26TH ANNUAL INSURANCE SYMPOSIUM

APRIL 5, 2019

Cooper & Scully
A Professional Corporation

26TH ANNUAL INSURANCE SYMPOSIUM

APRIL 5, 2019

Speakers:

R. Brent Cooper
Kyle Burke
Summer Frederick
Andrew Harold (*Nelson Forensics*)
Eric Hines
Wes Johnson
David H. Jones
Chad Nelson
Julie Shehane
Fred Shuchart
Lauren Smith
Stephen Smith
Aaron Stendell
Rob Witmeyer
Gordon K. Wright

Cooper & Scully
A Professional Corporation

SPONSORED BY:

DUTY TO DEFEND AND THE USE OF EXTRINSIC EVIDENCE

R. Brent Cooper
Cooper & Scully, P.C.
900 Jackson Street, Suite 100
Dallas, TX 75202
Telephone: 214-712-9500
Telecopy: 214-712-9540
Email: Brent.Cooper@cooperscully.com

RULE OF CONTRACT

- 1973 CGL Form
- "company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if the allegations of the suit are groundless, false or fraudulent . ."

2

RULE OF CONTRACT

- 2013 CGL Form
- "We will have the right and duty to defend the insured against any "suit" seeking those damages,"

3

RULE OF CONTRACT

- "We may look to extrinsic evidence outside of the allegations and/or fact pleaded by any claimant to determine whether we owe a duty to defend or indemnify against a suit. We may rely on extrinsic information to deny the defense and/or indemnity of a suit."
- "We have the right and duty to defend only those insureds . . against any suit seeking damages to which this insurance applies."

4

EARLY SUPREME COURT AUTHORITY

- Early Texas Supreme Court authority made no mention of and did not consider the use of extrinsic evidence One of the earliest cases, Heyden Newport Chem. Ins. Co. v. Southern Gen'l Ins. Co. (1965), referred only to the eight-corners rule implying that only the pleadings and the policy could be considered. See Argonaut Southwest Ins. Co. v. Maupin (1973) National Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchants Fast Motor Lines (1997) and King v Dallas Fire Ins. Co. (2002).

5

GUIDEONE

- GuideOne Elite Ins. Co. v. Fielder Road Baptist Church, 197 S.W.3d 305 (Tex. 2006)
- "Although this Court has never expressly recognized an exception to the eight-corners rule, other courts have. Generally, these courts have drawn a very narrow exception, permitting the use of extrinsic evidence only when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim."

6

GUIDEONE

- "Recently, the Fifth Circuit observed that if this Court were to recognize an exception to the eight-corners rule, it would likely do so under similar circumstances, such as: "when it is initially impossible to discern whether coverage is potentially implicated *and* when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case." Northfield Ins. Co. v. Loving Home Care, Inc., 363 F.3d 523, 531 (5th Cir.2004)"

7

PINE OAKS

- Pine Oak Builders v. Great American Lloyds, 279 S.W.3d 650, 655 (Tex. 2009)
- "Although this Court has never expressly recognized an exception to the eight-corners rule, other courts have. Generally, these courts have drawn a very narrow exception, permitting the use of extrinsic evidence only when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim."

8

PINE OAKS

- "In deciding the duty to defend, the court should not consider extrinsic evidence from either the insurer or the insured that contradicts the allegations of the underlying petition. "
- "Pine Oak views GuideOne Elite as distinguishable because in that case the insurer was attempting to introduce extrinsic evidence to limit its duty to defend, whereas here Pine Oak, the insured, offered extrinsic evidence to trigger the duty to defend. This distinction is not legally significant."

9

PINE OAKS

- "Our analysis in GuideOne Elite did not consider whether an exception to the eight-corners rule might exist where the parties to the underlying suit collude to make false allegations that would invoke the insurer's duty to defend, because the record did not indicate collusion."

10

D.R. HORTON

- D. R. Horton—Texas v. Markel Intern. Ins., 300 S.W.3d 740 (Tex. 2009)
- "D.R. Horton argues that the court of appeals erred by not recognizing an exception to the eight-corners doctrine, also known as the complaint allegation rule, to allow parties to introduce extrinsic evidence relating to coverage-only facts in the duty to defend analysis. Markel argues that D.R. Horton waived this issue, and we agree."

11

D.R.HORTON

- We do not decide D.R. Horton's argument for this Court to recognize an exception to the eight-corners doctrine because it did not raise this argument in the trial court or in the court of appeals until its second motion for rehearing, after our opinion issued in GuideOne Elite Insurance Co. v. Fielder Road Baptist Church, 197 S.W.3d 305 (Tex.2006)

12

WHO IS AN INSURED?

- Blue Ridge Ins. Co. v. Hanover Ins. Co., 748 F. Supp. 470, 473 (N.D. Tex. 1990)
- "Those decisions assume as a predicate for application of the rule they express that the person claiming a right to a defense is an insured. Blue Ridge's case authorities do not mean that a person who is not an insured under an insurance policy is to be treated as one for defense purposes just because of false allegations made by the damage suit plaintiff. The status of "insured" is to be determined by the true facts, not false, fraudulent or otherwise incorrect facts that might be alleged by a personal injury claimant, Parker in this case. "

13

WHO IS AN INSURED

- Calderon v. Mid-Century Ins. Co. of Tex., 1998 WL 898471 (Tex.App.-Austin 1998)
- "We hold that the eight corners rule applies in deciding Mid-Century's duty to defend and that extrinsic evidence cannot be considered. We must take the allegations in the Ibarra petition as true. The Ibarras alleged that Erica had permission to drive Brian's car, a fact Mid-Century and State Farm dispute. Nevertheless, taken as true, the allegation negates the exclusionary provision cited by Mid-Century. As the supreme court has held, the duty to defend is not affected by the facts ascertained before, during, or after the conclusion of the underlying lawsuit. Trinity, 945 S.W.2d at 829. The duty to defend does not depend on what the facts are; it depends only on what the facts are alleged to be. "

14

ADDITIONAL INSURED

- Roberts, Taylor & Sensabaugh, Inc. v. Lexington Ins. Co., 2007 WL 2592748 (S.D.Tex.2007)
- "("[W]here the basis for the refusal to defend is that the events giving rise to the suit are outside the coverage of the insurance policy, facts extrinsic to the claimant's petition may be used to determine whether a duty to defend exists.").
- Extrinsic evidence of the Roberts-Eagle-Pro and Eagle-Pro-Roberts contracts is admissible to show whether Roberts's alleged liability to Jenkins "arises out of Jenkins's work for or on behalf of Eagle-Pro, under Eagle-Pro's contract with Roberts."

15

ADDITIONAL INSURED

- Willbros RPI, Inc. v. Continental Cas. Co., No. H-07-2479, (S.D.Tex. 2008)
- "[R]esort to the [subcontract] is justified because the CNA Policy permits, and indeed requires, one to go beyond its four corners to determine whether a person or organization is an additional insured. Use of the "blanket" endorsement effectively incorporates any written agreement under which [the named insured] agreed to add a person or organization as an insured. In a sense the [subcontract] is part of the CNA Policy, and for the Court to consider it is well within reason and the contemplation of CNA as the policy's drafter."

16

ADDITIONAL INSURED

- Swinerton Builders v. Zurich American Ins. Co., 2010 WL 4919073 (S.D. Tex.2010)
- " Technically, this contract is outside of the eight-corners rule. However, as the Southern District of Texas has noted, "[s]everal Texas appellate courts have recognized a limited exception to the [eight-corners] rule, to allow parties to introduce extrinsic evidence when the petition in the underlying lawsuit does not allege facts sufficient for a determination of whether those facts, even if true, are covered by the policy."

17

DATE OF LOSS

- Evanston Ins. Co. v. Kinsale, 7:17-cv-327(S.D. Tex. July 12, 2018)
- Texas courts have recognized "a very narrow exception" to the eight-corners rule that permits the "use of extrinsic evidence only when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim." This exception applies "when it is initially impossible to discern whether coverage is potentially implicated and when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case."

18

DATE OF LOSS

- "Here, applying the eight-corners analysis, the 'four corners' of the Policies indicate that allegations of damage to tangible property that take place after inception would give rise to a duty to defend, but damage that occurred before inception would not. However, the 'four corners' of the VCC Crossclaim do not clearly provide dates when the alleged property damage occurred."

19

DATE OF LOSS

- "If the Court were to accept Plaintiff's argument, then artfully pled complaints that lack specific dates would be sufficient to bind insurance companies to defend claims that are clearly outside of the bounds of their policy. Such a rule would undermine the Court's driving aim which is to give effect to the intention in the underlying insurance policy."

20

DATE OF LOSS

- "[T]he Court also agrees with Defendant that this is a situation in which the extrinsic evidence exception applies. The alleged date of construction goes solely to a fundamental issue of coverage and does not implicate the merits or depend on the truth of the facts alleged. Plaintiff argues that the extrinsic evidence exception would not apply because the Court may not consider a complaint as evidence of the truth of an assertion since the facts asserted in pleadings do not constitute evidence. However, the Court is not referring to the PSJA Counterclaim as evidence of the truth of the dates of construction, but rather as evidence of what allegations were made in the PSJA Counterclaim regarding the dates of construction. Thus, the pleading itself is the evidence, and would fall within the extrinsic evidence exception."

21

EXCLUSIONS

- International Service Ins. Co. v. Boll, 392 S.W.2d 158 (Tex. Civ. App.--Houston [1st Dist.] 1965, writ ref'd n.r.e.)
- Cook v. Ohio Cas. Ins. Co., 418 S.W.2d 712 (Tex. Civ. App.--Texarkana 1967, no writ)
- State Farm Fire & Cas. Co. v. Wade, 827 S.W.2d 448 (Tex. App.--Corpus Christi 1992, writ denied)

22

EXCLUSIONS

- Star-Tex Resources v. Granite State Ins. Co., 553 Fed.Appx. 366 (5th Cir. 2014) "we have suggested that extrinsic evidence is more likely to be considered when an "explicit policy coverage exclusion clause" is at issue."

23

CLAIMS MADE POLICIES

- Constitution State Ins. Co. v. Michigan Mut. Ins. Co., No. 04-95-00197-CV, 1996 WL 383117 (Tex. App.—San Antonio, July 10, 1996)

24

RULE #1

- Rule #1-Extrinsic evidence will not be allowed to contradict specific allegations in the pleading. In both GuideOne as well as Pine Oak, there were specific pleadings that went to the coverage issue that was involved. In GuideOne it was the dates of employment of Evans. In Pine Oak, it was allegations that the home had been built by Pine Oak and not by subcontractors. In GuideOne the court noted that "the extrinsic evidence here concerning Evans' employment directly contradicts the plaintiff's allegations that the Church employed Evans during the relevant coverage period." In Pine Oak, the supreme court noted that "the extrinsic fact Pine Oak seeks to introduce in this coverage action contradicts the facts alleged in the Glass suit." Therefore, it is clear that extrinsic evidence will not be allowed to contradict specific pleadings to the contrary.

25

RULE #2

- Rule #2-Extrinsic evidence will be allowed only when relevant to independent and discrete coverage issue, not touching on the merits of the underlying third-party claim. In the GuideOne decision, the supreme court also referenced the rule announced in Northfield Ins. Co. v Loving Home Care, Inc. That decision referenced the rule set out above plus added another requirement: "when it initially impossible to discern whether coverage is potentially implicated." However, when the Texas Supreme Court was reiterating its GuideOne decision holding in the Pine Oak decision, it omitted this element. This distinction is important. The Supreme Court seems to say that extrinsic evidence may be allowed if it does not touch on the merits of the underlying case, even if the parties are able to discern whether coverage is implicated.

26

RULE #3

- Rule #3-Extrinsic evidence will be admitted to both create coverage as well as to defeat coverage. Pine Oak argued that a different rule should apply when a party was trying to use extrinsic evidence to create coverage than when extrinsic evidence was being used to defeat coverage. The court held that "[t]his distinction is not legally significant."

27

RULE #4

- Rule #4-Extrinsic evidence may be used if collusion can be shown. This exception was referenced in both GuideOne ("the record before us does not suggest collusion. . . ") and Pine Oak ("Our analysis in GuideOne Elite did not consider whether an exception to the eight-corners rule might exist where the parties to the underlying suit collude to make false allegations that would invoke the insurer's duty to defend, because the record did not indicate collusion.") It should be pointed out that collusion does not equate to false allegations in the petition. The plaintiff may try to plead the case in the coverage and allege facts that are known to be false. The insurer in this case still has a duty to defend even if the allegations are false or fraudulent. Collusion in the context of GuideOne and Pine Oak means an agreement between the plaintiff and the insured in the underlying case. The involvement of the insured is essential to trigger the collusion exception.

