Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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FARMERS WINS STATEWIDE MDL FOR THOUSANDS OF TEXAS WIND-HAIL CASES

On April 7, 2015, the Texas Multidistrict Litigation Panel granted Farmers' request to transfer over 1,500 wind/hail storm cases into multidistrict litigation in MDL No. 14-0882, *In re Farmers Insurance Company Wind/Hail Storm Litigation.* This MDL is unique and unprecedented in several respects. First, this is the single largest MDL created in Texas jurisprudence. This MDL encompasses cases from all over Texas against Farmers from February 29, 2012 and June 11, 2014. Second, this MDL encompasses eight major storms across Texas and many smaller intervening storms, more than any prior MDL in Texas. Third, this MDL was divided into three regional MDL pretrial courts, which has never happened before with any prior Texas MDL proceeding. The MDL Panel appointed three judges to handle these cases across Texas—Judge Sylvia Matthews in Harris County, Judge David Evans in Tarrant County, and retired Judge Elma Teresa Salinas Ender in Webb County.

The division of the cases between the three judges is also unprecedented. Cases from six of the major storms are assigned to Judge Ender in Webb County. Cases from two of the major storms are assigned to Judge Evans in Tarrant County. Of the remaining cases, those with plaintiffs' counsel in Harris County are assigned to Judge Matthews in Harris County. The remainder will be assigned to the various three pretrial judges based on recommendations from the pretrial judges to the MDL Panel. Never before have cases been assigned based on the location of plaintiffs' counsel, although this is certainly consistent with the requirement under Rule 13 of the Texas Rules of Judicial Administration that "transfer would be for the convenience of the parties and witnesses and would promote the just and efficient conduct of the cases." See Tex. R. Jud. Admin. 13.3(a)(2). This is also the first time that the Panel has taken suggestions or recommendations from any pretrial judge as to where a case should be transferred. This also marks the first time that the MDL Panel has granted such a sweeping request to transfer cases into MDL across the state of Texas. The Panel also gave explicit guidance as to what should be done with regard to other cases involving claims against Farmers arising out of wind/hail storms across Texas. If such claims arose within the time parameters of the current MDL, they can be tagged into the current MDL. If the cases fall outside the date range, Farmers can bring a second motion to transfer. This new guidance, analysis, and unique remedy involving multiple pretrial courts will change the approach and practice of moving to transfer cases to MDL in Texas.

The law firm of Martin, Disiere, Jefferson & Wisdom is honored to have had the opportunity to represent Farmers before the MDL Panel in this MDL proceeding. MDJW is pleased to stand at the forefront of firms helping to shape the law in Texas concerning MDL practice as it relates to insurance carriers in mass litigation.

TEXAS SUPREME COURT TACKLES CONCURRENT CAUSATION AND UPHOLDS EXCLUSION IN A HURRICAN IKE PROPERTY DAMAGE CASE

Last Friday, April 24th, in *JAW The Pointe, LLC v. Lexington Insurance Co.* 2015 WL 1870054 (Tex. 2015) the Texas Supreme Court affirmed the Fourteenth Court of Appeals and refused to reinstate a $3.7 million trial verdict against Lexington Insurance Co. for losses stemming from property damage from Hurricane Ike.

The dispute involved losses the insured incurred as a result of city ordinances triggered by damage to an apartment complex during Hurricane Ike. The parties agreed the insurance policy covered the costs of complying with city ordinances, but only if the policy covered the property damage that triggered the enforcement of the ordinances. In this case the property damage resulted from wind, which the policy covers, and flooding, which the policy expressly excludes. Lexington provided the primary coverage layer, limited to $25 million per occurrence. Hurricane Ike damaged about 135 other complexes also covered by the same policy. The insured initially planned to repair the apartments, but the City of Galveston ordinance required that all apartment complexes that were "substantially damaged" (meaning they sustained damage equal to or exceeding 50% of their market value) must be brought into compliance with current code requirements, which included raising the structures to a base flood elevation. Two months after the hurricane, the insured submitted a permit application to the city and included a third-party consultant's estimate that it would cost $6,256,887 to repair all of the damage the building had sustained. The estimate did not distinguish between damage caused by wind and damage caused by flooding. The city determined that the building was in fact "substantially damaged" because the cost of the damage "equals or exceeds 50 percent of the market value." The city also found that because the building was "substantially damaged," city ordinances also required the insured to elevate the apartments three additional feet.

