THE ZELLE LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Tuesday, January 9, 2024 | ISSUE 9

Welcome to The Zelle Lonestar Lowdown, our monthly newsletter bringing you news from the trenches on everything related to Texas first-party property insurance claims and litigation. If you are interested in more information on any of the topics below, please reach out to the author directly. As you all know, Zelle attorneys are always interested in talking about the issues arising in our industry.

INSIDE THIS ISSUE

Upcoming Events

You don't want to miss this!

January 11, 2024: Steve Badger will be participating in a session entitled "Badger Steve Badger" at the Storm Restoration Contractor Conference in Denton, TX.

January 17, 2024: Steve Badger will be presenting on current appraisal issues at the Insurance Appraiser and Umpire Association Certification conference in Tampa, Florida

January 17, 2024: Steve Badger will be presenting "Insurance and Public Policy Issues Arising From the 911 Terrorist Attack" at the Tampa Bay Claims Association meeting in

Tampa, Florida.

January 23, 2024: Brandt Johnson will be presenting “What the Hail is Going On? Fraud in CAT Claims” at the National Association of Catastrophe Adjusters (NACA) Annual Convention in Reno, NV on January 23, 2024. More information here.

2024 *WHAT THE HAIL?* Conference February 8-9, 2024!!

REGISTRATION IS FILLING UP - SECURE YOUR SPOT NOW!

The **2024 *WHAT THE HAIL?* Conference** will be held on February 8-9, 2024 at the Irving Convention Center at Las Colinas in Irving, Texas. Here are the details:

Key Information

- **Cost:** $100 (inclusive of all classes/meals/events)
- **Dates:** Thursday, February 8 and Friday, February 9, 2024 - Two-day seminar format (all day Thursday/half-day Friday)
- **Location:** Irving Convention Center at Las Colinas
- **Continuing Education:** Approved for 12 hours of Texas CE credit (10 General and 2 Ethics)
- **Rooms:** The Westin Irving Convention Center. Book your rooms **here** by January 17th!
- **Events:**
  - Welcome Reception Wednesday, February 7, 2024 for all attendees 6:00 pm - 9:00pm.
  - The legendary 80’s Party will return on Thursday evening (February 8, 2024) at the Toyota Music Factory, with a full concert by *The Molly Ringwalds* band... and a few other special surprises.

Register

News From the Trenches

by **Steve Badger**

If you are interested in a full Update From The Trenches, I encourage you to attend the upcoming ***What The Hail?* Conference** to be held on February 8 and 9 at the Irving Convention Center near DFW Airport. Registration info is included above. We presently have over 400 people registered. We will be full at 500. I expect we will get to that number in the next couple weeks. So register soon.

We are really excited to have over 25 industry partners sponsor the event this year. They will all have booths where you can visit with them about their services. Don’t hesitate to ask questions and collect information. Additionally, we hold a really cool charitable activity where you are given a backpack at check-in and asked to fill the backpack with school supplies passed out at the sponsor booths. Fill your backpack and you will have a chance to win a generous gift card. The backpacks are then donated to a local school for homeless children.

The meeting content of the conference is always top notch. Many of our sponsors will be speaking on all the hot topics in the industry. But don’t worry, almost every session is limited to only 20 minutes. So the engineers aren’t going to bore you with any hour long deep dives into highly technical topics. They will give you just enough information so you will understand their topic and know how to deal with it in the claims process. And the Zelle lawyers won't bore you with any lengthy and complicated legal updates. You’ll learn all you need to know about the hot legal topics in short and simple to understand presentations.

See Todd Tippett’s Top Ten list for some of the topics being covered.

The only exception to the 20-minute rule is my **Update From The Trenches** session. That one is longer (I organize the event; I get to set the rules). I will wrap up the day on Thursday with a 45-minute session looking at many of the issues I have raised here over the past several months. It’s a full 45-minute Badger rant.

Overall, I think it is safe to say that every thorny issue we are seeing in the claims, appraisal, or legal process will be addressed either in a full 20-minute session or during my **Update From The Trenches** session. And if we miss anything, we always close with an open "Ask The Experts" session where the audience can text their questions to me and the entire speaker panel is on stage to answer the questions. That's always fun.