28

RULE #5

- Rule #5-The traditional burden of proof issues will apply. The insured initially has the burden of showing that the case falls within the coverage. The insurer will have the burden of showing the application of an exclusion or breach of a condition. What does this mean? In a case where there is no date alleged as to the bodily injury or property damage, the insured would have the burden of bringing forth evidence showing the date of the bodily injury. Similarly, if the injured plaintiff is an employee of the insured but there are no allegations in the petition, the insurer should have the burden of bringing forth extrinsic evidence showing the application of the employee exclusion. If the party with the burden of proof fails to bring forth the evidence where the pleading is silent, summary judgment will be appropriate against that party for failing to carry their burden.

29

RULE #6

- Rule #6-If the pleadings are silent, there will be no duty to defend until the insured brings forward evidence establishing that bodily injury occurred within the policy period. The insured cannot wait until the end of the case and then present the evidence to the insurer and argue that there was a duty to defend from the initial tender even though the extrinsic evidence had not been tendered. If the pleadings are silent, no duty to defend will commence until the extrinsic evidence has been proffered.
- Likewise, if there are no allegations regarding whether the injured plaintiff was an employee of the insured, the insurer would have an obligation to defend until it presented evidence regarding the plaintiff's employment status.

30

Rule #7

- Rule #7-What if the insurer and insured produce extrinsic evidence that is contradictory? It is not the policy where the rules of construction would apply. No Texas court has addressed this particular situation. However, consistent with the rules governing the duty to defend, if there is credible extrinsic evidence that would arguably create a duty to defend, the insurer must defend.

31

RULE #8

- Rule #8-Under Texas law, an insurer has no duty to attempt to search out extrinsic evidence that would potentially create a duty to defend. However, the issue arises as to what is the duty of the insurer if it discovers credible extrinsic evidence that would trigger a duty to defend, even if the burden of producing such evidence is not on the insurer. Under the duty to defend Texas law has imposed no such duty on the part of the insurer. However, consistent with the duty to defend if there is potentially a cause of action stated, the insurer would have a duty to defend if the evidence was credible.

32

Menchaca – Rehearing and Unresolved Issues

KYLE M. BURKE & DAVID H. JONES (WITH THANKS TO R. BRENT COOPER, DIANA L. FAUST, & MICHELLE E. ROBBERSON)

COOPER & SCULLY, P.C. APRIL 5, 2019

Disclaimers:

- This presentation provides information on general legal issues. It is not intended to provide advice on any specific legal matter or factual situation, and it should not be construed as defining Cooper and Scully, P.C.'s position in a particular situation. Each case must be evaluated on its own facts.
- This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship. Readers should not act on this information without receiving professional legal counsel.

Menchaca I

- *USAA Texas Lloyds Co. v. Menchaca*, No. 14-0721 (April 7, 2017)
- Framed the issue as whether an insured can recover policy benefits when a jury finds the insurer violated the Insurance Code, and the violation resulted in a loss of benefits the insurer "should have paid" under the policy, even though the jury also failed to find the insurer breached the policy.

Menchaca I: Facts & Procedural History

- Homeowners' claim for damages from Hurricane Ike
- Adjuster investigated, concluded damage ($700) did not exceed policy deductible ($2,020)
- Second adjuster reached same conclusion
- Menchaca sued USAA for breach of policy and unfair settlement practices under Insurance Code
- Jury answered "no" to breach of policy question

Menchaca I

- Jury answered "yes" to Ins. Code question (violated duty to conduct reasonable investigation before denying claim)
- Awarded $11,350 in damages (difference in sum USAA should have paid for property damage ["policy benefits"] and amount actually paid)
- Trial court set aside breach of contract answer and rendered judgment for Menchaca on Ins. Code claim.
- Court of Appeals affirmed; TSC granted review.

Menchaca I - Holding

- Supreme Court concluded that Menchaca could recover for statutory violations without finding of breach of contract. The court remanded the case back to the trial court, holding that while the jury held that USAA failed to conduct a reasonable investigation into a claim "it should have paid," the trial court improperly ignored the jury's answer to Question 1.

Menchaca I - Holding

- Court established five key rules : (1) the general rule; (2) the entitled-to-benefits rule; (3) the benefits-lost rule; (4) the independent injury rule; and (5) the no-recovery rule.
- USAA was not happy with decision, said it created more confusion, and moved for rehearing

Rehearing Granted

Menchaca II

APRIL 13, 2018

Menchaca II

- Court reaffirms the legal principles and rules announced in original opinion.
- Court disagrees on the procedural effect of those principles in this case.
  - "Because a majority of the Court agrees to reverse the court of appeals' judgment and remand the case to the trial court for a new trial, our disposition remains the same."

Menchaca II: The Five Rules

- 1. General Rule: Insured cannot get policy benefits as actual damages for a statutory violation in the absence of a contractual right to receive benefits.
  - Derives from fact that Insurance Code only allows Insured to recover actual damages "caused by" Insurer's statutory violation. Tex. Ins. Code §541.151.
  - *Stoker* (Tex. 1995): There can be no bad faith [denial of an insured's claim for policy benefits] when Insurer has promptly denied a claim that is, in fact, not covered.
  - *Castañeda* (Tex. 1998): Plaintiff asserted Ins. Code violation and sought "equivalent" policy benefits. Failure to properly investigate is not a basis for obtaining policy benefits.

Menchaca II: The Five Rules

- 2. Entitled-to-Benefits Rule: If insured proves a right to policy benefits, it can recover those as actual damages if the Ins. Code violation causes loss of those benefits
  - *Vail* (Tex. 1988): Insurer's unfair refusal to pay the Insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld.
  - Ins. Code remedies are cumulative of other remedies; Insured can elect to recover the benefits under the statute, even though also could have asserted breach of contract claim.
  - *Vail* not rejected in *Stoker* (Tex. 1995) or *Castañeda* (Tex.1998)

Menchaca II: The Five Rules

- 3. Benefits-Lost Rule: If the Insured cannot prove a present right to policy benefits, it still can recover those as actual damages under the Ins. Code if the statutory violation caused the Insured to lose that right
  - Misrepresentation (that policy provides coverage it does not in fact provide) can give rise to liability under statute for those benefits, if the Insured is adversely affected or injured by reliance on the misrepresentation
  - Example: representing policy provides pregnancy coverage when it does not

Menchaca II: The Five Rules

- 4. Independent-Injury Rule: Insurer's extra-contractual liability is "distinct" from its liability for benefits under the insurance policy
- *Stoker*: "we do not exclude … possibility that in denying the claim, the insurer may commit some act, so extreme, that would cause injury independent of the policy claim."
- If the Insurer's statutory violation causes injury independent of the Insured's right to recover policy benefits, the Insured may recover damages for that injury, even if the policy does not entitle the Insured to receive benefits.
- Insurer's statutory violation does not permit the Insured to recover any damages beyond policy benefits unless violation causes injury independent from loss of benefits.
- "Rare" "we have yet to encounter one" -- Court would not speculate what would constitute a recoverable independent injury.

Menchaca II: The Five Rules

- 5. No-Recovery Rule: Insured cannot recover any damages for an Ins. Code violation unless the Insured establishes a right to receive policy benefits or an injury independent of a right to receive benefits
  - This is "simply the natural corollary to the first four rules"
  - Citing to *Castañeda* and courts of appeals cases

Menchaca II: Rehearing Issues Addressed

- USAA argued: Because Menchaca did not prevail on breach of contract, she cannot recover policy benefits for a statutory violation. Apply General Rule (Rule 1)
- Menchaca argued: Because USAA violated statutory obligation and failed to pay benefits she was entitled to, Menchaca's recovery independent of breach of contract claim. Apply Entitled-to-Benefits Rule (Rule 2)

Menchaca II: Rehearing Issues Addressed

- Court rejected USAA's argument: insured need not prevail on separate breach of contract claim to recover policy benefits for statutory violation, applying "Entitled to Benefits" Rule (Rule 2). *Vail* allows insured to elect to recover benefits under statute instead of contract.
- Court rejected Menchaca's argument: "Entitled to Benefits" Rule allows insured policy benefits the insurer "should have paid." But, jury's finding that USAA did not fail to comply with policy means there were no benefits that USAA "should have paid," applying General Rule (Rule 1) and No-Recovery Rule (Rule 5)
- Jury's answers in fatal conflict
- Error not preserved – neither side objected to conflicting answers
- Remand in interest of justice

Menchaca II: Summary

- Plurality (Justice Boyd): rejected USAA's argument that it was entitled to judgment because the jury found that USAA did not breach the policy. Insured is not required to separately prevail on breach of contract But, conflict between the jury's answers to Question 1 and answers to Questions 2&3 should not have been ignored by trial court.
- Justice Hecht (Concurring): concurs with five key rules; joins dissenting opinion as to how those rules applied to Menchaca. J. Hecht would remand because a new trial is required to correct the trial court's error.
- Justices Green, Guzman, and Brown(concur with five key rules but dissent to result): Judgment should be rendered in USAA's favor because Menchaca failed to sustain her burden to prove that she was entitled to policy benefits (Question 1)

Menchaca II: Unresolved Issues – Appraisal

- Bulk of post-*Menchaca II* litigation has been in appraisal context
- Typical scenario: Insurer and insured dispute amount of loss; one or both parties invoke appraisal provision of insurance contract. Unsatisfied insureds sue insurer, asserting breach of contract and extra-contractual claims
- Insurer pays appraisal award, then moves for summary judgment, asserting that payment of appraisal award extinguishes contractual and extra-contractual claims

Menchaca II: Appraisal Disputes

- Courts long recognized that insurer's payment and insured's acceptance of appraisal award estopped the insured from prevailing on breach of contract or extra-contractual claims, unless the insured could show independent injury
- E.g. ***Ortiz v. State Farm Lloyds***, No. 04-17-00252-CV, 2017 WL 5162315, at *1 (Tex. App.—San Antonio Nov. 8, 2017, pet. granted); *Braden v. Allstate Vehicle and Prop. Ins. Co.*, 2019 WL 201942 (N.D. Tex. 2019); *Hinojos v. State Farm Lloyds*, 2019 WL 257883 (Tex. App.—El Paso 2019, no pet. h.); *Byrd v. Liberty Ins. Corp.*, 2018 WL 7021591 (S.D. Tex. 2018)

Menchaca II: Appraisal Disputes

- State Farm denied payment for Ortiz's claim for wind and hailstorm damage to home; inspection showed damage less than deductible
- Ortiz sued, asserting contractual and extra-contractual claims; State Farm invokes appraisal provision. Appraisal awarded: $9.5k, State Farm paid Ortiz $4200, representing actual cost value minus deductible and depreciation
- T/c granted summary judgment on State Farm's assertion that payment of appraisal estopped Ortiz from pursuing contract or extra-contractual claims
- COA affirmed

Menchaca II: Appraisal Disputes

- Texas Supreme Court granted review; oral argument held on 2/20/2019
- Ortiz's argument: denial of common-law or statutory claims after appraisal award means Ortiz better off not pursuing claims because can't recover costs, attorney's fees, etc. after State Farm invoked appraisal provision
- Ortiz says *Menchaca* changed rule that, absent a breach of contract claim, no other causes of action survive.
- State Farm: Precedent is uniform: payment of appraisal award is payment of all benefits to which the insured is entitled.

Menchaca II: Appraisal Disputes

- *Ortiz* oral argument:
- Justices inquire about appraisal's purpose in saving time, and even if insured has to pay extra fees/costs associated with appraisal, may be balanced by fact that insurer is giving up some defenses during appraisal
- Also inquire as to whether damages have to be independent from appraisal and whether question of coverage is resolved when either party invokes appraisal
- Court wants to know impact of *Menchaca*; Also seem a bit concerned about impact on small claims

Menchaca II: Appraisal Disputes

- Companion case: *Barbara Techs. Corp. v. State Farm Lloyds*, 566 S.W.3d 294, 296 (Tex. App.—San Antonio 2017, pet. granted)
- Same type of appraisal issues but involves whether Prompt Payment claims are barred once appraisal is timely paid
- COA held that summary judgment on Prompt Payment claims proper where insurer timely paid appraisal award

Menchaca II: UM/UIM Cases

- "the UIM insurer is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist." *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006)
- Insureds now arguing that *Menchaca* changes the landscape because insureds don't need breach of contract finding to pursue statutory claims
- So far, courts have rejected this argument. *E.g. In re State Farm Mut. Auto. Ins. Co.*, 553 S.W.3d 557, 559 (Tex. App.—San Antonio 2018, no pet.).

Menchaca II: Other Cases

- *Lyda Swinerton Builders, Inc. v. Oklahoma Sur. Co.*, 903 F.3d 435, 450-53 (5th Cir. 2018)
- General contractor (LSB) sought recovery for extra-contractual damages from subcontractor's insurer
- COA affirmed t/c's judgments that insurer breached duty to defend and violated prompt payment statute
- LSB sought reversal of t/c's ruling denying claim for extra-contractual damages under Chapter 541
- Application of *Menchaca* Rule 2

Menchaca II: Other Cases

- *Wall v. State Farm Lloyds*, No. 01-17-00681-CV, 2018 WL 6843781, at *4 (Tex. App.—Houston [1st Dist.] Dec. 31, 2018, no pet.)
- Breach of contract jury question may be unnecessary, but language of jury questions important
- Jury answered "No" question on whether State Farm breached policy, but "Yes" to question on whether State Farm engaged in unfair or deceptive practices; Trial court rendered take-nothing judgment against insureds
- COA: Under *Menchaca*, while the jury's "No" answer did not defeat the Walls's statutory claims, the jury's answer to Insurance Code violation question did not support judgment for the Walls

Menchaca II: Possible Independent Injury?