Lexington's building consultant submitted a report estimating the building sustained wind damage totaling approximately $1,278,000 and flood damage of approximately $3.5 million. Subsequently the insured submitted a proof of loss to Lexington, requesting payment of $817,940, which represented the $1,278,000 in wind damage less an applicable deductible. Lexington promptly paid this claim, but did not pay the additional amounts the insured had claimed as costs incurred to demolish and rebuild the building pursuant to the city's ordinances. The insured claimed that Lexington never formally denied the claims for these ordinance-compliance losses.

The insured filed suit in July of 2009 asserting claims for breach of the insurance contract and violations of the Texas Insurance Code and the Texas Deceptive Trade Practices Act. Despite the lawsuit, Lexington and the adjuster continued working on the claim. In September 2009, Lexington notified the insured by letter stating it would not pay for flood damage or for costs to comply with the city ordinances. Meanwhile, Lexington continued paying claims associated with the other apartment complexes that its policy covered, and in January 2010 it notified the insured that the policy's $25 million per-occurrence limit had been exhausted.

Prior to trial, Lexington filed two motions for partial summary judgment, one seeking dismissal of the breach of contract claim on the ground that Lexington had exhausted the policy limits, and the other seeking dismissal of any claims based on flood damage on the ground that the policy expressly excluded coverage for such damage. The insured did not oppose these motions, and the trial court granted them, leaving only the insured's statutory claims for trial. On the remaining claims, the jury returned a verdict finding that Lexington had engaged in "unfair or deceptive acts or practices in the business of insurance" by failing to (a) "attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the insurer's liability had become reasonably clear;" (b) provide a reasonable explanation for its coverage denial; and (c) affirm or deny coverage within a reasonable time, and that Lexington had engaged in this conduct "knowingly." The jury found actual damages and expenses of $1,230,000 and awarded additional statutory damages of $2.5 million. Based on the jury's verdict, the trial court entered a judgment awarding these damages plus $170,000 in attorney's fees.

The court of appeals reversed and rendered a take-nothing judgment concluding the policy excluded coverage for the code-compliance losses and therefore Lexington could not be liable for Insurance Code and DTPA violations. Relying on the policy's anti-concurrent-causation clause, the court of appeals held the policy excluded coverage of costs to comply with the city's ordinances because the necessity of compliance resulted at least in part from flooding, expressly excluded from the policy.

In its analysis last Friday, the Texas Supreme Court began by reiterating that, as a general rule, there can be no claim for bad faith when an insurer has promptly denied a claim that is not covered, unless there was some "extreme" conduct causing damages unrelated to the policy claim. For that reason, the Court confined its inquiry to whether or not the policy provided coverage for the claimed costs. The Court found: first, the policy expressly excludes coverage for any "loss or damage caused directly or indirectly by any of the" listed causes, "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Second, the policy specifically lists "flood" as an excluded cause, and the parties agreed the policy does not cover losses caused by flooding. And third, even though the policy expressly excludes coverage for any losses that result "directly or indirectly" from "[t]he enforcement of any ordinance or law," there were two endorsements that the parties agreed provided coverage for such losses, despite the exclusion.

The Court acknowledged that it had not previously addressed an anti-concurrent-causation clause but listed decisions from federal courts and lower courts of appeals that have interpreted and upheld the applicability of virtually identical clauses under Texas law and other states' laws. They concluded the evidence conclusively established that "Hurricane Ike caused both wind damage and flood damage, in a sequence of events, which combined to cause the city to enforce the ordinances against The Pointe". The Court further agreed with the Fifth Circuit that, under Texas law, the anti-concurrent-causation clause and the exclusion for losses caused by flood, "read together, exclude from coverage any damage caused by a combination of wind and water." The high court ultimately said because the evidence established that flood damage triggered the enforcement of the city ordinances and thus 'directly or indirectly' caused the insured's losses, the policy excludes coverage for such losses "regardless of the fact that wind damage 'contribute[d] concurrently or in any sequence to the loss." The court affirmed and found the policy did not cover the insured's losses, thus the insured cannot recover for the insurer's bad faith failure to effectuate a prompt and fair settlement of the claim.