Here are some actual review comments received after our 2022 conference…

- "Best CE event I have ever attended." [we hear this one a lot]
- "All Conferences should limit speeches to 20 minutes."
- "I learned more here than from any other event."
- "Informative, fast paced, and fun."
- "I cant think of anything I would change."
- "Better than PLRB, LEA, or Wind."
- "Do it every year please."
- "It is really nice to have a place to connect with industry friends."
- "80's Party is the best industry event of the year."

Speaking of the 80's Party, yes, it is a totally gnarly party. It will be held at the Toyota Music Factory, which is an actual concert venue just across the street from the convention center. You will be transported back to the 1980's (this old guy's favorite decade; during which I spent my six years in college doing a lot of [things]). You will be immersed in 80's themed activities, decorations, and more. So be sure to join me and many others in wearing your favorite 80's garb. The highlight of the night will be a concert (yes, an actual concert) from the top 80's cover band in the country – The Molly Ringwalds. And you thought the Spazmatics were fun last time? Wait until you see The Molly Ringwalds (also, be ready for an appearance by a special guest artist as well). It's going to be an evening you don't want to miss.

With all that said, I do hope you will join us next month at the ***What The Hail?*** **Conference**. I am certain you will not be disappointed that you attended.

Until then, if you want to remain current on all the hot topics in our industry, I encourage you to connect with me on **LinkedIn**. I will continue posting several times a week about various interesting and controversial topics. My posts always generate a lot of interest and dialogue. And it's worth it just to read the angry comments I receive.

See you next month.

1. 12 hours of CE credit.

2. Cheapest two-day conference in the country at $100.

3. Covers all the hot technical topics in the industry (roof dents, dating damage, Xactimate abuse, fraud, collecting weather data, solar panel damage, conducting damage assessments, ethics in claims, and much more).

4. Fast paced sessions only 20 minutes long.

5. Trade show with over 25 industry partners giving away cool swag.

6. Hang-out, collaborate, and have fun with 500 of your insurance industry friends.

7. Covers all the hot legal issues in the industry (appraisal, fraud,

Do Not Underestimate the OLLE

by **Kristin Cummings** and **Kiri Deonarine**

The Occurrence Limit of Liability Endorsement ("OLLE" and pronounced "Ollie") is a hot topic right now in property insurance law as it is being included with increasing frequency in property insurance policies, and many insureds seemingly do not understand how it impacts coverage. Ultimately, many courts that have interpreted OLLEs have held that an OLLE, together with a statement of values ("SOV") can turn a "blanket" policy, with an overall limit available across multiple items and multiple locations into a "scheduled" policy, which limits recovery for each location (and/or item) to the stated value in the SOV□the value of the property the insured reported to the insurer.

By requiring an insured to accurately report the value of covered property, insurers can appropriately assess risk and determine premiums, resulting in a more stable insurance market for all. However, whether an insured (1) fails to read an OLLE in a policy at the time of purchase or (2) intentionally purchases scheduled coverage for lower premiums planning to argue for blanket coverage in the event of a loss, underreporting values in an SOV can have significant consequences. If the insured does not suffer a loss during the policy period, it is possible that the only effect of the insured's sloppy (or dishonest) valuation and underreporting is that the insurer collects less premium than it would if the values were properly reported. But, if the insured suffers a loss, the insured's underreporting can significantly limit the amount it can recover under the policy. Acknowledging the existence and application of an OLLE on the front end leads to transparency for all involved.

concurrent causation, burdens of proof, and much more).

8. Participate in a charity school supplies drive by filling a backpack with pencils, paper, etc. collected from the sponsor tables.

9. Attend an amazing concert by famous cover band *The Molly Ringwalds* at the Thursday night 80's Party.

10. It's an event (and party!) you will be sorry you missed when your friends are all talking about it.

Read the full article here

A Step-by-Step Guide to Texas Concurrent Causation in a Single Case

by **Shannon O'Malley**

In recent years, the plaintiffs' bar has tried to twist and turn the Texas concurrent causation doctrine into a confusing morass in order to create a fact issue and avoid summary judgment. But in *Landmark Partners, Inc. v. Western World Ins*., No. 02-23-00116-CV, 2023 WL 8940812, at *1 (Tex. App. Dec. 28, 2023), the Fort Worth Court of Appeals appropriately applied the doctrine according to the Texas Supreme Court's guidance. The court affirmed summary judgment for the carrier because the concurrent causation doctrine defeated the insured's contractual claim.

