont.)

* This insurance does not apply to:
* Subcontractors and Independent Contractors — Installation, Service of Repair of "Your Product"
* "Bodily injury," "property damage" or "personal and advertising injury";
  * (1) Arising directly or indirectly out of the installation, service or repair of "your product(s)" performed by independent contractors or subcontractors of an insured; or
  * (2) Sustained by any contractor, subcontractor, or independent contractor or any of their "employees," "temporary workers," or "volunteer workers."

Colony Ins. Co. v. Adsil, Inc., 2016 WL 4617449 (Tex.App.—Houston 2016) (Cont.)

* CISD's Twelfth Amended Petition (Doc. No. 31, Ex. 1) reads, in pertinent part:
  * Based on information and belief, one or more of the Defendant manufacturers of the HVAC/rooftop units utilized as their product of choice for corrosion protection a product made by Adsil, Inc. . . . Adsil, in turn, sub-contracted with Defendant CJO, Inc., to "install" Adsil's Microguard product for the purpose of servicing the manufacturers' HVAC units. . . . Defendant CJO was hired to apply a product manufactured by Adsil to coat/recoat HVAC coils on units belonging to Plaintiff, which had been installed and operating on school district property.

Colony Ins. Co. v. Adsil, Inc., 2016 WL 4617449 (Tex.App.—Houston 2016) (Cont.)

* Weathertrol's First Amended Cross-Claim (Doc. No. 31, Ex. 2) against Adsil alleges that
  * Weathertrol contracted directly with CJO to apply Adsil's protective coating to a 12 ton Lennos RTU. Thus, to the extent there are issues with the instructions for applying the coating or the application thereof at CHS, Adsil would be responsible for any alleged damages . . . Adsil failed to provide instructions that would allow one to properly apply the materials, particularly in regard to the pre-application cleaning of the coils.

Colony Ins. Co. v. Adsil, Inc., 2016 WL 4617449 (Tex.App.—Houston 2016) (Cont.)

* AirPro's First Supplemental Cross-Claim against Adsil states:
  * [T]he evidence indicates that the coating applied to the units at CMS, Wood, East and McGee were manufactured by Adsil and applied by CJO. Thus, to the extent there are issues with the coating material itself or the application thereof or the instructions for applying the coating or the instructions for maintaining the coating, both CJO and Adsil would be responsible for any alleged damages. Still further, Adsil, as a manufacturer of the coating product, owes indemnity to Air Pro pursuant to Tex. CPRC Section 82.02, to include Attorney's fees.

Colony Ins. Co. v. Adsil, Inc., 2016 WL 4617449 (Tex.App.—Houston 2016) (Cont.)

* Colony argues that the "arising directly or indirectly out of" language used in its policy exclusion should be interpreted to exclude coverage for all claims asserted against Adsil, even those alleging that Adsil negligently provided insufficient instructions for application of its product. According to Colony, "the fact that Adsil had a contractor install the product is sufficient to trigger the exclusion, whether or not the installation was negligent or proximately caused the loss claimed, and whether or not other allegedly negligent acts by Adsil or others contributed."

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* As the court noted, "arising out of," as used in insurance policy exclusions, has been interpreted broadly by Texas courts, requiring only "a causal connection between the excluded operation and the loss."
* Thus, if the installation of Adsil's product by a subcontractor was a but for cause of all of the claims against Adsil, Colony's policy exclusion should bar coverage. However, if conduct that clearly falls outside of the subcontractor exclusion independently caused the injury, Colony has a duty to defend Adsil.

Colony Ins. Co. v. Adsil, Inc., 2016 WL 4617449 (Tex.App.—Houston 2016) (Cont.)

* Examining the pleadings in the underlying lawsuit, it is not clear that all of the claims against Adsil arise out of the installation of its product by a subcontractor. Although CISD alleges that Adsil "sub-contracted" with CJO to install Adsil's product, Weathertrol's pleading asserts that Weathertrol "contracted directly" with CJO to apply Adsil's product. AirPro's cross-claim states only that the coating applied to the air conditioning units was "manufactured by Adsil and applied by CJO."

Colony Ins. Co. v. Adsil, Inc., 2016 WL 4617449 (Tex.App.—Houston 2016) (Cont.)

* It is possible that both CISD and Weathertrol's allegations are true — the underlying lawsuit relates to the installation of more than 200 air conditioning units over the course of five years, involving multiple defendants and several contracts. Thus, conduct that is covered under Colony's policy exclusion and conduct that falls outside of the exclusion could have jointly contributed to CISD's loss.

Colony Ins. Co. v. Adsil, Inc., 2016 WL 4617449 (Tex.App.—Houston 2016) (Cont.)

* When plaintiffs in the underlying suit allege covered and excluded causes for their injuries, Texas courts distinguish between "separate and independent" causation and "concurrent" causation. In cases involving separate and independent causation, the covered event and the excluded event each independently cause the plaintiff's injury, and the insurer must provide coverage despite the exclusion. In cases involving concurrent causation, the excluded and covered events combine to cause the plaintiff's injuries. . . Because the two causes cannot be separated, the exclusion is triggered.

Colony Ins. Co. v. Adsil, Inc., 2016 WL 4617449 (Tex.App.—Houston 2016) (Cont.)

* In this case, Weathertrol's complaint against Adsil alleges conduct that could have caused CISD's injury independent of any conduct that would qualify under Colony's subcontractor exclusion. Weathertrol alleges that it contracted directly with CJO, not Adsil. If this is true, CJO was not a subcontractor for Adsil for this portion of the claims, and any injury that CISD sustained as a result of Weathertrol's contract with CJO falls outside of Colony's exclusion. This conduct would have caused the injury separately and independently of any contract work that would fall under Colony's exclusion.

Colony Ins. Co. v. Adsil, Inc., 2016 WL 4617449 (Tex.App.—Houston 2016) (Cont.)

* The court held that there is a genuine dispute about whether some of Adsil's conduct at issue in the underlying lawsuits falls outside of the subcontractor exclusion in Colony's insurance agreement. As a result, the court denied Colony's Motion for Summary Judgment.