- *Great Am. Ins. Co. v. AFS/IBEX Fin. Services, Inc.*, 612 F.3d 800, 808 (5th Cir. 2010)
- Premium finance company (AFS) sought coverage under crime protection policies issued by Great American after AFS suffered loss caused by check forgery; Great American denied coverage.
- District court concluded coverage existed, but later dismissed extra-contractual damage claims, because AFS's damages all potentially flowed from GAIC's breach of its insurance contract.
- Fifth Circuit reverses on the extra-contractual claims issue; suggests that attorney's fees in related lawsuit might provide the separate injury necessary to recover for extra-contractual damages.

Thank You!

Restatement of the Law: Liability Insurance

Fred L. Shuchart
Cooper & Scully, P.C.
815 Walker Street, Suite 1040
Houston, Texas 77002
Telephone: 713-236-6810
Fax: 713-236-6880
Fred@cooperscully.com

American Law Institute

The Institute's mission is "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." It achieves this goal through the development of Institute projects, which are categorized as Restatements, Codes, or Principles.

American Law Institute

Restatements are primarily addressed to courts and aim at clear formulations of common law and its statutory elements, and reflect the law as it presently stands or might appropriately be stated by a court. Although Restatements aspire toward the precision of statutory language, they are also intended to reflect the flexibility and capacity for development and growth of the common law. That is why they are phrased in the descriptive terms of a judge announcing the law to be applied in a given case rather than in the mandatory terms of a statute.

CONFIDENTIALITY

§ 11. Confidentiality

(1) An insurer or insured does not waive rights of confidentiality with respect to third parties by providing to the insured or the insurer, within the context of the investigation and defense of a legal action, information protected by attorney- client privilege, work-product immunity, or other confidentiality protections.

(2) An insurer does not have the right to receive any information of the insured that is protected by attorney-client privilege, work-product immunity, or a defense lawyer's duty of confidentiality under rules of professional conduct, if that information could be used to benefit the insurer at the expense of the insured.

CONFIDENTIALITY

ILLUSTRATIONS:

2. Insured child is sued for property damage arising out of a fire allegedly started by the child at school. During a private meeting with the child and child's parents, the attorney obtains information indicating that the child may have intentionally set the fire for the purpose of damaging the school. The defense lawyer provides this information to the insurer without consent of the child or the parents.

That information is relevant to a potential coverage dispute between the insured and insurer and should not have been disclosed to the insurer under the circumstances. Nevertheless, the provision of that information to the insurer does not waive the confidentiality of that information with respect to the plaintiff in the underlying tort action.

CONFIDENTIALITY

4. Insured child is sued for property damage arising out of a fire allegedly started by the child at school. Insurer hires a defense lawyer to defend the insured. During a deposition, the child provides testimony indicating that the child may have intentionally set the fire or purpose of damaging the school.

Upon request, the insurer has the right to a copy of the transcript of the deposition, even though the testimony could lead the insurer to refuse to cover the suit, because deposition testimony is not confidential.

CONFIDENTIALITY- TEXAS

Texas law seems to fall in line with the Restatement. As set forth in *Employer's Cas. Co. v. Tilley*, 496 S.W.2d 552(Tex. 1973), defense counsel's ethical obligation runs to the insured and (s)he should not provide information to the insurance company which is detrimental to the insured with respect to coverage

DUTY TO DEFEND

§ 13. Conditions Under Which the Insurer Must Defend

(1) An insurer that has issued an insurance policy that includes a duty to defend must defend any legal action brought against an insured that is based in whole or in part on any allegations that if proved, would be covered by the policy, without regard to the merits of those allegations.

(2) For the purpose of determining whether an insurer must defend the legal action is deemed to be based on:

(a) Any allegation contained in the complaint or comparable document stating the legal action; and

(b) Any additional allegation known to the insurer, not contained in the complaint or comparable document stating the legal action, that a reasonable insurer would regard as an actual or potential basis for all or part of the action.

DUTY TO DEFEND

(3) An insurer … must defend until its duty to defend is terminated under § 18 by declaratory judgment or otherwise, unless facts not at issue in the legal action for which coverage is sought and as to which there is no genuine dispute establish that:

(a) The defendant in the action is not an insured;

(b) The vehicle or other property involved in the accident is not covered property …;

(c) The claim was reported late under a claims-made-and-reported policy;

(d) The action is subject to a prior-and-pending-litigation exclusion or a related-claim exclusion in a claims-made policy;

(e) … [T]he insurance policy has been properly cancelled; or

(f) There is no duty to defend under a similar, narrowly defined exception to the complaint-allegation rule recognized by the courts in the applicable jurisdiction.

DUTY TO DEFEND

§ 10. Scope of the Right to Defend

When a liability insurance policy grants the insurer the right to defend a legal action,

That right includes, unless otherwise stated in the policy or limited by applicable law:

(1) The authority to direct all the activities of the defense of any legal action that the insurer has a right to defend, including the selection and oversight of defense

counsel; and

(2) The right to receive from defense counsel all information relevant to the defense or settlement of the action, subject to the exception for confidential information

stated in § 11(2).

DUTY TO DEFEND

§ 14. Duty to Defend: Basic Obligations

When an insurance policy obligates an insurer to defend a legal action:

(1) Subject to the insurer's right to terminate the defense under § 18, the insurer has a duty to provide a defense of the action that:

(a) Makes reasonable efforts to defend the insured from all of the causes of action …, including those not covered by the liability insurance policy; and

(b) Requires defense counsel to protect from disclosure to the insurer any information of the insured …, if that information could be used to benefit the insurer at the expense of the insured;

(2) The insurer may fulfill the duty to defend using its own employees, except when an independent defense is required;

DUTY TO DEFEND

§ 20. When multiple Insurers Have a Duty to Defend

When more than one insurer has the duty to defend a legal action brought against an insured:

(1) The insured may select any of these insurers to provide a defense of the action;

***

(3) The selected insurer must provide a full defense until the duty to defend … until another insurer assumes the defense … .

***

(5) If neither the policies nor the insurance-market practice establish an order of priority:

(a) The duty to defend is independently and concurrently owed to the Insured by each of the insurers;

(b) Any nonselected insurer has the obligation to pay its pro rata share of the reasonable costs of defense of the action and the noncollectible shares of other insurers; and

(c) A selected insurer may seek contribution from any of the other insurers for the costs of defense.

DUTY TO DEFEND- TEXAS

Basically comports with Texas law. Although not directly addressed by Texas case law, Restatement prohibits carrier from agreeing to provide defense by paying less than full pro-rata share based on carriers actually providing a defense.

LIABILITY FOR DEFENSE

§ 12. Liability of Insurer for Conduct of Defense

(1) If an insurer undertakes to select counsel to defend a legal action against the insured and fails to take reasonable care in so doing, the insurer is subject to liability for the harm caused by any subsequent negligent act or omission of the selected counsel that is within the scope of the risk that made the selection of counsel unreasonable.

(2) An insurer is subject to liability for the harm caused by the negligent act or omission of counsel provided by the insurer to defend a legal action when the insurer directs the conduct of the counsel with respect to the negligent act or omission in a manner that overrides the duty of the counsel to exercise independent professional judgment.

LIABILITY FOR DEFENSE-TEXAS

TEXAS LAW

The Texas Supreme Court's decision in State *Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625(Tex. 1998) is directly contrary to the Restatement. In *Traver*, the Court held that an carrier is not responsible for the acts of defense counsel. The Court reasoned that defense counsel is an independent contractor and the carrier does not exercise the requisite control to be vicariously liable.

DUTY TO SETTLE

§ 24. The Insurer's Duty to Make Reasonable Settlement Decisions

(1) When an insurer has the authority to settle a legal action brought against the insured, or the insurer's prior consent is required for any settlement by the insured to be payable by the insurer, and there is a potential for a judgement in excess of the applicable policy limit, the insurer has a duty to the insured to make reasonable settlement decisions.

(2) A reasonable settlement decision is one that would be made by a reasonable insurer that bears the sole financial responsibility for the full amount of the potential judgment.

(3) An insurer's duty to make reasonable settlement decisions includes the duty to make its policy limits available to the insured for the settlement of a covered legal action that exceeds those policy limits if a reasonable insurer would do so in the circumstances.

DUTY TO SETTLE- TEXAS

American Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842 (Tex. 1994)

THREE ELEMENTS
(1) the claim against the insured is within the scope of coverage;
(2) the amount of the demand is within the policy limits; and
(3) the terms of the demand are such that an ordinary prudent insurer would accept it, considering the likelihood and the degree of the insured's potential exposure to an excess judgment.

DUTY TO SETTLE- TEXAS

- Texas law is consistent with Restatement with respect to elements of cause of action. Texas law differs significantly with respect to duty. There is no duty under Texas law to negotiate or make settlement offers.

MULTIPLE CLAIMANTS

§ 26. The Effects of Multiple Claimants on the Duty to Make Reasonable Settlement Decisions

(1) If multiple legal actions that would count toward a single policy limit are brought against an insured, the insurer has a duty to the insured to make a good-faith effort to settle the actions in a manner that minimizes the insured's overall exposure.

(2) The insurer may, but need not, satisfy this duty by interpleading the policy limits to the court, naming all known claimants … .

MULTIPLE CLAIMANTS- TEXAS

Texas Farmers Ins. Co. v. Soriano, 881, S.W.2d 312 (Tex. 1994)

HOLDING

- No *Stowers* exposure
- Can settle one of multiple claims, if:
  - No unreasonable refusal of other demand, or
  - Settlement of claim is reasonable when viewed in isolation.
- Sounds like "first come, first serve" but may not be

MULTIPLE CLAIMANTS- TEXAS

Strong argument that Texas law is consistent with Restatement part 1 because *Soriano* does not address issue of whether you have to settle one at a time but only holds that it may be proper. Texas law does not allow interpleader unless you obtain agreement to provide full and final release before filing.

COVERAGE DISPUTE

§ 25. The Effect of a Reservation of Rights on Settlement Rights and Duties

A reservation of the right to contest coverage does not relieve an insurer of the duty to make a reasonable settlement decisions stated in § 24, but the insurer is not required to cover a judgment on a noncovered claim.

COVERAGE DISPUTE-TEXAS

American Western Homes Ins. Co. v. Tristar Convenience Stores, Inc., 2011 WL 2412678 (S.D. Tex June 2, 2011)

FACTS

- Settlement demand for policy limits for all defendants
- Carrier rejected demand because of coverage issues
- 2nd settlement demand for policy limits for 2 defendants
- Carrier accepted 2nd demand
- Carrier brings suit seeking declaration that policy exhausted and no duty to defend
- Insured argued that failure to accept 1st demand violates *Stowers*

HOLDING

- Carrier not entitled to summary judgment
- *Garcia* states no *Stowers* if no coverage
- *Garcia* does not mean no *Stowers* if coverage dispute
- Existence of coverage dispute relevant to whether carrier acted reasonably

COVERAGE DISPUTE-TEXAS

Texas law seems to conflict with the Restatement in that Texas law allows the coverage dispute to be considered in determining whether the carrier acted reasonably in declining the demand whereas the Restatement appears to make a coverage issue irrelevant to the inquiry.

FAILURE TO SETTLE DAMAGES

§ 27. Damages for Breach of the Duty to Make Reasonable Settlement Decisions

(1) An insurer that breaches the duty to make reasonable settlement decisions is subject to liability for any foreseeable harm caused by the breech, including the full amount of damages assessed against the insured in the underlying legal action, without regard to the policy limits.

FAILURE TO SETTLE DAMAGES- TEXAS

The Restatement clearly does not limit damages for a failure to settle to the amount of the excess verdict. In the comment section, it suggests that the damages include consequential damages similar to any other tort causes of action which would include mental anguish, financial damages and punitive damages. There is no Texas case which directly addresses the issue but the cases imply that the amount of the excess judgment may be the sole element of damage.

ALLOCATION AMONG CARRIERS

§ 41. Allocation in Long-Tail Harm Claims Covered by Occurrence-Based Policies

(1) Except as stated in subsection (2), when indivisible harm occurs over multiple policy periods, the amount of any judgement entered in or settlement of any liability action arising out of that harm is subject to pro rata allocation under occurrence-based liability insurance policies as follows;

(a) For purposes of determining the share allocated to an occurrence-based liability insurance policy that is triggered by harm during the policy period, the amount of the judgement or settlement is allocated equally across years, beginning with the first year in which the harm occurred and ending with the last year in which the harm would trigger an occurrence-based liability insurance policy;

ALLOCATION AMONG CARRIERS-TEXAS

Texas law is not settled on the issue whether vertical or horizontal exhaustion applies. The Restatement adopts horizontal exhaustion and provides a very straight forward and easy method to allocate among multiple policy periods and carriers.