THE FIFTH CIRCUIT PROVIDES GUIDANCE ON "ERODING LIMITS" LIABILITY POLICIES AND THE DUTY OF A PRIMARY INSURER TO DEFEND

On April 21st, the Fifth Circuit Court of Appeals in New Orleans examined whether defense costs and attorney's fees were "expenses" and whether an endorsement transforms the policy into an "eroding limits" liability policy. In *Amerisure Mut. Ins. Co. v. Arch Specialty Ins. Co*. 2015 WL 1811843 ((5th Cir. April 21, 2015), Arch Specialty Insurance Company appealed an adverse summary judgment in favor of Amerisure Mutual Insurance Company in an insurance policy dispute. Amerisure cross-appealed. In 2006, Amerisure issued a Texas Commercial Package Policy to Admiral Glass & Mirror Co. The policy afforded coverage in excess of any coverage afforded by a controlled insurance program policy. Arch issued an Owner Controlled Insurance Program ("OCIP") policy to Endeavor Highrise, LP and its contractors and subcontractors for bodily injury and property damage arising out of construction of the Endeavor Highrise. Admiral was a subcontractor insured under the policy. The policy had combined bodily injury and property damage limits of $2,000,000 per occurrence, a general aggregate limit of $2,000,000, and a products-completed operations aggregate limit of $2,000,000. The OCIP policy contained a Supplementary Payments provision which provided that Arch will pay "[a]ll expenses we incur" in connection with any covered claim, and that "[t]hese payments will not reduce the limits of insurance." Endorsement 16 to the OCIP policy expressly deleted and replaced the statement quoted above with: "[supplementary payments] will reduce the limits of insurance." The OCIP policy also provided that Arch's duty to defend ends "when we have used up the applicable limit of insurance in the payment of judgments or settlements."

Prior to the claim giving rise to this lawsuit, Arch settled three claims under the OCIP policy: a wrongful death suit arising from a worker's fatal fall (settled for $1,555,000.00; attorneys' fees and defense costs of $159,543.160); a toilet leak claim in one of the apartment units (settled for $60,000; attorneys' fees and defense costs of $62,620.18 incurred); and a fire sprinkler leak claim (settled for $880,000; attorneys' fees and defense costs of $31,671.87 incurred).

On June 7, 2010, Endeavor sued Admiral and others for faulty work. Amerisure tendered the lawsuit to Arch as the primary insurer. Prior to Arch accepting the defense, Amerisure incurred $23,879 in defense fees. In April 2012, Arch withdrew from defense of the lawsuit asserting that attorneys' fees, defense costs, and settlements of $2,000,000 from defending Admiral and other subcontractor defendants exhausted policy limits. Amerisure took over the defense and incurred additional fees and costs of $114,957 before settling the claims. In total, Arch paid a settlement of $1,555,000 and defense costs of $159,543 under the general coverage limit of the OCIP, and paid settlements totaling $1,472,032 and defense costs of $527,967 under the products-completed operations coverage of the OCIP policy.

Amerisure sued Arch in Texas state court for breach of contract, contending Arch wrongfully refused to defend and indemnify Admiral. Arch removed the case to federal court based on diversity jurisdiction. Amerisure filed a motion for partial summary judgment seeking a declaration that: (1) Arch had not exhausted the policy because defense costs did not erode the policy limits; or (2) Arch had a continuing duty to defend after the policy was exhausted. Arch filed a cross-motion for partial summary judgment on the same issues and a second motion for partial summary judgment seeking a declaration on a third issue: that it had not "wrongfully exhausted" the policy by paying uncovered claims. The magistrate judge determined (1) defense costs and attorneys' fees were "expenses" under the Supplementary Payments provision and therefore eroded the policy limits; (2) though subject to the same policy limits, the duty to defend ended only when the policy limits were exhausted by judgments and settlements alone (i.e., not by defense costs); and (3) coverage existed for the toilet and sprinkler leaks and therefore Arch did not "wrongfully exhaust" the policy limits with payments on uncovered claims. The district court adopted the magistrate's recommendation over both parties' objections and held that Arch did not breach its duty to indemnify, but did breach its duty to defend Admiral.

Arch appealed the finding that it had a duty to defend Admiral that had been breached. Amerisure cross-appealed the part of the judgment holding that Arch had no duty to indemnify Admiral. Turning first to the meaning of the term "expenses," the court noted: "given it its ordinary meaning, when an insurer pays costs of defense, including attorneys' fees, that is an "expense" to the insurer. Absent some indication that a different meaning is intended, we see no reason to deviate from this ordinary meaning of the term." Turning then to the question of whether "supplementary payments" erode the limits, the court concluded the endorsement transforms the policy into an "eroding limits" policy. The court further found the district court's finding that there are two separate policy limits for indemnity and defense essentially "reads the endorsement out of the policy." Finally, the court turned to the argument that Arch wrongfully exhausted the policy by paying claims that should have been excluded under the "products-completed" coverage. The court questioned whether Amerisure had the authority to argue that amounts were "wrongfully paid" and whether such a claim even exists and found that even if assuming arguendo that such a claim did exist, it did not apply here. The court affirmed the district court's judgment regarding the duty to indemnify, reversed the district court's judgment regarding the duty to defend, and rendered judgment for Arch.

