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TEXAS INSURANCE LAW NEWSBRIEF

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FIFTH CIRCUIT AFFIRMS INSURER WIN ON OCCURRENCE & CONCURRENT CAUSE

Last Tuesday, The Fifth Circuit affirmed the results of a bench trial in favor of a group of commercial property insurers based on an examination of the number of occurrences and the concurrent cause doctrine. In *Seahawk Liquidating Trust v. Certain Underwriters at Lloyds London*, 15-30324, 2016 WL 233384 (5th Cir. Jan. 19, 2016), Seahawk's claim involved damage to a jack-up drilling rig used to perform ocean oil drilling. Seahawk submitted an insurance claim for physical damage to the rig and lost earnings on a drilling contract that could not be performed because of the damage.

The rig had a 20-year history of repairs due to wear and tear on its hydraulic jack system, but Seahawk's claim focused on two storms which occurred in 2010. In February 2010, rough seas encountered during a storm caused the rig's legs to become misaligned. After the storm, Seahawk made repairs to the jack system, but at the time it had not yet discovered the legs were misaligned. In April, the rig was used to perform a drilling contract for Hilcorp, but was unable to complete the contract due to continuing problems with the jack system. It was not clear whether Hilcorp noticed the misaligned legs either. In May, Seahawk learned of the misaligned legs, but elected not to repair them. In early July, the rig successfully completed another contract in calm seas despite the misaligned legs. On July 21, the rig encountered another storm, and the crew attempted to jack it up out of the water. During this process, the rig became disengaged, slid onto the rough sea surface, and remained there for 30 hours, sustaining significant damage.

Seahawk's insurance policy had a $10 million per-occurrence deductible. When Seahawk submitted a claim for approximately $17 million in repair costs, the insurers rejected the claim on the ground that the damage was the result of two separate occurrences—one caused by the February storm and another caused by the July storm—and thus subject to two deductibles. Seahawk sued, asserting all the damage arose out of the February storm and there was only one occurrence.

The policy defined an "occurrence" to include "a sequence of losses or damages arising from the same occurrence." The court focused on the meaning of "arising from" in the context of the number of occurrences, and whether it requires and examination of the proximate cause of the loss or something less specific. While there is a body of Texas law holding that the similar term "arising out of" requires only bare "but-for" causation, those cases were all decided in a different context in which the lower causative standard would increase coverage for the insured. The court acknowledged that Texas law generally requires ambiguities to be construed in favor of the insured, but observed that in the occurrence context, this is not so simple. The same interpretation can cut both ways—in one case, the insured might seek a broad interpretation to create a single occurrence and avoid the application of two deductibles, but in a different case, the insured might seek a narrow interpretation to create two occurrences and gain access to two policy limits.

Therefore, instead of choosing an interpretation based purely on its effect on coverage, the court looked to existing Texas cases on the question of how many occurrences exist in various fact patterns. After examining a number of often-cited cases on this issue, the court concluded that Texas courts typically look to the proximate cause of the loss, and not a more general cause, to determine the number of occurrences. Here, the court concluded the evidence supported a finding that there were two proximate causes of loss – the February storm caused the misalignment of the legs, and the July storm caused the additional damage. Thus, Seahawk owed two deductibles and could recover nothing.

The court also addressed the concurrent cause doctrine, which holds that when a covered and a non-covered peril combine to create a loss, only the portion of damage caused solely by the covered loss is recoverable. Here, the damage to the legs was covered, while the problems with the jack system were shown to be the result of long-term wear and tear which had been a known problem for over twenty years. The court conducted a review of the evidence and concluded there was sufficient evidence to support a finding that the loss of the Hilcorp contract was due at least in part to the wear and tear on the jack system, and Seahawk presented no evidence showing what portion of the damage, if any, was attributable to the misaligned legs. Thus, Seahawk could not recover for the loss of the contract.

[Editor's Note: This ruling can potentially create confusion for the unwary reader as it creates the appearance of a conflicting rule for the meaning of the phrase "arising out of/arising from." But the rule is context-dependent: when determining the number of occurrences, it means proximate cause. In the separate context of construing additional-insured endorsements in commercial liability

policies, however, it continues to mean mere “but-for” cause, which is a significantly lower standard and creates broader coverage for a putative additional insured**.]**