EXHAUSTION

§ 39. Excess Insurance: Exhaustion and Drop Down

When an insured is covered by an insurance policy that provides coverage that is excess to an underlying insurance policy, the following rules apply, unless otherwise stated in the excess insurance policy:

(2) The underlying policy is exhausted when an amount equal to the limit of that policy has been paid to claimants for a covered loss, or for other covered benefits subject to that limit, by or on behalf of the underlying insurer or the insured;

EXHAUSTION- TEXAS

The Restatement defines exhaustion as payment of the policy limits to a claimant without requiring that the payment be made in connection with a judgment or settlement. This appears contrary to the plain language of the standard primary policy. Also, it would allow payment in exchange for a covenant not to execute while Texas law is unsettled on the issue.

Engineering Investigation of Common and Uncommon Perils

Presented to:
Cooper & Scully
26th Annual Insurance Workshop
April 5, 2019

NELSON FORENSICS

NELSON FORENSICS

Your questions. Our people. Expert solutions.

LICENSED EXPERTS NATIONWIDE
delivering unparalleled responsiveness and superb quality from 12 strategic locations

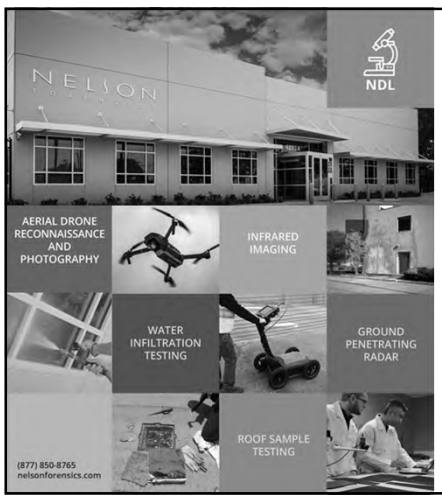
WHO WE ARE
Nelson's engineers, architects, and scientists identify damage and develop remediation solutions for buildings, equipment, and other property caused by natural perils, inadequate maintenance and misuse, and design and construction errors.

Nelson is the forensic industry's respected, independent, and objective source for solving its clients' complex problems.

VISIT US ON THE WEB
- Browse Service Capabilities
- Request Forensic Services
- View Professional Papers
- Request Expert CVs
- Find Continuing Education Opportunities
- Explore Career Opportunities
- [illegible]tter

common perils

Nelson's professionals deliver exceptional client service; embrace advanced technologies; formulate decisive and independent opinions; and report focused, properly researched, and technically accurate findings.



Nelson Discovery Laboratory specializes in developing customized tests to resolve questions of fact in a dispute or for scientific analysis

Roof Sample Testing
- Roof Core Sampling
- Membrane Delamination
- Membrane Desaturation
- Water Column Testing
- Identification of Coal Tar vs. Asphalt Materials
- Identification of TPO vs. PVC Materials
- ASTM Standard Protocols

Water Infiltration Testing
- Determining Areas of Water Penetration
- Evaluate As-Built Conditions On-site
- Mock-up Evaluations

Infrared Imaging
- Electrical Systems and Building Envelopes
- Anomaly Identification
- Moisture Detection
- Certified Thermographers

Aerial Drone Reconnaissance and Photography
- Difficult Access Surveys
- Large and Complex Structures
- Collapse Documentation

Ground Penetrating Radar
- Concrete Evaluation
- Reinforcement and Void Detection
- 3D Imaging of Concealed Conditions

About the Presenter

Licensed Professional and/or Structural Engineer in 42 states, the District of Columbia, and the USVI

M.S. in Civil Engineering – Purdue University

B.S. in Civil Engineering – Purdue University

B.A. in Chemistry – Miami University

CalEMA Safety Assessment Program

Member – ACI, ASCE, ASCE/SEI

Andrew D. Harold, S.E., P.E.
Executive Director of Operations

NELSON FORENSICS

Goals

- Explore methodologies for evaluating damage to buildings which results from any number of perils
- Examine case studies for the investigation of claims related to the following perils:
  - Tornado
  - Hail
  - Fire
  - Hurricane

NELSON FORENSICS

What is a Peril?

A source of danger; something that causes loss, injury, or destruction

Examples of Common Perils (in Texas)?
- Weather (e.g., Hail, Wind, Ice/Snow, Freeze)
- Natural Disaster (e.g., Hurricane, Tornado)
- Foundation Movement
- Collapse
- Fire
- Water Intrusion
- Vehicle Impact
- Mechanical, Electrical, or Plumbing (MEP) Failure
- Design/Construction Defect
- Deterioration

What about Uncommon Perils (in Texas)?
- Earthquake
- Tsunami

Forensic Engineering

The application of engineering principles and methodologies to answer question of fact that may have legal ramifications.

- Randall Noon

Forensic Engineering and Technology

Why Utilize Technical Investigators?
- Targeted Expertise
- Forensic Discipline
- Industry Knowledge

Forensic Investigations

The Scientific Method

- Define the Problem
- Collect Data
  - Document Observed Conditions
    - Photographs
    - Field Sketches/Notes
  - Perform Testing
    - Sampling and Measurements
    - Non-destructive (In Situ) Testing
    - Destructive (Intrusive) Testing
    - Laboratory Analysis of Extracted Samples
- Conduct Research
  - Weather Data
  - Reference Material (e.g., codes, design standards, manufacturer's literature)
- Perform Analysis
  - Explain How/Why the Data Means What It Means
  - Provide a Rational Basis for Conclusions
- Conclusions
  - Grounded in Theory and Practice
- Recommendations

Types of Forensic Testing

Non-Destructive

Destructive

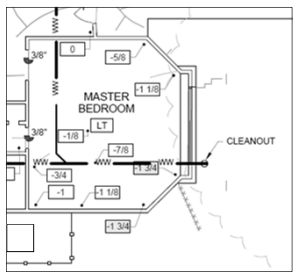
Non-Destructive Testing

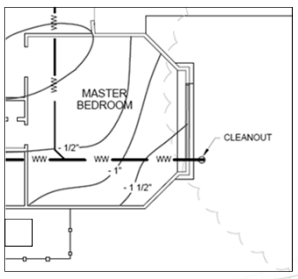
- Visual Observation and Sampling
- Photographs (Onsite and Aerial)
- Detailed Distress Survey
- Elevation or Plumbness Surveys
- Moisture Testing
- Infrared (Thermography)
- Water Spray Testing (Building Envelope)

Non-Destructive Testing

Broom Lines Remaining from Crack Mapping Survey

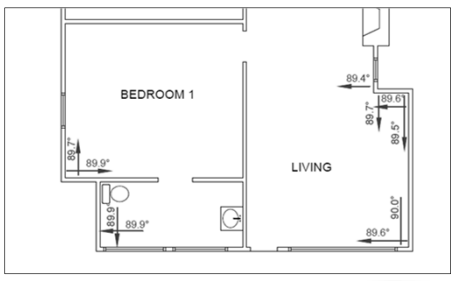
Non-Destructive Testing





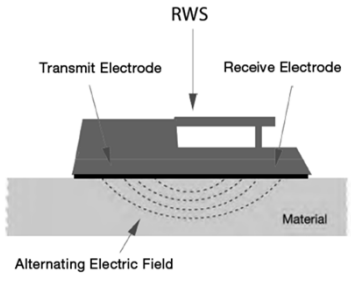
Distress and Elevation Surveys

Non-Destructive Testing



Plumbness Survey

Non-Destructive Testing Tools

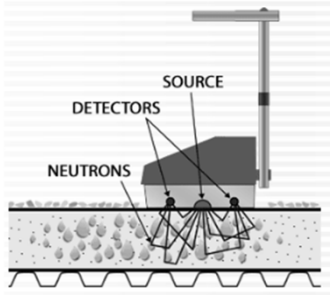


Electrical Capacitance (Impedance) Testing

Non-Destructive Testing Tools

Electrical Capacitance (Impedance) Testing

Non-Destructive Testing Tools



Nuclear Hydrogen Detection

Non-Destructive Testing Tools

Infrared Thermography

Non-Destructive Testing Tools

Designation: C1153 – 10

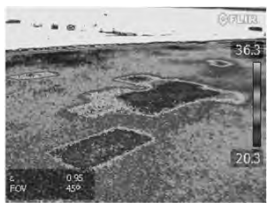
Standard Practice for Location of Wet Insulation in Roofing Systems Using Infrared Imaging[1]

Table 1 – General Site Conditions for Infrared Roof Survey

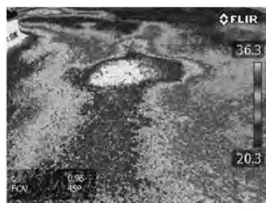
Time of Survey	6:00 PM
Wind Velocity	8 mph
Outside Temperature	51 °F
Weather During Survey	Clear
Weather 24 hrs Prior to Survey	Sunny/Clear
Roof Surface Condition at Time of Survey	Dry

Non-Destructive Testing Tools

Isolated Anomaly

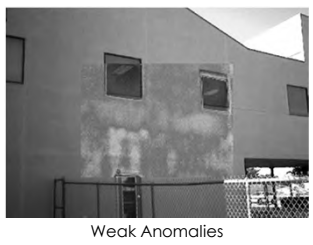


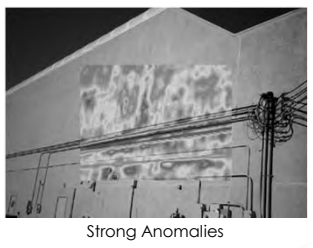
Various Anomalies



Possible Moisture Source

Non-Destructive Testing Tools


Weak Anomalies


Strong Anomalies

Non-Destructive Testing Tools


Infrared Image

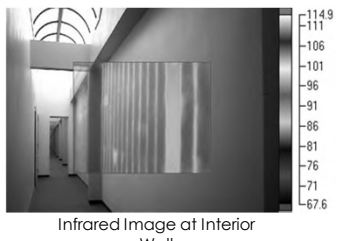

Corresponding Visible Light Image

Non-Destructive Testing Tools

Infrared Image at Exterior Wall


Corresponding Visible Light Image

Non-Destructive Testing Tools



Infrared Image at Interior Wall


Corresponding Visible Light Image

Additional Examples of Non-Destructive Testing

- Moisture/Vapor Emission
- Hardness
- Ultrasonic
- Structural Analysis
- Load Testing
- Ground Penetrating Radar (GPR)
- Soil Sampling and Testing
- Water Origin and Quality
- Mold
- Asbestos

Destructive or Non-Destructive?

Non-Destructive

Destructive

Examples of Destructive Testing

- Moisture Probe
- Roof Coring and Sampling
- Wall (Veneer) and Finish Removal
- Concrete/Masonry Probe
- Concrete Coring
- Water Spray Testing
- Load Testing

Destructive Testing

Roof Coring and Sampling

Destructive Testing

Exterior Veneer Removal

Destructive Testing

Water Spray Testing

Testing Summary

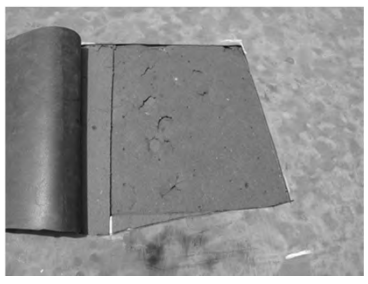
- Gather the Data Necessary to:
  - Test Hypotheses
  - Objectively Support Conclusions
- Data Collection May Need to be Altered or Augmented Depending Upon Findings
- Focus Should be on Objectivity, Sound Technique, and Reproducibility
- Available Documents are also Data to be Used in Forming Conclusions