FEDERAL COURT IN AUSTIN GRANTS SUMMARY JUDGMENT IN FAVOR OF INSURER IN PLUMBING OVERFLOW CASE

A federal district court ruled two weeks ago that damage to a dwelling from a sewage overflow was limited under a homeowners policy in *Durrett v. Nationwide Prop. and Cas. Ins. Co.*, No. A-14-CA-167-SS, 2015 WL 1564783 (W.D. Tex. Apr. 6, 2015). The

dispute began when Keith Durrett, a homeowner who held a policy with Nationwide Insurance, contacted his municipal utility district (KMUD) because of sewage water entering his home. Durrett contracted with ServPro to pump water out of the house, during which a Nationwide adjuster was present. The next day, a KMUD representative came to the property and replaced a street-level check valve that was partially responsible for the overflow.

The Nationwide Policy contained an exclusion for damage caused by "(2) water or water-borne material which...(a) backs up through sewers or drains from outside the dwelling's plumbing system." The Durretts had also purchased additional optional coverage, which included "up to a maximum of five (5) percent of the Coverage A [$168,000]...for direct damage to covered property caused by or resulting from water or waterborne material which: 1. backs up through the sewers or drains from outside the dwelling's plumbing system; or 2. overflows from a sump pup, sump pump well or other system designed to remove subsurface water or water-borne material from the foundation area." Finding that both the main exclusion and the option coverage provision applied, the adjuster issued the optional coverage limit of $8,595 to the Durretts. The Durretts disagreed, reasoning that since their contractor ServPro was able to pump all the water out of the house into a storage tank and an employee of the city replaced the street-level valve the next day when the interior leaking had already stopped, the leak was caused by the dwelling's plumbing system and the exclusion therefore did not apply. In response to this disagreement, the Nationwide adjuster retained an engineer to perform a reinspection. The engineer concluded that the sewer backup was caused by two concurrent failures: a failed coupling located within the dwelling and a failed check valve outside the premises. Based on these findings, Nationwide again determined that the policy's optional coverage provision limited payment to 5% of the entire dwelling limit.

The Durretts filed suit against Nationwide in Llano County state court and Nationwide removed to the District Court for the Western District of Texas. The substance of the Durretts' argument was that the exclusion at issue depended on the location of the plumbing failure (i.e. whether it occurred inside or outside the dwelling). In interpreting the relevant policy provision, the Court concluded that coverage did not depend on where the plumbing failure occurred, but turned instead on whether the water came from outside the dwelling's plumbing system. The only admissible evidence in the record was the affidavit of Nationwide's adjuster, who testified that the damage had resulted from a back-flow of city sewer water that then entered the dwelling's plumbing, and that this back-flow was concurrently caused by the failure of a street-level valve and a coupling that was part of the dwelling's plumbing system. The Court found this evidence placed the damage squarely within the exclusion and optional-coverage limit. The Court also rejected as unsupported by any evidence the argument by the Durretts' attorney that the sudden-and-accidental-discharge provision applied because the water had in fact leaked from a water-storage unit attached to the dwelling. Finally, the Court rejected the Durrett's argument claiming some allegedly conflicting statements made by the adjuster during claims handling should affect the meaning of the policy language, finding these statements hearsay and stating that coverage determinations turn on the plain language of the policy, not on any contrary interpretation by Nationwide or its adjusters.

Finding that Nationwide had correctly applied the optional-coverage limit, the Court granted summary judgment in favor of Nationwide on the Durretts' breach-of-contract cause of action and their extra-contractual claims of bad faith and violations of the Texas Insurance Code and the Deceptive Trade Practices Act.