In *Landmark*, the insured sought $1.3 million to replace its roof following a May 2020 hailstorm. Two months after the alleged loss, the insurer's adjuster visited the site and determined there was no hail damage. Landmark's public adjuster, however, responded, noting he found hail damage and submitted an estimate for repair. The carrier retained an engineer who found some hail damage to mechanical units on the roof, but determined the damage occurred before the policy took effect in February 2020. Accordingly, the carrier denied the claim.

After suit was filed, Landmark provided expert reports from an engineer and a different public adjuster. Both experts opined that the roof was damaged in the May 2020 storm but also admitted that there were other causes that contributed to the damage including prior hailstorms, construction defects, and wear and tear. Because these experts could not segregate covered from non-covered damage, the trial court granted summary judgment.

On appeal, the court recognized that the concurrent causation doctrine "applies 'when covered and excluded events combine to cause an insured's loss.'" *Id.* at *1 *citing* ***Dillon Gage Inc. of Dall. v. Certain Underwriters at Lloyds Subscribing to Policy No. EE1701590*, 636 S.W.3d 640, 645 (Tex. 2021)**. The court further recognized the Texas Supreme Court's determination that "when a covered event and an excluded event 'each independently cause' the loss, 'separate and independent causation' exists, 'and the insurer must provide coverage.'" *Id. citing* ***JAW The Pointe v. Lexington Ins*., 460 S.W.3d 597, 608 (Tex. 2019)**). Under *Dillon Gage* and *JAW The Pointe*, "if both covered and uncovered events combine to cause a loss, and '[the] covered and uncovered events are inseparable, then causation is concurrent, the insurance policy's exclusion applies, and the insurer owes no coverage for the loss.'" *Id.* at *1. The court further recognized that a carrier cannot breach the insurance contract unless coverage exists.

Based on these principles, the court determined that "[b]ecause an insurer has no obligation to pay for damage caused by an event not covered under the policy, if covered and non-covered events combine to cause the damage, the insured must segregate between the damage attributable to the covered event and the damage attributable to other causes." *Id.* at *2. Ultimately, the court found that when covered and non-covered perils combine, the insured must show one of three circumstances to avoid summary judgment:

> (1) that the damage had only one cause, which was covered by the policy;
> (2) that the damage had multiple independent causes, one of which was covered; or
> (3) although covered and non-covered events combined to cause the damage, [the insured] had segregated between the covered damage and non-covered damage.

Id.

The court recognized the established rule that the insured has "the burden to show that the damage for which it sought coverage resulted from the [ ] storm or another covered event." *Id.* at *3. The court concluded that if the insurance carrier's summary judgment evidence established as a matter of law that segregation of concurrent causes is impossible, the carrier is entitled to summary judgment unless the insured responded with evidence raising a fact issue. *Id.*

The court looked at all the summary judgment evidence and determined that Landmark could not meet its burden to segregate. The court focused on evidence where the experts agreed they could not determine *when* the hail occurred and the experts' recognition that the problems with the roof were due to a combination of "weathering, poor design, poor construction, settlement at the edges, ponding, UV rays, and hail and wind." *Id.* at *6. Ultimately, the experts could provide "no guidance that could be used by a factfinder in estimating when the hail or wind damage had occurred. To the contrary, his testimony indicated that there was no way to make that kind of determination." *Id.* Ultimately, because Landmark could not meet its burden to show the covered event (the May 2020 hail storm) was an independent cause of its damage, and offered no evidence to segregate the covered from non-covered causes of loss, the court of appeals affirmed the summary judgment.

The Fort Worth Court of Appeals' opinion walks through the evidence and accurately applies the concurrent causation doctrine as defined by the Texas Supreme Court. Its three-tiered approach provides guidance to courts and litigants on how concurrent causation should appropriately be applied in the context of hail claims.

AI Update

What is AGI and Why is it Important?

by **Jennifer Gibbs**

Artificial General Intelligence "(AGI") is also called accurate intelligence, strong AI, or full AI, and could hypothetically perform any intellectual task a human could ever do – such as produce objective thoughts, be self-aware, and have the ability to feel, observe, and experience subjectively.**[1]**

To understand AGI, however, it might be helpful to understand the terms Artificial Narrow Intelligence ("ANI") and Artificial Super Intelligence ("ASI").

