Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

APR 5, 2021

SUPREME COURT OF TEXAS FINDS ALLEGED INSURANCE CODE VIOLATIONS ARE NOT "TRULY INDEPENDENT" OF RIGHT TO RECEIVE UNDERINSURED MOTORIST BENEFITS – BIFURCATED TRIAL REQUIRED

The Supreme Court of Texas recently examined an insured's ability to pursue recovery for alleged unfair claims handling under the Texas Insurance Code without first establishing a contractual right to receive underinsured motorist benefits and determined that the insured could not absent a "truly independent" injury. In *In re State Farm Mutual Automobile Insurance Company*, 2021 WL 1045651 (Tex. March 19, 2021), the insureds filed suit against State Farm in relation to claims presented for underinsured insured motorist (UIM) benefits. State Farm determined that benefits were not owed, and the insureds filed suit. But rather than alleging breach of contract and extracontractual claims under the Texas Insurance Code, the insureds did not allege breach of contract, and brought only the extracontractual claims under the Texas Insurance Code. State Farm relying on policy language requiring the insured to first establish both legal liability and damages in support of the UIM claim, sought to bifurcate the trial and first require the insureds to establish benefits were owed as a prerequisite to presenting claims for alleged insurance code violations. The trial court and appellate court denied the motion to bifurcate and this petition to the Supreme Court of Texas followed.

The Supreme Court considered the insureds' argument that they should be allowed to "recover UIM benefits as extracontractual damages without first establishing that they are 'legally entitled to recover' from the underinsured motorist if they not allege a breach of contract claim." And that the *Brainard v. Trinity Universal Insurance Co.* 216 S.W.3d 809 (Tex. 2006) decision establishing the "legally entitled to recover" pre-requisite had been overruled. The court clarified that there are two paths to recovery for recovery under the Insurance Code and that the insured must either: 1) establish "a right to receive benefits under the policy" or 2) "an injury independent of a right to receive benefits." The court observed the unique nature of UIM benefits as contractually conditioned on the insured's right to recover from a third party. And without first establishing legal liability and damages against the third party, that right could not be determined. Further, the court considered the alleged independent nature of the damages sought and concluded that they were not "truly independent." "To the contrary, the insureds' entitlement to these damages is entirely predicated on their entitlement to policy benefits." Accordingly, and to avoid prejudice to State Farm arising from a failure to bifurcate the trials and conditionally granted the writ of mandamus.

Editor's Note: This decision provides an excellent primer on UIM causes of action, the "independent injury" rule and summary of related case law. In particular, the footnotes provide an excellent analysis of the precedential value of the *USAA v. Menchaca*, 545 S.W.3d 479 (Tex. 2018), decision relied on by the insureds to mistakenly assert that *Brainard* had been overruled.

SUPREME COURT OF TEXAS HOLDS PROMPT PAYMENT OF APPRAISAL AWARD DOES NOT PRECLUDE PROMPT PAYMENT PENALTIES, BUT INSURED MUST STILL ESTABLISH CONTRACTUAL LIABILITY FOR DAMAGES

The Supreme Court of Texas recently considered whether an insurers prompt payment of the additional amount of loss determined through appraisal, after its initial timely payment based on its own damage estimate, precluded liability for statutory interest under Texas Prompt Payment of Claims Act on the additional amount, and determined that statutory interest may be recovered. But, despite the appraisal award, the insured must first establish: 1) the amount for which the insurer is contractually liable under the policy; 2) the insurer's failure to comply with statutory deadlines; and 3) "statutory damages based on the amount contractually owed less the amounts paid within the statutory deadline."

In *Hinojos v. State Farm Lloyds,* 2021WL 1080854 (Tex. March 19, 2021), the insured presented a claim for wind and hail damage to the insured residence and after a series of reinspections, State Farm timely paid amounts owed after applying the deductible. Disputing the amount of damage, the insured filed suit and fifteen months later into the lawsuit, State Farm invoked appraisal. The appraisal process determined the amount of loss to be $22,974.75 more than what State Farm initially paid. "Within a week of the appraisers' decision, and about two-and-a-half years after Hinojos submitted his claim, State Farm tendered" the additional amount and moved for summary judgment asserting that payment of the award precluded further liability. Prior to the Supreme Court's *Barbara Technologies Corp. v. State Farm Lloyds*, 589 S.W.3d 127 (Tex. 2019), and *Alvarez v. State Farm Lloyds,* 601 S.W.3d 781 (Tex. 2020), decisions, the trial court granted State Farm's motion and the court of appeals affirmed. The Supreme Court granted the homeowners petition for review.