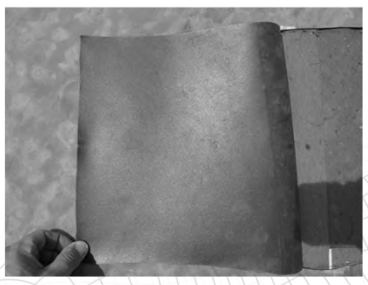
Case Study: Hail

Office, Warehouse, & Distribution Facility –
Englewood, CO

Case Study: Hail

Case Study: Hail





Case Study: Hail

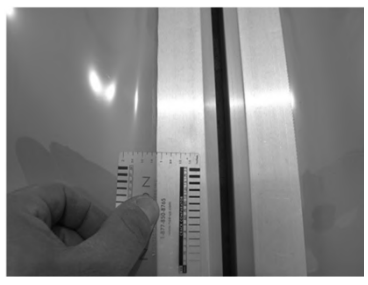
Case Study: Hail

Case Study: Hail

Case Study: Hail

Case Study: Hail

Case Study: Hail



Case Study: Hail

Case Study: Hail

Case Study: Hail

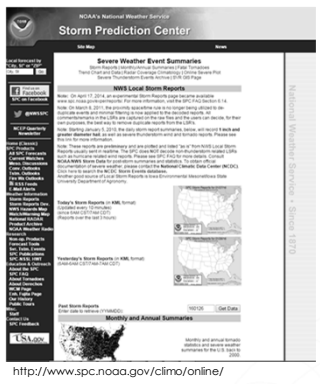
Case Study: Hail

Case Study: Hail

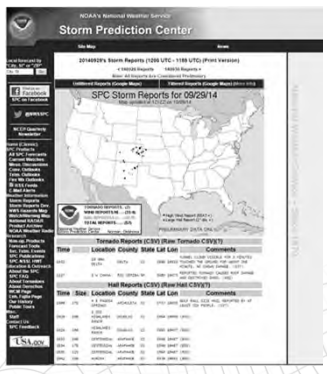
Weather Data
- NOAA (NCEI, SPC, NWS)
- Weather Stations
- Purchased Reports
  - CompuWeather
  - CoreLogic
  - Verisk Climate
- News/Media Outlets

Source: Reppenhagen, May 8, 2017

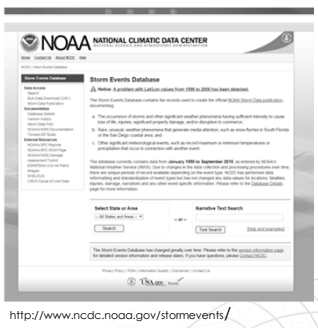
Case Study: Hail



http://www.spc.noaa.gov/climo/online/



Case Study: Hail



http://www.ncdc.noaa.gov/stormevents/

Case Study: Wind

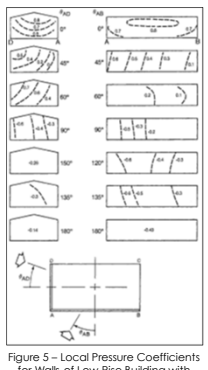


Figure 5 – Local Pressure Coefficients for Walls of Low-Rise Building with Varying Wind Direction (Holmes 1986)

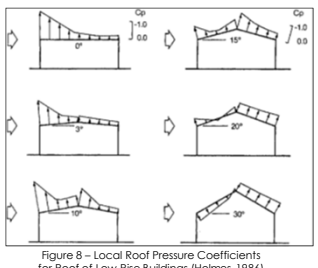


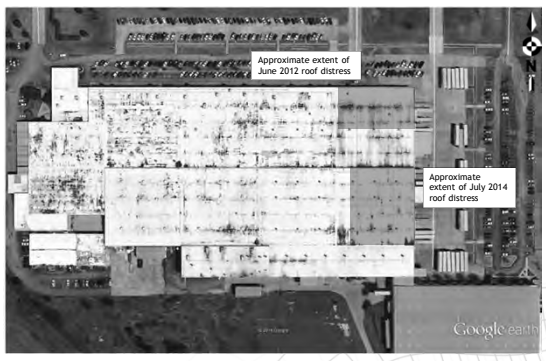
Figure 8 – Local Roof Pressure Coefficients for Roof of Low-Rise Buildings (Holmes 1986)

2001 ASHRAE Fundamentals Handbook

Case Study: Wind

Office, Manufacturing, Warehouse, & Distribution Facility – Northeast Arkansas

Case Study: Wind



Case Study: Wind



Case Study: Wind

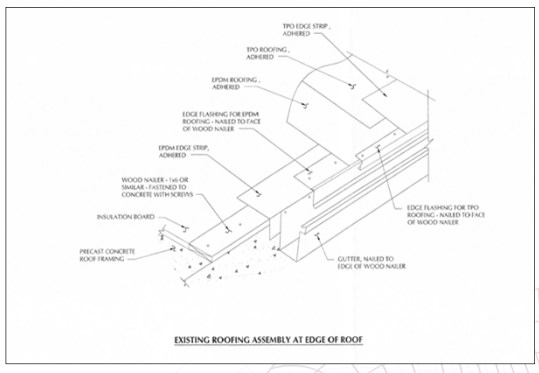

Case Study: Wind

Case Study: Wind

Case Study: Wind

Case Study: Wind

Case Study: Wind



EXISTING ROOFING ASSEMBLY AT EDGE OF ROOF

Case Study: Wind

Photographs by Others

Case Study: Wind

Photographs by Others

Case Study: Wind

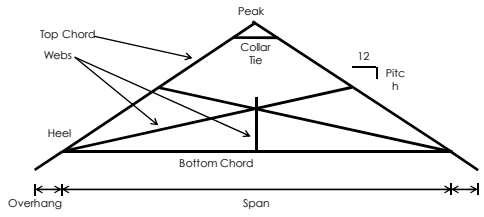
Photographs by Others

Case Study: Snow

Church – Pocatello, ID

Case Study: Snow

Case Study: Snow



Line Diagram of a Typical Roof Truss

Case Study: Snow

Truss Details

- Approximately 36’ span w/ 2’ overhangs
- 8:12 pitch (i.e., vertical rise: horizontal run)
- 24” on center spacing
- 2x6 chords and webs, 1x8 collar ties
- 5/8” diameter bolt at visible web-to-chord connections
- Nailed collar tie connections and splices

Case Study: Snow

Case Study: Snow

Case Study: Snow

Case Study: Snow

Weather Data – NCEI (formerly NCDC)

- Snow data from 1950 – present
- Only events with reported property damage
  - 3" – 5" in October 2007
  - 2" – 4" in November 2011
  - 3" – 7" in November 2014
- Wind data from 1950 – present
  - Multiple events with 58 – 81 mph wind speeds between 1989 - present

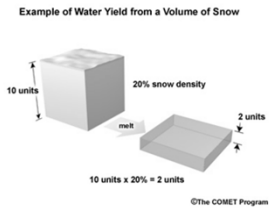
Case Study: Snow

Snow:Water Equivalent

- Heavy: 1:1 – 9:1
- Average: 9:1 – 15:1
- Light: > 15:1

(Roebber et al. 2003)

7" of wet snow (5:1) weighs approximately 7 psf.



Case Study: Fire

Mexican Grocery and Restaurant – Phoenix, AZ (Google Earth Pro 2016)

Case Study: Fire

Case Study: Fire

Case Study: Fire

Case Study: Fire

Case Study: Fire

Case Study: Fire

Case Study: Fire

Case Study: Fire

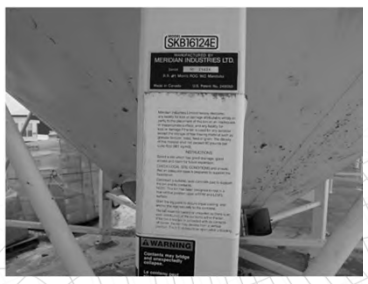
Case Study: Fire

Case Study: Collapse

Storage Bin Failure Analysis – North Dakota (Google Earth 2014)

Case Study: Collapse

Case Study: Collapse



Case Study: Collapse

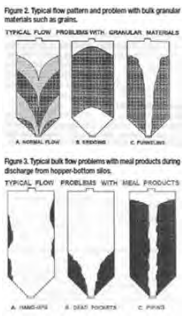
Case Study: Collapse

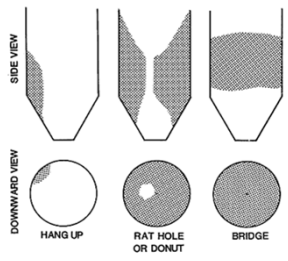
Case Study: Collapse

Case Study: Collapse

Case Study: Collapse

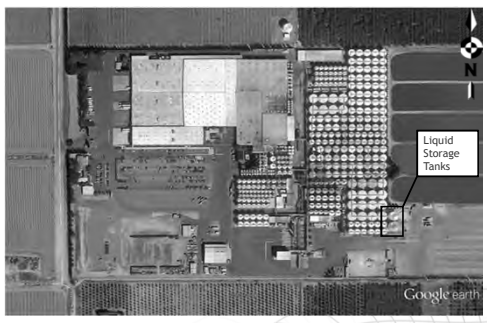
Case Study: Collapse





www.feedmachinery.com

Case Study: Defect

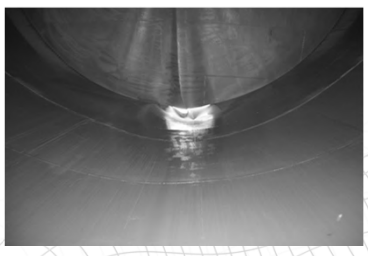


Wine Making Facility – Northern California

Case Study: Collapse

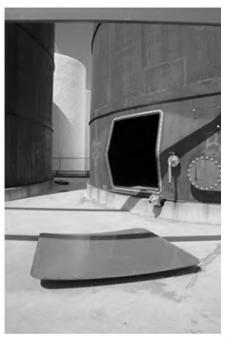
Photographs by Others

Case Study: Collapse



Photographs by Others

Case Study: Collapse

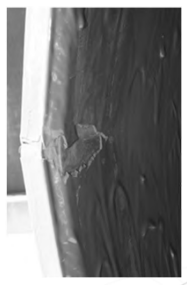


Photographs by Others

Case Study: Collapse

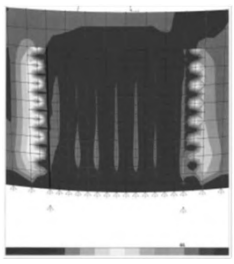
Photographs by Others

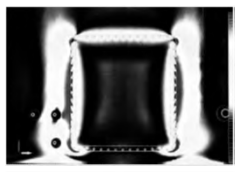
Case Study: Collapse

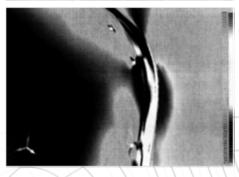


Photographs by Others

Case Study: Collapse







Results of FEA Analysis by Others

Case Study: Collapse

Case Study: Collapse

Case Study: Collapse

Case Study: Collapse

Case Study: Collapse

Case Study: Collapse



Summary

- Forensic engineering investigations can assist in providing resolution for claims or disputes
- A typical scope - determine extent, causation, and/or responsibility; provide recommendations for remediation
- A proper investigation uses the scientific method to *objectively* solve a problem
- A rational basis should be established for conclusions via a properly substantiated analysis

Thank you!

Contact me at:
aharold@nelsonforensics.com
www.nelsonforensics.com
877.850.8765

NELSON
FORENSICS

26th Annual Insurance Symposium: Appraisals

April 5, 2019

Stephen Smith
Stephen.Smith@cooperscully.com

Summer Frederick
Summer.Frederick@cooperscully.com

Clause in the Conditions section of an insurance policy which allows a binding determination of the amount of damages to covered property.

What is the Appraisal Clause?

- Appraisal can generally be demanded by either party, and is generally mandatory if demanded
- Binding on parties when properly executed
- Can be demanded either before or after litigation, and if demanded after litigation the case may be abated

General Principles

- Philosophy behind it is a preference for non-judicial decision making
    1. Battle of experts depending less on the credibility of the witnesses
    2. If that is the only basis behind the dispute, then no need for judicial involvement
    3. The idea is that the experts are supposed to be impartial
- Basis for Modern Questions Largely Type of Policy
    1. Older forms were single interest policies- fire, wind, lightning
    2. Changes in twentieth century led to multi-peril policies

History of the Appraisal Clause

- Must be a covered loss
- Must be a demand under the policy- cannot generally appraise by agreement
- Must be a dispute as to damages
- Selection of appraiser usually must occur within certain time period following the demand
- Appraiser must be a person, not an organization

Prerequisites to Invoking Appraisal Clause - Key Areas of Conflict

- Demand must be made within a reasonable time
    1. Waiting too long to demand appraisal in a waiver – *In re Slavonic Mut. Fire Ins. Ass'n*, 308 S.W.3d 556 (Tex. App.-Houston [14th Dist. 2010], n. pet. h.) – simple delay does not constitute waiver- generally accompanied by evidence of intent
    2. *Boone v. Safeco Ins. Co. of Ind*., 2010 WL 2303311 (2010) – Question on waiver by insurer depends on knowledge by insurer that there is an impasse and that the insured disputes amount of loss
- Denial of liability by insurer can result in a waiver of appraisal

Prerequisites to Invoking Appraisal Clause - Key Areas of Conflict Cont'd

"Competent and Independent"

1. Competence
   a. Generally refers to the ability of the appraiser to make a decision based on the evidence
   b. No specific requirement of technical, as opposed to general competence

2. Independence
   a. Extent of financial involvement
   b. Involvement with particular industry

Appraisers, Umpires, and Procedure

- Ability to disqualify appraiser - Generally by those with an interest in the outcome of the appraisal- doing work for a party in the past is not sufficient in and of itself. *Franco v. Slavonic Fire Ins. Assoc*, 308 S.W.3d 556 (Tex. App.-Houston [14th Dist. 2010], n. pet. h.)
- The first job is to pick an umpire within a specified number of days
- There are again no technical requirements as to qualifications, although in terms of his conduct the umpire acts in a "quasi-judicial" role

Appraisers, Umpires, and Procedure

- Appraisers set the amount of loss
  1. No definite procedure;
  2. Generally it is considered necessary to inspect the loss
  3. Disagreement is required in order to trigger umpire involvement
  4. Disagreements are resolved by the umpire
  5. Umpire is not completely bound by the appraisers determinations
- The award is made when two of the three agree on award elements.
  1. Issues relating to "split" awards-the umpire cherry picks
  2. Issues when Umpire reaches his own conclusion
- Effect of not following the proper procedure can lead to invalidation of the award

Appraisers, Umpires, and Procedure

- After fifteen days of no agreement as to umpire, either side may petition the judge of a judicial district where the loss occurred for an umpire appointment
    1. There is no procedure defining exactly how to about this in Texas
    2. This is not true in other states
- Probably notice and hearing is required, although there is no definitive procedure in Texas
- Not necessary to wait for expiration of time periods before filing for decision
- As it has developed, virtually all Petitions to appoint umpire are related to a larger lawsuit

Appraisers, Umpires, and Procedure

Fraud, Accident, Mistake

1. Fraud - very broad- essentially any intentional misrepresentation which results in an improper award
2. Accident - writing down the wrong number
3. Mistake - the award was not as intended

- While these standards are still applicable, there is caselaw holding that even if a portion of the award is invalid, the rest of the award can still be valid. *TMM Investments v. Ohio Casualty Ins. Co*., 2013 WL 5222625 (Fifth Cir. September 17, 2013)- "Minor" problem with award authority not sufficient in order to require reversal of entire award.