ANI (or sometimes considered weak AI) is an AI system designed to perform specific tasks.**[2]** An example of ANI is a self-driving car with the specific task of safely controlling a car.

ASI is an AI system designed to far exceed human intelligence – e.g., sentient AI supercomputers. So far, it appears we are nowhere near developing ASI, and it currently remains confined to fictional depictions in sci-fi movies.

AGI is an AI system that exhibits human-like intelligence and is not trained for specific tasks, but is able to do multi-step tasks, despite having little background knowledge. The ability to do in-context learning is an especially meaningful meta-task for AGI.**[3]** AGI is the type of artificial intelligence with the most potential for disrupting the current workforce.

Steve Wozniak, co-founder of Apple, put forward the coffee test that would judge AGI based on its ability to make coffee. The test is as follows:

> "The AI machine has to go to an average American home and find the ingredients and equipment needed to make a cup of coffee, including coffee, a coffee machine, water, and a mug, and then push the right buttons of the machine to brew the coffee. Locating ingredients and mixing them in the right amounts at an unfamiliar location is a difficult task and requires human intelligence." If an AI machine can do this without errors, it's highly likely that the machine qualifies as AGI".**[4]**

Some predict AGI will be reached in the next 10 years and will be able to do any job a human can do. Microsoft claimed — and received pushback for claiming — that its AI systems are already showing **hints** of AGI.**[5]**

Nevertheless, the development of AGI will undoubtedly have a transformative effect on society and can create unique opportunities, but also challenges. It is thus important for each person to educate themselves as to the basics and capabilities of AI as these technologies continue to become part of the fabric of humanity.

[1] https://www.g2.com/articles/artificial-general-intelligence (last visited January 8, 2024).
[2] https://zapier.com/blog/artificial-general-intelligence/ (last visited January 8, 2024).

[3] **https://www.noemamag.com/artificial-general-intelligence-is-already-here/** (last visited January 8, 2024).
[4] **https://www.g2.com/articles/artificial-general-intelligence** (last visited Jan. 8, 2024).
[5]**https://www.pymnts.com/artificial-intelligence-2/2023/microsofts-general-artificial-intelligence-claims-spark-debate/** (last visited January 8, 2024).

Lassoing Liability
with Megan Zeller

Court Denies the Use of Extrinsic Evidence to Determine an "Occurrence" During the Policy Period

When determining the duty to defend in Texas, insurers are typically confined to the eight-corners rule, where insurers may only consider (1) the complaint against the insured and (2) the terms of the insurance policy, without regard to the truth or falsity of those allegations and without reference to facts known or ultimately proven. *See, e.g., GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006). However, in 2022, the Texas Supreme Court recognized that under limited circumstances, extrinsic evidence may be used in determining the duty to defend when "the extrinsic evidence (1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved." *Monroe Guar. Ins. v. BITCO Gen. Ins.*, 640 S.W.3d 195, 197 (Tex. 2022). Texas courts are now beginning to grapple with this new legal framework.

Most recently, in ***Hanover Lloyds Ins. Co. and United Fire & Cas. Co. v. Donegal Mutual Ins. Co.***, the United States District Court of Texas Western District, El Paso Division, held that an insurer did not need to rely on extrinsic evidence when determining if there was an "occurrence" during the applicable policy period.

In *Hanover*, an insured notified its three commercial general liability insurance carriers that it was sued for defective and negligent construction work, where two of the three carriers provided a defense to the insured under a reservation of rights. Donegal Mutual Insurance Company, however, declined to defend. As a result, the two carriers who agreed to defend the insured sued Donegal and filed a joint motion for pretrial judgment, seeking: (1) a declaration that Donegal had a duty to defend the insured; (2) a declaration that Donegal had a duty to indemnify the insured; and (3) a declaration that Donegal breached its own policy by failing to defend or indemnify the insured.

As part of its argument, Donegal asserted that extrinsic evidence was necessary to resolve any ambiguities with regard to when the property damage occurred, which was necessary to determine if there was an "occurrence" under Donegal's policy. Donegal specifically argued that because the Original Petition was filed prior to its policy period, there was an ambiguity as to the exact date of when the property damage occurred. The Western District, however, found that although the date of the alleged construction defect was not explicitly stated in the Original Petition, the fact that there were subsequent amended petitions filed around Donegal's policy period suggested that some of the damage may have occurred at a later date. The Court found that "[t]his means that the extrinsic evidence does not conclusively establish the coverage fact to be proved," and as a result, "the Court cannot conclude that no property damage to the facility occurred due to [the insured's] negligent work during the time period of [Donegal's] policy with [the insured]."