Applying its holdings in *Barbara Technologies Corp. v. State Farm Lloyds* and *Alvarez v. State Farm Lloyds*, the Court rejected State Farm's "reasonable payment" arguments based on dicta in those and related decisions and held that "an insurer's acceptance and

partial payment of the claim within the statutory deadline does not preclude liability for interest on amounts owed but unpaid when the statutory deadline expires." And addressing the reasonableness argument further, the Court stated: "Although the statute says nothing about reasonableness, a reasonable payment should roughly correspond to the amount owed on the claim. When it does not, a partial payment mitigates the damage resulting from a chapter 542 violation. Interest accrues only on the unpaid portion of the claim."

Lastly, the Court noted that the decision did not address the insured's affirmative claim for Chapter 542 relief and that in order to prevail, the insured must first establish: 1) the amount for which the insurer is contractually liable under the policy; 2) the insurer's failure to comply with statutory deadlines; and 3) "statutory damages based on the amount contractually owed less the amounts paid within the statutory deadline." Accordingly, the summary judgment in State Farm's favor was reversed, and the case was remanded to the trial court for further proceedings.

Editor's Note: The Texas Supreme Court's ruling is consistent with our expectations following *Barbara Technologies Corp. v. State Farm Lloyds* and *Alvarez v. State Farm Lloyds*. And the requirement that the insured establish contractual liability as a prerequisite to recovery under Chapter 542, recognizes that than an appraisal award, does not necessarily establish coverage or liability for the loss as suggested by *Barbara Technologies Corp. v. State Farm Lloyds* and *Ortiz v. State Farm Lloyds*, 589 S.W.3d 127 (Tex. 2019). So coverage issues and other policy defenses should be properly documented and preserved.

FOR WANT OF A SWORN PROOF OF LOSS, A $600,000 APPRAISAL AWARD IS OVERTURNED

Last week, a federal judge in Wichita Falls granted summary judgment for an insurer after it challenged a large appraisal award. *Great Lakes Insurance SE v. Horton Family Trust, LLC,* No. 7:19-CV-00138-O, 2021 WL 1117171 (N.D. Tex. Mar. 24, 2021) involved a wind/hail claim which the insurer initially denied after finding no damage caused by the claimed weather event. When the policyholder demanded appraisal six months later, the insurer requested a sworn proof of loss, which the policyholder did not return. After obtaining an *ex parte* umpire appointment, the policyholder's appraiser and the umpire signed an appraisal award of about $600,000. The insurer filed a declaratory judgment action challenging the appraisal award and the original invocation of appraisal.

The court granted the insurer's motion for summary judgment because the policyholder had not submitted a sworn proof loss when the insurer requested it in response to the appraisal demand. The court rejected arguments the insurer had waived its right to request a sworn proof loss by denying the claim without requesting one, noting multiple courts have held a sworn proof loss is a condition precent to appraisal. The court also pointed out Texas law does not support the conclusion that denial of a claim waives other rights under the policy, particularly when the policy contains express nonwaiver wording. Because a condition precedent was not satisfied, the court concluded the appraisal award did not comply with the policy terms and was issued without authority. The court granted summary judgment for the insurer, declared the appraisal award void, struck the umpire, and dismissed the policyholder's counterclaims with prejudice.

Editor's Note: This case contains clear lessons for both insurers and policyholders: First, always request a sworn proof of loss. And when one is requested, never fail to provide it.

INSURER WINS SUMMARY JUDGMENT ON BURST PIPE CLAIM DUE TO FAILURE TO SEGREGATE DAMAGES

A federal judge in Houston recently granted summary judgment for a property insurer after the insured failed to demonstrate its claimed damages were actually caused by a burst pipe during the policy period, rather than the long history of other losses. *Henry v. Allstate Veh. & Prop. Ins. Co.*, No. 4:20-CV-310, 2021 WL 1132812 (S.D. Tex. Mar. 24, 2021). A homeowner submitted numerous claims over a period of ten years. One of the later of these claims was for a burst pipe in a second-floor bathroom, which caused water damage to the first floor kitchen below. Allstate denied the claim on the ground that it was not sudden and accidental but was actually the result of ongoing leakage from a faulty expansion joint.

There was evidence the homeowners had submitted at least four prior claims for water damage to the kitchen area, but their own testimony and their expert report failed to make any effort to distinguish between damage caused by the current loss versus previously reported losses that were years old, or that the loss being claimed was even a new one and not existing damage that had occurred over a year earlier. Because the homeowners could not establish coverage for the claim, the court also dismissed their extracontractual claims.