Invalidating the Appraisal

- Determination of Cause of Loss- *State Farm Lloyds v. Johnson* 290 S.W.3d 886 (Tex. 2009)
- Insurer position was that any disagreement in scope rendered the matter inappropriate for appraisal under *Wells v. American States*, 919 S.W.2d 679 (Tex. App. – Dallas1996, writ den.)
- *Johnson* reviewed the scope of appraisal and term "amount of loss"
- Is the primary case that is relied on by subsequent cases in discussing causation.

Determination of Cause of Loss

Causation Issues

- Under *Johnson,* whether a particular issue is a coverage issue depends on the facts.
- Distinction between the causes of particular types of damage (ie, "what caused the hail damage), vs assigning covered and noncovered causes of loss to a single loss- in other words, whether you are addressing causation as a liability question or as a damages question.
- Accordingly, addressing the extent of covered damages, separating covered from non covered causes of

Problems with Determining Cause of Loss

loss, are appropriate subjects of appraisal. *MLCSV10 v. Stateside Enterprises,* 866 F.Supp.2d. 691 (S.D. Tex. 2012)

- In *Stateside,* determination that a cause of loss was due to a particular storm was valid and proper.
- On the other hand, a conclusion that a particular piece of ductwork was not valid, and improper
- *Central Mut. Ins. Co. v. White Stone Properties*, Ltd. 2014 WL 1092121 (March 19, 2014)- Application of replacement cost in appraisal

Determining Causation

What is the Texas Prompt Payment of Claims Act and why does it Matter?

EXCERPTS

542.056: an insurer shall notify a claimant in writing of the acceptance or rejection of a claim not later than the 15th business day after the date the insurer receives all items required by the insurer to secure final proof of loss.

542.057: if an insurer notifies a claimant under Section 542.056 that the insurer will pay a claim or part of a claim, the insurer shall pay the claim not later than the fifth business day after the notice is made.

542.058: if an insurer, after receiving all items, statements, and forms reasonably requested and required under Section 542.055, delays payment of a claim for more than 60 days, the insurer shall pay damages and other items as provided by Section 542.060.

- 542.055: "information the insurer believes it will require."
- Damages: 18% per annum statutory interest, reasonable and necessary attorneys fees, pre-judgment interest. Texas Supreme Court has determined that the 18% runs until the date of judgment.

It matters because it is debated whether the TPPCA applies to appraisal cases …

TPPCA: Additional Context

An Outlier?

***Graber v. State Farm Lloyds*, No. 3:13-cv-2671, 2015 WL 3755030 (N.D. Tex. June 15, 2015)**

To resolve the issue presented in *Graber*, the Texas Supreme Court recently granted Petition for Review to consider:

1. Whether an insurer violates the TCCPA by delaying payment of a claim until it pays the appraisal award after being sued; and

2. Whether the appraisal process delays the 60-day deadline to pay a valid claim under the TCCPA

***Barbara Technologies Corp. v. State Farm Lloyds*, 566 S.W.3d 294 (Tex. App.—San Antonio 2017, pet. granted)**

- Hail damage was under the deductible, and insurer made no payment. After second inspection, no payment for the same reason.
- Insured sued; alleged violations of TPPCA. Appraisal ensued. Insurer timely paid appraisal award. Insured sought TPPCA damages.
- Court granted summary judgment in favor of insurer.

***Barbara Technologies Corp. v. State Farm Lloyds*, 566 S.W.3d 294 (Tex. App.—San Antonio 2017, pet. granted)**

Both parties presented their cases in oral arguments before the Texas Supreme Court.

Insured's position:

- This is a statutory issue. Under the TPPCA, the insurer must pay within 60 days after it receives all items it reasonably requests from the claimant (not the appraiser/umpire).
- If insurer does not pay within 60 days, it is liable – regardless of negligence or intent. The statute does not make an exception if case goes to appraisal.
- Insured said appraisal established both coverage and valuation in the case, and insurer did not pay covered claim within timeframe.

***Barbara Technologies Corp. v. State Farm Lloyds*, 566 S.W.3d 294 (Tex. App.—San Antonio 2017, pet. granted)**

Insurer's position:

- TPPCA does not apply to appraisal when parties agree claim is covered, but dispute valuation.
- Must be a finding that carrier is liable for a claim before TPPCA applies. Appraisal does not determine liability, and payment of appraisal award is not admission of liability.
- In general, an appraisal cannot be demanded, completed, and paid within 60 days.
- Either party can demand appraisal. If the 60 day TPPCA deadline applies, there would be nothing to stop an insured from waiting until long into the process, demanding appraisal, dragging it out, and then claiming damages under the TPPCA.

22

Questions?

NOTES

RIGHT TO INDEPENDENT COUNSEL: OVERVIEW AND UPDATE

Wes Johnson
Cooper & Scully, P.C.
900 Jackson Street, Suite 100
Dallas, TX 75202-4452
Telephone: 214-712-9500
Telecopy: 214-712-9540
Email: wes.johnson@cooperscully.com
www.cooperscully.com

YOU HAVE SENT OUT THE ROR—NOW WHAT?

EXISTENCE OF DUTY TO DEFEND

- Background and Basis of the Duty to Defend
  - Duty to Defend – Eight Corners Rule.
  - Duty to Indemnify – Actual Facts Rule.

RESPONSE TO A REQUEST FOR A DEFENSE

- Insurer has three options:
  - Deny the request for a defense;
  - Provide an unqualified defense;
  - Provide a qualified defense pursuant to a reservation-of-rights letter.
- Can Also file a Declaratory Judgment Action.

NATURE OF CONFLICT BETWEEN INSURER AND INSURED

Subject to the terms of the insurance policy, if the insurer has a duty to defend with respect to *any* aspect of the lawsuit, it has the duty to defend with regard to *every* aspect of the lawsuit.

Heyden Newport Chem. Ins. Co. v. Southern Gen'l Ins. Co., 387 S.W.2d 22, 26 (Tex. 1965)

What are Insured's Options

- Accept the Defense (silence is implied consent);
- Reject the Defense.

What circumstances give rise to the right to reject?

Northern County Mut. Ins. Co. v. Davalos

- Facts:

  Davalos (a resident of Matagorda County) was involved in a car accident in Dallas County. Davalos brought suit in Matagorda County. The other driver brought suit against Davalos in Dallas County. Davalos moved to transfer venue to Matagorda County.

Northern County Mutual Ins. Co. v. Davalos

- Northern's letter stated that if Davalos' personal attorneys:

  > . . . continue to defend you in the Dallas County lawsuit and continue to pursue the motion to transfer venue, we will take the position that there is no liability protection under the [policy], and the outcome of the Dallas County case will be your personal responsibility.

Northern County Mut. Ins. Co. v. Davalos

- Trial Court's Holding:
  - Final judgment rendered in Davalos' favor for breach of contract and violation of article 21.55 of the insurance code.

Northern County Mut. Ins. Co. v. Davalos

- Court of Appeals' Affirmed:

  In determining an Insurer's responsibilities under the standard form Texas personal auto policy, the Texas Supreme Court held that: "The insurer's control of the insured's defense under this policy thus includes authority to accept or reject settlement offers and, ***where no conflict of interest exists***, to make other decisions that would normally be vested in the client, here the insured." *State Farm Mutual Ins. Co. v. Traver*, 980 S.W.2d 625, 627 (Tex. 1998)

Northern County Mut. Ins. Co. v. Davalos

- Northern County's Position in the Supreme Court:
  - The "settle and defend" clause of a liability policy give the right to take exclusive control of the suit.
  - These provisions give the insurer "absolute and complete control of the litigation, as a matter of law."
  - An insured must cooperate with his insurer and turn the defense over to the insurer when the insurer tenders an unconditional defense.
  - The insured's actions must not deprive the insurer of any valid defense.

Northern County Mut. Ins. Co. v. Davalos

- Northern County's Position in the Supreme Court:
  - A dispute as to the manner in which the defense should be conducted does not constitute a conflict in the sense of insurance coverage.
  - A conflict exists only when an insurer questions whether an event is covered by an insurance policy.
  - The Appellate Court's reliance upon *State Farm Mutual Ins. Co. v. Traver*, 980 S.W.2d 625, 627 (Tex. 1998) was misplaced.

State Farm Mutual Ins. Co. v. Traver, 980 S.W.2d 625, 627 (Tex. 1998)

- Facts:
  - Traver's Estate was sued by a party injured in an auto accident.
  - State Farm hired counsel to represent Traver.
  - Case went to trial – 100% fault attributed to Traver resulting in judgment in excess of policy limits.
  - Estate sued State Farm for breach of the duty to defend, alleging counsel committed malpractice.

State Farm Mutual Ins. Co. v. Traver, 980 S.W.2d 625, 627 (Tex. 1998)

- Supreme Court's Holding:

  "We have recognized that a liability policy may grant the insurer the right to take complete and exclusive control of the insured's defense...Here, the standard form Texas Personal Auto Policy provides that the insurer "will settle or defend, as [it] consider[s] appropriate, any [covered] claim or suit ..." The insurer's control of the insured's defense under this policy thus includes authority to accept or reject settlement offers and, where no conflict of interest exists, to make other decisions that would normally be vested in the client, here the insured. *However, even assuming that the insurer possesses a level of control comparable to that of a client, this does not meet the requisite for vicarious liability*."

Northern County Mut. Ins. Co. v. Davalos

- Davalos' Position in the Supreme Court:
  - An insurer may assume the control over the insured's defense only where no conflict of interest exists. A conflict of interest exists where there is a dispute between the insurer and the insured *with regard to how the lawsuit should be defended*."
  - A conflict existed between Northern County's and Davalos because Northern County's insistence upon Dallas as the venue of choice would result in "race to trial" in the underlying matter.
  - A conflict existed between Northern County and Davalos because Davalos sued Northern County over the same claim where a defense was requested.
  - The conflict persisted because Northern County sought coverage advice from the very lawyer it selected to defend Davalos. Specifically, Steven W. Drinnon, Northern County's choice of counsel, provided advice on "coverage" solicited by Northern County.

Northern County Mut. Ins. Co. v. Davalos

- Davalos' Position in the Supreme Court:
  - Northern County forfeited its right to control the defense by attempting to impose a condition not mandated by its policy with Davalos, and acting directly contrary to ethical considerations and duties to its insured.
  - Northern County is not entitled, by virtue of its insurance policy, to compromise Davalos's affirmative claims against a third party including his claim against Northern County.
  - Since Northern breached the duty to defend, Davalos was entitled to assume control over his own defense.

Northern County Mut. Ins. Co. v. Davalos

- **Holdings of the Supreme Court:**
  - **The supreme court held that the right to conduct the defense by the insurer is a matter of contract.**
  - **The insurer has the right to make defense decisions as if it were the client "*where no conflict of interest exists*." *State Farm Mutual Automobile Ins. Co. v. Traver.***
  - **A disagreement about how the defense should be conducted is not a conflict of interest under *Traver.***
  - **Where there is a question regarding the existence of scope of coverage and the duty to indemnify the insured, there may be exist a right for disqualifying conflict. A disqualifying conflict exists when the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends.**

Types of Conflicts That May Justify Rejection

- **When the defense tendered "is not a complete defense under circumstances in which it should have been."**
- **When the "attorney hired by the carrier acts unethically and, at the insurer's direction, advances the insurer's interest at the expense of the insured's."**
- **When "the defense would not, under the governing law, satisfy the insured's duty to defend," and**
- **When though the defense is otherwise proper, "the insurer attempts to obtain some type of concession from the insured before it will defend."**

Housing Authority of Dallas, Tex. V. Northland Ins. Co., 333 F.Supp.2d 595 (N.D. Tex. 2004)

Reservation of rights issued on "willful violation of statute" exclusion created disqualifying conflict in the face of allegations that the insured willfully violated U.S.C.S., Title VII.