Based on *Hanover* and other recent cases, it appears that Texas courts continue to be relatively conservative when applying extrinsic evidence to coverage concerns. While an insurer may encounter a number of ambiguities during its duty to defend analysis, it is important to remember that Texas courts nonetheless construe coverage in favor of the insured during this analysis.

Application of Rule 702, Post-Amendment, to First-Party Property Case:

Scrutinizing The Bases of Expert Opinions in *State Automobile Mutual Insurance Co. v. Freehold Management Inc. et al.*

by **Eric Bowers**

The amendments to Federal Rule of Evidence 702 took effect December 1, 2023. A few months ago, my colleagues Shannon O'Malley and Claire Fialcowitz commented on the change and how it would require courts to apply a preponderance-of-the-evidence standard in all three prongs for assessing the reliability of an expert's opinions. U.S. District Judge Sam Lindsay of the U.S. District Court for the Northern District of Texas recently applied the Rule amendment on a rehearing of expert challenges in a first-party property case.

State Automobile Mutual Insurance Co. v. Freehold Management, Inc. et al. involves alleged wind and hail damage to a North Texas shopping center roof almost ten years ago, on April 3, 2014. 2023 WL 8606773, *1 (N.D. Tex. December 12, 2023). State Automobile Mutual Insurance ("State Auto") originally filed suit seeking a declaratory judgment regarding coverage for damage claimed to the shopping center because of the April 3, 2014 storm. The shopping center was comprised of multiple retail units, including a Kroger supermarket. State Auto had already paid over $1 million for damage to the center. The dispute principally concerned whether gravel-covered built-up roofs had sustained wind and/or hail damage and needed to be replaced, versus repaired. Defendants countersued seeking actual damages for full roof replacements, and they hired Matt Phelps and meteorologist Rocco Calaci to try to prove their counterclaim that the April 3, 2014 storm had damaged the roofs to the extent that they required full replacement.

After originally hearing the expert challenge in early 2019, the court held that the opinions of both Phelps and Calaci were unreliable and inadmissible. In particular, Judge Lindsay observed that the link between the data relied upon by Calaci and his conclusions were not sufficiently explained/developed in his report or even the subsequent declaration that Defendants submitted from Calaci before the hearing to try to shore up the bases for his opinions concerning the size of hail and speed of wind that occurred at the property on April 3, 2014. Calaci relied on conditions that State Auto had shown conclusively existed before the storm, and he conceded in his deposition that one of the key phenomena on which he relied – the presence of "hook" activity and "gate-to-gate" sheer – did not usually indicate tornadic activity.

Similarly, with respect to Phelps' opinions, the court held in 2019 that the analytical gap between Phelps' conclusions and the data he relied upon was too great and not explained sufficiently. Phelps' report included no analysis demonstrating why his conclusion that the capacity of the roof membrane had been reduced was reliable. As with Calaci, Defendants had also submitted a declaration from Phelps in response to State Auto's Motion to Strike to try to cure the gaps and deficiencies in Phelps' report. But Judge Lindsay outlined his reasoning in a March 31, 2019 order that although Phelps' descriptions of the information he gathered and how he assessed damage to the roofs were fairly detailed, Phelps did not explain why his data, information and observations supported the conclusions in his report and declaration that "hail and buffeting winds on April 3, 2014 damaged the field and underlying decking of the built-up gravel roofs at the Denton Center," or that the roofs needed to be replaced because of it. Based on these defects, Judge Lindsay excluded the opinions of both Calaci and Phelps in their entirety.

After several years of delays due to COVID and criminal dockets, the court heard Defendants' Motions for Reconsideration of its rulings on State Auto's Motion to Exclude. Defendants presented both Calaci and Phelps to testify, and State Auto was allowed to cross-examine. Both parties were allowed to elicit testimony and adduce other evidence relevant to the issues of reliability that the court had previously identified.