FEDERAL COURT IN SAN ANTONIO GRANTS SUMMARY JUDGMENT IN FAVOR OF INSURER IN COMMERCIAL FORGERY CASE

A federal district court recently provided guidance on whether an employee's forgery falls within the scope of commercial-theft coverage. The dispute in Tesoro Refining & Marketing Company LLC v. Nat. Union Fire Ins. Co. of Pittsburgh, Pennsylvania, No. SA:13-CV-931-DAE (W.D. Tex. Apr. 7, 2015) began with an arrangement between Tesoro Refining and Ensmex Corp. (a petroleum distributor) whereby Tesoro sold fuel to Ensmex on credit. Calvin Leavell was an employee of Tesoro responsible for managing Ensmex's credit account and Ensmex’s letters of credit that secured the account. After several transactions and audits, Tesoro presented Ensmex's letter of credit to Bank of America, which informed Tesoro that the letter was no longer valid. A forensic investigation suggested that Leavell had forged the signatures on several of the relevant letters of credit and security agreements.

Tesoro made an insurance claim with National Union Fire for losses related to these forgeries, which National denied. Tesoro then filed suit against National for breach of contract and breach of the duty of good faith and fair dealing. At issue in the lawsuit was the policy's Employee Theft provisions, which provided that National would "pay for loss of or damage to 'money,' 'securities' and 'other property' resulting directly from 'theft' committed by an 'employee'...For the purposes of this Insuring Agreement, 'theft' shall also include forgery." Tesoro claimed the “loss” was the loss of fuel that it had sold to Enmex on credit.

National argued that the employee-theft provision did not cover a loss caused by an employee's forgery that does not qualify as a "theft," defined as an "unlawful taking of property to the deprivation of the insured." Tesoro countered that phrase "'theft' shall also include forgery" meant that forgery could equate to theft, such that there was coverage any time any loss resulted from a forgery. After engaging in a thorough interpretation of the relevant provisions, the Court concluded that there had to be an employee forgery that was used to effectuate an “unlawful taking” of property from the insured. Applying this interpretation to the facts of the case, the Court found that Leavell’s forgery did not cause him to exercise any control over the fuel that Tesoro sold to Ensmex. Accordingly, the Court granted summary judgment in favor of National Union on Tesoro’s claims for breach of contract and breach of the duty of good faith and fair dealing.

[Editor's Note: although the Court sided with National Union when Tesoro had claimed that the loss was the fuel it sold to Ensmex, the Court cited to another federal court case from New Jersey in which the claimed loss was the money that a bank was required to reimburse customers because of an employee's forgery. It is therefore unclear whether the court would have ruled the same way if Tesoro had claimed that the loss was monetary or some other benefit that the employee had derived from the forgery].

DALLAS COURT OF APPEALS DISCUSSES ADMINISTRATIVE TOOL AVAILABLE TO INSURERS TO RECOVER FROM UNINSURED MOTORISTS

Two weeks ago, in an appeal from a jury verdict in favor of an insurance company against an uninsured motorist, the Dallas Court of Appeals discussed a tool that insurers can use in seeking reimbursement for claims paid: the threat of driver's license revocation under the Texas Transportation Code. In *Eoff v. Central Mut. Ins. Co.*, No. 05-14-00035-CV, 2015 WL 1568374 (Tex. App.--Dallas Apr. 7, 2015), David Eoff allegedly caused an automobile accident involving Charles Cabaniss, an insured of Central Mutual Insurance Company. After Central Mutual paid Cabaniss for damages related to the accident, Central sought reimbursement from Eoff, who was not listed as an insured under his own policy. Eoff agreed to pay Central Mutual $8,969 through installment payments, but defaulted on some of his payments. Central Mutual sued Eoff for breach of contract, and a jury ruled in Central's favor.

The Court of Appeals first addressed Eoff's contention that the trial court did not have jurisdiction over the case because Central Mutual had failed to exhaust its administrative remedies with the Texas Department of Public Safety. The relevance of the DPS in this case began when Eoff and Central Mutual agreed to sign Form-19, a document issued by the DPS that allows drivers to prevent revocation of their driver's license by showing they have settled a dispute related to an automobile accident. The form in this case was an "Installment Agreement" that obligated Eoff to make monthly payments to Central Mutual, and this agreement was the contract that Central Mutual claimed that Eoff breached when he stopped making payments. Throughout the litigation, Eoff argued his executed of Form-19 was not a contractual agreement, but merely an administrative mechanism to maintain his license, and that Central Mutual was therefore required to pursue revocation through the DPS before it sued Eoff in district court.