Downhole Navigator, LLC v. Nautilus Ins. Co., 686 F.2d 325 (5th Cir. 2012)

- Nautilus insured Downhole under a CGL policy;
- Downhole was sued by Sedona for damage to oil well sustained while Downhole was engaged to redirect the well (deviation);
- Sedona sued for loss profits, damage to the well, loss of business opportunity, loss of value in lease, loss of minerals, costs of delay, exemplary damages and attorney's fees.

Downhole Navigator, LLC v. Nautilus Ins. Co., 686 F.2d 325 (5th Cir. 2012)

- Nautilus reserved its rights under professional liability and testing exclusions, as well as a data processing exclusion;
- Downhole attempted to reject, citing a disqualifying conflict of interest between Downhole and Nautilus;
- Nautilus refused to pay Downhole's attorney's fees. Downhole sued.

Downhole Navigator, LLC v. Nautilus Ins. Co., 686 F.2d 325 (5th Cir. 2012)

- After granting of Summary Judgment for Nautlius, the Fifth Circuit held:
  - Under *Davalos*, a disqualifying interest exists "when the facts to be adjudicated in the liabilty lawsuit are the same facts upon which coverage depends."
  - A conflict does not arise unless the *outcome* of the coverage issue can be controlled by counsel retained by the insurer for the defense of the underlying suit. *Rx.com, Inc. v. Hartford Fire Ins. Co.*, 426 F.Supp. 546 (S.D. Tex 2006).

Allstate County Mutual Ins. Co. v. Wootton, 494 S.W.3d 825 (Tex. App. – Houston [14th Dist.] 2016)

- Post-Downhole Navigator application
- Insureds contended that they had a right to independent counsel because of a conflict of interest because of the underlying plaintiffs allegations of vicarious liability, that if proven, would show that the insured was acting in the course and scope of employment, which would bring the claim into a coverage exclusion
- Trial court granted declaratory judgment that Allstate had to provide independent counsel

Allstate County Mutual Ins. Co. v. Wootton, 494 S.W.3d 825 (Tex. App. – Houston [14th Dist.] 2016)

- On appeal, the 14th Court of Appeals reversed based upon *Downhole Navigator*.
- Whether that fact could be proven presented a "potential conflict of interest."
- "The Woottons are not entitled to independent counsel simply because there is a potential conflict of interest."

When Independent Counsel is Required

- Example (Covered Verses Non-Covered *Claims*):

Assume that a plaintiff alleges that a defendant-insured is guilty of either negligence or an intentional tort because of his wrong doing, and the insurance policy does not provide coverage for intentional torts. The insurer, under those circumstances, would be benefited, at the expense of the insured, if the insured's counsel shaped the defense so that, in the event he was unable to prove that the insured was not liable, the insured would be found guilty of an intentional tort. A conflict of interest, therefore, does exist in that situation.

When Independent Counsel Is Not Required

- Claim Against Multiple Insureds;
- Insured Suit Against Other Insureds;
- Suit for money in excess of policy limits;
- Person insured;
- Property insured;
- Policy period;
- Covered vs. non-covered damages.

When Independent Counsel Is Not Required: *Graper v. Mid- Continent*, 756 S.W.3d 388 (5th. Cir. 2014)

- Coverage Issues Where Facts Will Not Be Decided in the Underlying Case
- Court applied the "same facts" analysis in *Davalos* and *Downhole Navigator* to allegations of "willful conduct" for alleged violations of the Copyright Act in a claim where Mid-Continent reserved rights based upon coverage exclusions for intentional acts
- Court held that despite the fact that the Court would be determining whether or not the insureds conduct was willful, it would not violate the "same facts" because "willful" does not necessarily imply "knowing", which is required under the policy exclusion
- Demonstrates that it will take a rare case to meet the "same facts" standard

Poll Question

- Your policyholder brings you a claim where the request a defense for both their company and a vendor who they are forced to provide a defense under an indemnifaction agreement. You review the agreement and believe it might be unenforceable under Texas law. Has a right to independent counsel arisen?
- A: Yes
- B: No

Punitive Damages?

- ***Fairfield Ins. Co. v. Stephens Martin Paving, LP,* 246 S.W.3d 653 (Tex. 2008).**
  - **whether the plain language excludes coverage for punitive damages;**
  - **If the policy provides coverage, does Texas law allow or prohibits coverage in the circumstances of the underlying suit.**
  - **In determining policy, a central concern exists when shifting the risk from the insured to the insurer in cases where "extreme and avoidable conduct that causes injury" may warrant consideration. *See also* *American Int'l Sp. Lines Ins. Co. v. Res Care,* 529 F.3d 649 (5th Cir. 2008).**

What About Limitations?

- *Gilbert Texas Constr., L.P. v. Underwriters at Lloyd's London,* 327 S.W.3d 118 (Tex. 2010)
  - Holding: Exclusion 2(b) applies when liability is based upon breach of contract or other contract theory.
  - Conflict: Filing a Motion for Summary Judgment on Limitations for Negligence Claims.

Advising Insured of Right to Independent Counsel

- *Ideal Mutual Ins. Co. v. Myers*, 789 F.2d 1196 (5th Cir. 1986):

> You are at liberty to secure counsel of your own choice, at your expense, to represent you in regard to the amount [sued] which is in excess of your insurance coverage. . . .

Advising Insured of Right to Independent Counsel

- *Ideal Mutual Ins. Co. v. Myers*, 789 F.2d 1196 (5th Cir. 1986):

> The defendants do not show how the reservation of rights letter from Charles England of Aero Adjust Bureau was defective. On the contrary, the letter adequately apprised the buyers' estate of Ideal's position and the estate's rights. The letter specifically identified the policy in question; and informed the estate that McElhaney had been retained to defend the Rockwall action and apprise the estate of the initial results of Ideal's investigation and of Ideal's reservation of rights under the policy, including the right to withdraw from the defense of the Rockwall action.

Advising Insured of Right to Independent Counsel

- *J.E.M. v. Fidelity and Casualty Co. of New York*, 928 S.W.2d 668 (Tex.App.—Houston [1st Dist.] 1996, no writ):

> This case does not present a *Tilley* problem because there is no allegation that Fidelity used the same attorneys to defend the defendants that it used to determine coverage issues. Furthermore, the reservation of rights letter in this case detailed specific coverage problems that the defendants might face, and informed them they had a right to seek outside counsel.

Advising Insured of Right to Independent Counsel

- *J.E.M. v. Fidelity and Casualty Co. of New York*, 928 S.W.2d 668 (Tex.App.—Houston [1st Dist.] 1996, no writ):

> We therefore wish to advise you that you may, at your own expense, retain outside counsel to oversee you in this litigation. We are not suggesting that you do so but merely advising you of your right.

Actual Selection of Counsel

- Qualifications
- Fees
- Scope of Representation
- Reporting
- Record Keeping

Questions?

Wes Johnson
Cooper & Scully, P.C.
900 Jackson Street, Suite 100
Dallas, TX 75202-4452
Telephone: 214-712-9500
Telecopy: 214-712-9540
Email: wes.johnson@cooperscully.com
www.cooperscully.com

No Coverage for Attorney's Fees

Rob Witmeyer
Aaron G. Stendell
Cooper & Scully, PC

Award of Attorney's Fees

IT IS ORDERED, ADJUDGED, AND DECREED, that Defendant Satterfield & Pontikes Construction, Inc. shall comply with the terms of the Final Award of the AAA Arbitration Panel. This Court renders Final Judgment in favor for Zapata County to recover from Satterfield & Pontikes Construction, Inc., in the amounts as follows:

Actual Damages in the amount of:	$6,072,000.00
Reasonable and Necessary Attorney Fees for the Prosecution of the AAA Award:	$1,500,000.00
Prejudgment Interest:	$430,458.00
Additional Expenses:	$29,909.74
Total:	$8,032.367.74

What does the policy provide?

1. CGL policies are *general* liability policies. Unlike policies issued to cover a specific type of loss, CGL policies cover a broad range of risks. The insuring agreement provides coverage for "damages" because of bodily injury or property damage.

2. Supplementary Payments Provision: Attorney's fees can be considered "costs" considering the policy language.

ISO Form CG 00 01 12 04

SUPPLEMENTARY PAYMENTS - COVERAGES A AND B

We will pay, with respect to any claim or "suit" we defend:

5. All *costs* taxed against the insured in the "suit."

- Courts interpreting this provision typically held that prevailing party fees are covered "costs" within the meaning of the policy.
- Consider the implications for the insurer of having to pay the prevailing party's fees awarded in a class action products liability suit, in relation to the relatively miniscule policy limits -- typically $1,000,000 at the primary tier.

ISO Form CG 00 01 12 07

SUPPLEMENTARY PAYMENTS - COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

   e. All court costs taxed against the insured in the "suit." However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.

- Courts interpreting this provision hold that prevailing party fees are not "costs" within the meaning of the policy.

Insuring Agreement of a CGL

SECTION I - COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

   (a) We will pay those sums that the insured becomes legally obligated to pay as **damages** because of "bodily injury" or "property damage" to which this insurance applies.

In re Nalle Plastics Family Ltd. P'ship

- Texas Supreme Court case *In re Nalle Plastics Family Ltd. P'ship.*, 406 S.W.3d 168 (Tex. 2013)
  - Law firm sued Nalle, its client, for unpaid legal fees and was awarded $132,000 for damages and another $150,000 in attorney's fees
  - Pending appeal, Nalle deposited $132,000 with the trial court to suspend enforcement of the judgment
  - Law firm argued that deposit did not include $150,000 for attorney's fees, so judgment not properly superseded

In re Nalle

- Supersedeas statute required posting appeal bonds "equal [to] the sum of . . . the amount of compensatory damages awarded in the judgment"
- Are attorney's fees "compensatory damages"?
  - Appellate courts were split
  - No statutory definition of "compensatory damages"
  - But, long history that distinguished attorney's fees from damages
  - Other expenses (e.g. court costs and interest) are not damages

In re Nalle

- Court found attorney's fees are not compensatory damages for purpose of supersedeas statute
- "While attorney's fees for the prosecution or defense of a claim may be compensatory in that they help make a claimant whole, they are not, and have never been, damages."

Travelers Lloyds Ins. Co. v. Cruz Contracting of Texas, LLC, No. 5:16-CV-759-DAE, 2017 WL 5202891 (W.D. Tex. Sept. 7, 2017) (Ezra, J.).

- The general contractor hired a subcontractor to perform utility work. After the subcontractor performed the utility work, the general contractor and other third parties performed road work above the subcontractor's utility work. At some point prior to final completion of the road work, the general contractor became aware that the utility subcontractor's work was defective.
- The general contractor had to remove the almost-completed road work to access and replace the subcontractor's defective utility work. This resulted in physical injury to the road and loss-of-use damages.

Travelers Lloyds Ins. Co. v. Cruz Contracting of Texas, LLC

- After establishing that the CGL insurance policy covered some of the property damage, the insured sought coverage for the plaintiff's attorneys' fees assessed against the insured in the underlying litigation.
- The insurer argued that the policy did not provide insurance coverage for those fees because such attorneys' fees are not "damages."
- The CGL insuring agreement provided coverage only for "damages because of . . . property damage to which this insurance applies."

Travelers Lloyds Ins. Co. v. Cruz Contracting of Texas, LLC

- The court addressed the hot-button coverage issue—whether the CGL policy provides insurance coverage for the plaintiff's attorneys' fees assessed against the insured.
- Following a recent trend in Texas federal court opinions, the court answered that question in the negative. The court determined that the CGL insuring agreement cannot provide coverage for such attorneys' fees because those fees are not "damages."
- *See also AGLIC v. US Fire*, 255 F. Supp. 3d 677, 695 n.1 (S.D. Tex. June 1, 2017) (Rosenthal, J.) (attorney's fees are not damages)

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

- Mid-Continent issued a CGL policy to Petroleum Solutions, Inc. ("PSI")
- PSI was sued by Bill Head for faulty fuel storage system
- PSI filed third-party petition against Titeflex, supplier
- Titeflex filed a countersuit against PSI, asserting TEX. CIV. PRAC. & REM. CODE 82.002(a) [indemnity] and (g) [attorney's fees]
- At trial, Head awarded $1.1 million and $91,500 in attorney's fees
- Titeflex awarded $382,334 in attorneys fees

PSI

- Mid-Continent filed a Declaratory Judgment Action, asserting various policy exclusions and the cooperation clause.
- Mid-Continent also maintained that the Titeflex Judgment (including $382,334 in attorneys fees) was not covered as "damages"
  - The Titeflex Judgment did not satisfy the definition of "Money Damages" within the meaning of a professional liability endorsement;
  - The attorney's fees awarded in the Titeflex Judgment were not "damages because of 'property damage.'"