The court, in analyzing the evidence presented, first acknowledged the December 1, 2023 amendment to Federal Rule of Evidence 702, which now provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

As the gatekeeper of evidence, the court noted in particular the Advisory Committee's comment to the amendment to Rule 702 that added the underlined portion requiring a preponderance weighing of the evidence's reliability in all respects. The amendment also changed part (d) from "the expert has reliably applied the principles and methods to the facts of the case" to "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." These subtle changes were intended to remind the courts that the *reliability* factors in prongs (b) – (d) of the Rule must all be measured – by the court as gatekeeper – under a preponderance-of-the-evidence standard.

Although the Advisory Committee's Rule amendments are subtle, its comments are

not. The comments note that many courts had been incorrectly characterizing threshold questions of the sufficiency of an expert's basis and application of his/her methodology as questions of *weight*, rather than correctly as questions of admissibility. As Judge Lindsay observed, the Advisory Committee's comments further pointed out that the reliable application of an expert's basis and methodology is crucial when considering *forensic* expert testimony (such as that involved in most first-party property cases):

> The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. Forensic experts should avoid assertions of absolute or one hundred percent certainty – or to a reasonable degree of scientific certainty – if the methodology is subjective and thus potentially subject to error. In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods. This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty.

State Auto, 2023 WL 8606773, *11 (citing Fed. R. Evid. 702 Advisory Committee's notes on 2023 amendments).

After holding a *Daubert* hearing at which both Calaci and Phelps testified, and after considering an additional 3,000 pages of materials that Defendants presented to fill the gaps in applying their methodologies to the underlying facts to reach their conclusions, Judge Lindsay reaffirmed his holding that Calaci's opinions should be excluded in their entirety. The court modified its previous ruling regarding Phelps but, notably, maintained its exclusion of Phelps' opinion testimony that the roofs required replacement instead of repair, as well as any opinions that were premised on the hail, wind, and tornado conclusions reached by Calaci. The court held that although these opinions by Phelps were still excluded, Phelps would be allowed to testify regarding damage to the roofs and the causes of the damage only.

The depth of scrutiny employed by the court in analyzing the admissibility of Calaci and Phelps' respective opinions is the cornerstone of this opinion. The court, applying the amended Rule 702, meticulously weighed the admissibility of each of their opinions based on whether it was more likely than not that the underlying facts, methodologies and applications of those methodologies to the underlying facts were each more likely reliable than not. This is what Rule 702 requires. Indeed, as the Advisory Committee commented, it is what Rule 702 has always required.

Applying Rule 702 correctly requires diligent and thoughtful analysis as Judge Lindsay demonstrated. Courts should evaluate the expert opinion foundations, methodologies and their application to the conclusions reached under the preponderance-of-the-evidence standard to properly fulfill their gatekeeper function.

Concurrent Causation: Courts Should Not Ignore Common Sense to Find That All Claimed Damage Resulted From a Single, Covered Cause

by **David B. Winter**

In the last few years, the United States Court of Appeals for the Fifth Circuit has certified questions to the Texas Supreme Court concerning the application of the concurrent causation doctrine. But recently, in *Shree Rama, LLC v. Mt. Hawley Insurance Co*., No. 23-40123, 2023 WL 8643630 (5th Cir. Dec. 14, 2023) the Fifth Circuit was able to appropriately apply the doctrine without guidance from Texas' highest court.

Absent policy language that requires a different result, Texas courts apply the concurrent causation doctrine when covered and non-covered perils contribute to a loss. That doctrine provides that when "covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril(s)." *Wallis v. United Servs. Auto. Ass'n,* 2 S.W.3d 300, 302−03 (Tex. App.—San Antonio, 1999, pet. denied) (citing *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971); *Paulson v. Fire Ins. Exch*., 393 S.W.2d 316, 319 (Tex. 1965); *Warrilow v. Norrell*, 791 S.W.2d 515, 527 (Tex.App.—Corpus Christi 1989, writ

Spotlight:

Be sure to register for the 2024 *What the Hail?* Conference!