In addressing Eoff's argument, the Court discussed Texas Transportation Code Section 601.151.-.153, which provide for suspension of a license and registration if a driver not covered by liability insurance is involved in an accident resulting in bodily injury or death or in damage of at least $1,000 to a person's property. A license-holder may prevent suspension, however, by the timely filing of Form SR-19 with the DPS, described in the regulations as an installment agreement or other similar agreement between the parties. If the license-holder defaults on the agreement, the other party may then file a notice of default through Form SR-73, which will result in suspension of the license.

The Court of Appeals rejected Eoff's argument claiming Central Mutual had to exhaust its administrative remedies with DPS before filing suit and obtaining a judgment because other provisions of the Code expressly allowed for judicial remedies after a driver's default. Specifically, the Code allows a party that obtains a judgment to send the DPS Form SR-42 (a transcript of civil proceedings) and Form SR-62 (notice of unsatisfied judgment). The Court concluded the trial court had proper jurisdiction and that Form-19 was a binding contract that obligated Eoff to pay Central Mutual $8,069.25 through monthly installments. The Court also found the trial court erred by entering judgment of this entire amount, holding Eoff was only liable for past-due amounts of $1,200 because the installment agreement did not contain an acceleration clause and Eoff had done nothing to repudiate the entire contract.

This case provides helpful instructions on how insurers may use the Transportation Code to encourage payment from at-fault motorists, but also stresses the importance of including every desired term in installment agreements like Form SR-19, such as acceleration clauses or security agreements to ensure full payment from the uninsured motorist.

SOUTHERN DISTRICT OF TEXAS FINDS IN FAVOR OF INSURER'S CALCULATION AND APPLICATION OF COMMERCIAL GENERAL LIBILITY POLICY'S DEDUCDTIBLE

Federal District Judge Gray Miller for the Houston Division of the Southern District of Texas ruled in favor of an insurer's interpretation of a commercial general liability policy's calculation of a deductible for damages to various oil and gas properties resulting from Hurricane Ike. In *Saratoga Res., Inc. v. Am. Intern. Group., Inc.*, 2015 WL 1602130 (S.D. Tex. Apr. 9, 2015), the insured made a claim for $3,085,047 in damages. After deducting damages the adjuster determined were not related to Hurricane Ike and $912,500 for the policy deductible, the insurer paid $2,001,191. The insured disagreed with the manner the deductible was calculated, and asserted the deductible should be $400,000, not $912,500. The insured filed this lawsuit seeking a declaratory judgment that its interpretation of the policy's terms relating to the deductible are correct and the insurer breached the policy because it did not tender the complete amount due under the policy. The insurer filed a cross-motion for summary judgment.

The insurer interpreted the deductible provision as unambiguously requiring the insured to pay 5% of the total insurable values of each damaged property, added together, which it calculated to total $912,500. The insured contended the policy unambiguously prohibited any deduction exceeding the "largest applicable deductible" and that the deductible should be calculated to be 5% of the value of the

property with the highest total insured value, which is valued at $8,000,000. Five percent of $8,000,000 leaves a deductible of $400,000.

The court determined that the deductible calculation under the Policy was not ambiguous. Judge Miller noted that the parties agreed that Hurricane Ike quailed as a "named windstorm" therefore "[e]ach claim for loss or damage" was "subject to a per occurrence retention amount" of "5% of Total Insurable Values at the time and place of loss, subject to a minimum of $250,000 any one occurrence." The court concluded the insured's interpretation that 5% of the insurable value of each damaged property is a "deductible amount" and that the total deductible cannot exceed 5% of the highest valued property was not reasonable. The preceding paragraph in the policy indicated that one must consider the "total insurable values." If the phrase "two or more deductible amounts" in the next paragraph means taking 5% of two or more properties to arrive at two or more deductible amounts, the use of the word "total" in the phrase "total insurable values" would have no meaning. There also would be no reason to use the plural noun "values." Judge Miller reiterated courts must "examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless."

The court concluded a reasonable interpretation which takes the entire writing into account is that "5% of total insurable values" means a 5% of the total, or sum, of the insurable values of each damaged property. The term "total insurable values" contains the word "total" and it is a plural phrase, both of which indicate that more than one value is included. Judge Miller determined if the phrase is interpreted this way, it does not conflict with the next paragraph, which provides instruction when "two or more deductible amounts" apply, because a plain reading of this section indicates that different types of deductibles may apply, as opposed to different deductibles for each property. The deductible is calculated by adding the insurable values of each damaged property and taking 5% of the total. Accordingly, the court denied the insureds' motion for summary judgment and granted the insurer's cross-motion for summary judgment.