PSI

- Mid-Continent argued that pursuant to *In re Nalle Plastic Family Limited Partnership*, 406 S.W.3d 168 (Tex. 2013), "attorney's fees do not constitute compensatory damages."
- The Court granted the motion in part.
- Section 82.002(g) allows a party to recover attorney's fees for pursuing an indemnity claim. These are ***costs***, not damages, "because of" property damage.

PSI

- The Court also addressed an alternative argument that attorney's fees awarded to Titeflex were "Money Damages" under a professional liability endorsement in the policy.
  - "Money Damages" was defined in the endorsement to mean "a monetary judgment, award or settlement."
  - The Court held that while the definition of "Money Damages" was broad enough to encompass the fees awarded 82.002, the endorsement did not create additional coverage, but simply deemed "Money Damage" arising out of the rendering or failure to render professional services to be caused by an occurrence.

PSI - The Appeal

- PSI appealed to the Fifth Circuit, 917 F.3d 352 (2019)
- PSI maintained that the Professional Liability Exclusion ("PLE") provides coverage for the Titeflex attorney's fees. PSI also contended that the insuring agreement provides coverage for the attorney's fees.
- Fifth Circuit found that the PLE extends coverage when PSI has rendered professional services that result in "bodily injury", "property damage", or "money damages"
- "Money damages" is defined as "monetary judgment, award, or settlement", so it is broader than common-law definition of damages
- Here, money damages arose out of PL services, so coverage for fees. The court decided not to address the coverage for attorney's fees under the insuring agreement issue.

Anadarko Petroleum Corp. v. Houston Cas. Co.

- *Anadarko Petroleum Corp. v. Houston Cas. Co.*, No. 16-1013, 2019 WL 321921, at *8 (Tex. Jan. 25, 2019)

Anadarko

- Anadarko owned a 25% minority interest in Deepwater Horizon
- Anadarko accrued attorney's fees of over $100 million in defending the resulting DH lawsuits which were settled for $4 billion
- Anadarko has Underwriters Lloyd's "energy package" policy
  - Section III of policy provides excess-liability coverage of $150 million
  - Section III states that it will **reimburse** Anadarko for its "Ultimate Net Loss", which includes defense expenses (different from typical CGL policy where carrier pays)

Anadarko

- Joint Venture Provision endorsement limits coverage:
  - "[A]s regards any **liability** of [Anadarko] **which is insured** under this Section III and which arises in any manner whatsoever out of the operation or existence of any joint venture . . . in which [Anadarko] has an interest, the **liability** of Underwriters under this Section III shall be limited to the product of (a) the percentage interest of [Anadarko] in said Joint Venture and (b) the total limit afforded [Anadarko] under this Section III.
  - So, 25% (of DH interest) of $150m limit = $37.5 million

Anadarko

- Anadarko argues that this endorsement only applies to its "liabilities" and not attorney's fees.
- Trial court found the Joint Venture Provision limits reimbursement for Anadarko's defense expenses
- Appellate court agreed
- Texas Supreme Court reversed, found no JVP limit for defense expenses

Anadarko

- We have explained that, in the insurance context, "liability insurance" generally covers "damage the insured does to others." We have also held that an insured's defense expenses are not "damages" a third party sustains and "claims." Even in the broader common, ordinary sense, "damages" are "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury," and thus "attorney's fees are generally not damages, even if compensatory." The policy at issue here consistently uses the terms liability, damages, and defense expenses consistent with these common legal meanings.

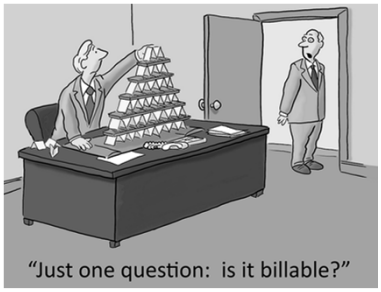
What does it all mean?

- Go back to CGL language:
  - "We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies."
- Under *Anadarko*, *Cruz*, and *AGLIC*, there is no coverage for attorney's fees because they are not damages sustained by a third party.
- But in *PSI*, there was coverage because the term "money damages" found in a policy endorsement is broader than the term "damages"

Implications

- The plaintiffs' attorneys' fees are often a major issue at mediation. The outcome of that mediation may be substantially different if the defendants have no insurance coverage for those fees, particularly if the insureds are not collectible
- May affect coverage under other policies, such as professional liability policies, that often use the term "damages" in their definitions of "loss"

Attorney's Fees



Questions?

Robert J. Witmeyer
214-712-9554
Rob.Witmeyer@cooperscully.com

Aaron G. Stendell
214-712-9524
Aaron.Stendell@cooperscully.com

COOPER & SCULLY, P.C.
900 Jackson Street, Suite 100
Dallas, TX 75202

Rideshares & Personal Auto Policies

Julie A. Shehane & Lauren Smith

2019 Annual Insurance Seminar

PERSONAL AUTO POLICIES

General Coverage

Personal auto policies generally include insuring agreement language that provides coverage for the following:

> We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the "insured".

PERSONAL AUTO POLICIES

Exclusions

Rideshare Exclusion:

For that "insured's" liability arising out of the ownership or operation of a vehicle while it is being used as a public or livery conveyance. This Exclusion **(A.5.)** does not apply to a share the-expense car pool.

PERSONAL AUTO POLICIES

Rideshare Exclusion

LEGAL DEFINITION:

- The term “livery conveyance" means a vehicle used indiscriminately in transporting the public and not limited to certain persons and particular occasions or governed by special terms.
- It refers to the transporting of people or goods for hire, including conveyance by taxi service, motor carrier, or delivery service.

PERSONAL AUTO POLICIES

Rideshare Exclusion

“RIDESHARE” DEFINITION:

* (1) of or relating to the sharing of rides or transportation, especially among commuters: The agency was set up to devise a ridesharing program.
* (2) of or relating to a car service with which a person uses a smartphone app to arrange a ride in a usually privately owned vehicle.

PERSONAL AUTO POLICIES

Rideshare Exclusion

Unlike traditional taxi and limousine services, ride-sharing companies insist that they are not common carriers. Instead, they assert that the law should regard them as providers of an “interactive computer service.” Essentially, much like dating sites, they are simply match-making services that connect independent drivers with potential riders.

Some services go further, by arguing that it is, fundamentally, “a noncommercial enterprise.”

PERSONAL AUTO POLICIES

Rideshare Exclusion

An insured's personal auto policy does not cover liability for any damages for which the insured becomes liable when the covered vehicle is being used as a rideshare, i.e. for Uber or Lyft, at the time of the accident

PERSONAL AUTO POLICIES

Rideshare Exclusion

Most personal auto policies exclude coverage for any vehicle while it is being used "as a livery conveyance."

Representatives of several of the nation's largest auto insurers confirmed their current standard personal lines policies would exclude coverage for commercial use.

PERSONAL AUTO POLICIES

Rideshare Exclusion

* The "Uber-type" program operators cover the driver and vehicle only while actually transporting a passenger; hence, there is a gap in coverage during the time the driver has the app on seeking a passenger and when the passenger is actually in the vehicle.
* Regulations that are required for taxicab owners and operators are not applicable to Uber drivers. This is another aspect of a personal auto claim that must be considered should an injury occur to the passenger, named insured or a third party.

PERSONAL AUTO POLICIES

Rideshare Exclusion

- It is customary for personal auto policies to cover vehicles used in carpools
- The rideshare exclusion specifically states: "This Exclusion **(A.5.)** does not apply to a share the-expense car pool."
- However, auto insurers limit the definition of car-pooling and car-sharing arrangements to ones in which costs are shared by the driver and passengers. The driver must not earn a profit on the ride

PERSONAL AUTO POLICIES

Rideshare Exclusion

Unlike taxi drivers, rideshare drivers are not employees of the company they are driving for. In most cases, Uber and Lyft do not claim legal responsibility for their drivers.

PERSONAL AUTO POLICIES

Exclusions

Business Use Exclusion:

Maintaining or using any vehicle while that "insured" is employed or otherwise engaged in any "business" (other than farming or ranching) not described in Exclusion **A.6.**

This Exclusion **(A.7.)** does not apply to the maintenance or use of a:

a. Private passenger auto;
b. Pickup or van; or
c. "Trailer" used with a vehicle described in a. or **b.** above.

PERSONAL AUTO POLICIES

Business Use Exclusion

A personal auto policy is designed to cover *only* the personal use of a private-passenger vehicle, not the commercial use of a vehicle. This commercial use exclusion extends beyond ride-sharing. It includes any business use of a private-passenger vehicle.

PERSONAL AUTO POLICIES

Business Use Exclusion

Under the Business Use Exclusion, coverage is determined based on the use of the vehicle at the time of the accident

PERSONAL AUTO POLICIES

Business Use Exclusion

"BUSINESS USE" DEFINITION

- The "automobile business" is defined as including "selling, repairing, servicing, storing or parking vehicles designed for use mainly on public highways."
- In other words, when one takes a vehicle to a dealer for repairs or servicing and the mechanic "test drives" the auto, coverage does not follow the vehicle. The dealer must have their own coverage. Likewise, when the insured goes to a fancy restaurant and the valet parking attendant goes joyriding while the insured has dinner, there is no coverage for the valet attendant.

PERSONAL AUTO POLICIES

Allstate Ins. Co. v. Zellars

- An employee of a pipe line business was on the road transporting equipment. After some equipment was picked up, the employee returned to his hotel. He then went into town for dinner when the accident occurred.
- The driver sued his personal auto insurance (Allstate) for coverage
- The personal auto policy excluded coverage where the use of the vehicle occurred while the insured was employed or engaged in any business or occupation.

PERSONAL AUTO POLICIES

Allstate Ins. Co. v. Zellars

- The personal auto insurer argued that the employer was charged with the primary duty to defend its driver while driving the employer's truck to the cafe, with the employer's permission, after his wages had ceased, and that the business use exclusion applied
- The court determined that the "other insurance" provision was not applicable since there was no other "valid and collectible" insurance from the employer at that time
- The trial court determined that the personal auto insurer had a duty to defend and indemnify the driver

PERSONAL AUTO POLICIES

Allstate Ins. Co. v. Zellars

- The jury found that the driver was not using the employer's truck in his business or occupation at the time of the accident
- The Supreme Court of Texas also concluded that coverage applied. In doing so, the Court focused on the use of the vehicle at the time of the accident.
- Even though the vehicle was clearly a commercial vehicle, the Court determined that the use was of a personal nature at the time of the accident and therefore the exclusion did not apply.

PERSONAL AUTO POLICIES

Business Use Exclusion

Rideshare drivers are not employees, but rather independent contractors acting as commercial drivers.

Most personal auto insurance policies prohibit coverage for commercial use, unless the insurer knows about it in advance. Usually, the driver's personal auto insurance policy is invalidated or canceled if the insurer discovers that the driver is driving for a ridesharing program.

PERSONAL AUTO POLICIES

Esurance Prop. & Cas. Ins. Co. v. Johnson

Identical Business Use Exclusion language:

> "This language disclaims coverage when the insured is using 'any vehicle' while 'engaged in any business' unless the insured first discloses the 'business use of a covered auto.' In other words, this exception excludes coverage when the insured uses a vehicle for business purposes without first informing plaintiff of the intent to do so."

Esurance Prop. & Cas. Ins. Co. v. Johnson, No. 16-CV-11880, 2017 WL 4225444, at *3 (E.D. Mich. Sept. 22, 2017).

PERSONAL AUTO POLICIES

Esurance Prop. & Cas. Ins. Co. v. Johnson

The court determined that the exclusion does not apply to business use of a covered auto by an insured that has been disclosed to the insurer, and for which all applicable premiums have been paid.

This language disclaims coverage when the insured is using "any vehicle" while "engaged in any business" unless the insured first discloses the "business use of a covered auto." In other words, this exception excludes coverage when the insured uses a vehicle for business purposes without first informing the carrier of his/her intent to do so.

PERSONAL AUTO POLICIES

Business Use Exclusion

- In particular, the great weight of cases determining whether an insured is operating in furtherance of his/her "business interests" hold that any vehicle operating while under dispatch is operating in furtherance of the named insured's business interests.
- Furthermore, operations that are not directly related to the pick-up or delivery of a load of cargo can still be considered to be in furtherance of an insured's business interests.

For questions or comments, contact:

Julie A. Shehane
(214) 712-9546
Julie.shehane@cooperscully.com

Lauren Smith
(214) 712-9556
Lauren.smith@cooperscully.com