denied)); *see also Methodist Hosps. of Dallas v. Affiliated FM Ins. Co.,* 521 F.Supp.3d 633, 639 (N.D. Tex. 2021), aff'd, No. 21-10424, 2021 WL 6140253 (5th Cir. Dec. 29, 2021) (citing *JAW The Pointe, L.L.C. v. Lexington Ins. Co.* , 460 S.W.3d 597, 608 (Tex. 2015)). Importantly, in such cases, the insured bears the burden to segregate the damage attributable solely to the covered peril. An insured's failure to carry this burden of proof can be is fatal to its ability to pursue the claim. *See Wallis,* 2 S.W.3d at 303 (citing *Telepak v. United Servs. Auto. Ass'n*, 887 S.W.2d 506, 507–08 (Tex. App.—San Antonio 1994, writ denied)); *Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co.*, 130 S.W.3d 181, 198 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

Recently, in *Shree Rama*, the Fifth Circuit addressed a situation where an insured twice sought coverage for damage to its roof, which triggered the concurrent causation doctrine. In particular, in 2019 Shree Rama submitted a claim for wind damage to its hotel roof to Mt. Howley Insurance Co. That claim was denied based on the adjuster's determination that the claimed damage was the result of wear and tear alone (an excluded peril). *Id*. at *1.

In July 2020, Shree Rama submitted another claim to Mt. Hawley for alleged roof damage from Hurricane Hanna – which caused severe damage in the area around the hotel. Mt. Hawley's adjuster found minimal damage from the hurricane, but that amount was below the policy's deductible. The investigator retained by Shree Rama did not find any additional hurricane damage but concluded that "wear and tear had made the roof too brittle to spot repair and that it would need to be replaced in full." *Id.* Mt Hawley concluded that Shree Rama was simply claiming coverage for the same uncovered damage submitted in 2019 and, as such, it denied the 2020 claim.

The District Court granted summary judgment to Mt. Hawley based on Shree Rama's failure to segregate covered losses from non-covered losses. The Fifth Circuit affirmed, finding:

> Shree Rama did not carry its burden under the concurrent causation doctrine. The policy issued by Mt. Hawley explicitly covers damage from wind and explicitly excludes damage from wear and tear. Viewing the facts in the light most favorable to Shree Rama, it is possible that some damage to the hotel roof came from Hurricane Hanna and some from wear and tear. But the concurrent causation doctrine requires Shree Rama to provide the jury with "a reasonable basis" for allocating the damage between wind and wear and tear. *See* [*Lyons v. Millers Cas. Ins. Co. of Tex*., 866 S.W.2d 597, 601 (Tex. 1993)]. Shree Rama provided no reasonable basis. To the contrary, Shree Rama admitted at the district court level that its causation expert "could not definitively attribute [specific damages to the roof] to Hurricane Hanna when deposed." *Shree Rama, LLC v. Mt. Hawley Ins. Co*., No. 1:21-CV-00091, 2023 WL 375358, at *1 (S.D. Tex. Jan. 24, 2023). Without a basis for allocating damages between covered and non-covered causes, Mt. Hawley was entitled to summary judgment.

Id. at *2.

Most notably, the Fifth Circuit distinguished the two cases wherein it certified questions to the Supreme Court of Texas regarding whether wear and tear triggers the concurrent causation doctrine - *Frymire Home Servs., Inc. v. Ohio Sec. Ins. Co*., 12 F.4th 467, 472 (5th Cir. 2021*); Overstreet v. Allstate Vehicle & Prop. Ins. Co*., 34 F.4th 496, 499 (5th Cir. 2022). In particular, the court found that based on the record presented, unlike in *Frymire* and *Overstreet*, Shree Rama could not colorably argue that its damage was solely the result of a covered peril

> [A]s we acknowledged in *Frymire*, without evidence from the insured "suggesting that the particular covered ... damage was the sole cause of the loss," a case is "(at best) a concurrent cause case in which the insured ha[s] failed to attribute loss to the covered peril." 12 F.4th at 472. In such cases, summary judgment is appropriate. *Id.* Shree Rama provided no evidence suggesting that Hanna was the sole cause of damage to the hotel roof. Nor could it. Shree Rama had filed an insurance claim for the same roof damage one year before the storm. As

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noted above, Shree Rama's expert even testified that he could not definitively designate the storm the sole cause of damage.

Id. at *2.

The takeaway from this decision is that just because an insured claims that all of its alleged damage is the result of a single, covered peril, does not make it so. Counsel for insurance carriers should explore the plausibility of any such theory through both facts evidencing damage from non-covered perils and deposition of the insured's expert. If definite evidence of non-covered damage can be presented, a Texas court should hold the insured to its burden of allocating its damages between the covered and non-covered perils.

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