U.S. DISTRICT COURT CONCLUDES THAT INSURER HAD NO DUTY TO DEFEND OR INDEMNIFY BUS COMPANY AGAINST CLAIM THAT IT FAILED TO RENDER AID TO PASSENGER INJURED ELSEWHERE

Recently, the United States District Court for the Southern District of Texas concluded that insurer had no duty to defend or indemnify its insured, a bus company operating in the United States, against claim of failure to render aid to bus passenger injured in Mexico, because the insurance policy's territory-coverage provision and definition of "accident" excluded coverage. In *Nat'l Liability & Fire Ins. Co. v. Los Chavez Autobuses Inc. et. al.,* No. 4:20-CV-01302, 2021 WL 920138 (S.D. Texas [Houston Division], March 10, 2021), Antonia Compean boarded a bus in Matehuala, Mexico destined for Houston, Texas. The bus was owned and operated in Mexico by Autobuses El Refugio, and in the United States by Los Chavez Autobuses Inc. ("Los Chavez"). In Mexico, the bus passed over a speed bump at an excessive rate of speed, causing Compean to hit her head on the ceiling. Nonetheless, the bus continued on to

the United States, where a driver for Los Chavez replaced the driver for El Refugio. Then, the bus continued on to Houston.

Compean initiated an action in Texas state court against Los Chavez (and El Refugio) (the "underlying action"). As against Los Chavez, Compean contended that she should have been given medical treatment in Laredo (rather than Houston) and that the delay in treatment proximately caused her injuries.

Los Chavez had a business auto insurance policy with National Liability. The policy expressly excluded coverage for accidents occurring in Mexico. The policy defined "accident" as a "continuous or repeated exposure to the same conditions resulting in bodily injury." As such, National Liability sought a declaratory judgment that it had no duty to defend or indemnify Los Chavez. Compean challenged such a declaration.

The court held that National Liability had no duty to defend Los Chavez. The court concluded that it was "initially impossible to discern whether coverage [was] potentially implicated" based on the eight-corners doctrine (as the underlying action did not expressly state where the injury-causing accident occurred). And whether the accident occurred in Mexico was a question that went "solely to a fundamental issue of coverage and [did not] overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case." Thus, extrinsic evidence was permitted, which indisputably established that Compean was initially injured in Mexico.

The court further concluded that even if Compean was injured because of the failure to render aid, such failure did not meet the definition of "accident" under the policy because the bus was merely the "locational setting" of Compean's injury.

The Court also concluded that National Liability had no duty to indemnify, even though the underlying action had not been resolved. The court reasoned that "no facts could possibly be developed in the underlying action that would transform an 'accident' in Mexico into one within the United States." Further, "no facts could be developed that could transform the alleged failure to render aid in the United States into an 'accident' within the meaning of the policy." Thus, the same facts that negated the duty to defend equally negated any duty to indemnify.

U.S. DISTRICT COURT HOLDS THAT INSURER'S POST-SUIT ELECTION OF ACCEPTANCE OF ITS AGENT'S LIABILITY RESULTS IN IMPROPER JOINDER

Recently, the United States District Court for the Western District of Texas concluded that insurer's post-suit acceptance of its agent's liability resulted in improper joinder of the agent. Therefore, the court denied the insured's motion to remand case to state court and dismissed the claims against the agent. In *Southbound, Inc. v. Firemen's Ins. Co. of Washington, D.C., et. al.,* No. SA-21-CV-78-XR, 2021 WL 932045 (W.D. Texas [San Antonio Division], March 10, 2021), Southbound owned properties damaged by a hail and windstorm. Southbound's insurer, Firemen's Insurance, assigned Jim Amato to inspect and assess the claim. Amato subsequently estimated hail damage in the amount of $125,112.81. On the other hand, Plaintiff's inspector estimated damage in the amount of $960,912.63.

Believing that Firemen's Insurance improperly valued and assessed its insurance claim, Southbound brought suit in state court against Firemen's Insurance and Amato alleging various contractual and extra-contractual claims. In response, pursuant to Section 542A.006 of the Texas Insurance Code, Firemen's sent Southbound a letter accepting all of Amato's liability that may arise from Southbound's claims. Two days later, Firemen's removed the case to federal court, asserting diversity jurisdiction. Southbound's Motion to Remand followed on the basis that complete diversity was lacking as both Southbound and Amato were citizens of Texas.

In deciding whether removal to federal court was proper, the issue was whether Southbound had a reasonable basis of recovery against Amato, which turned on the court's interpretation of Texas Insurance Code § 542A.006, which provides that "an insurer that is a party to the action may elect to accept whatever liability an agent might have to the claimant for the agent's acts or omissions related to the claim by providing written notice to the claimant."

Noting that this provision has created a split among the district courts regarding whether an insurer's post-suit election of its agent's liability results in improper joinder, the court concluded "that both pre-suit and post-suit elections of acceptance of liability are sufficient to establish improper joinder." The court disagreed with other district courts' conclusions that "if a party is improperly joined, it must be for a reason that predated his joinder." Instead, the court concluded that "when a diverse insurer elects to accept liability for a non-diverse defendant under Section 542A.006, and that election establishes the impossibility of recovery against the non-diverse defendant in state court at the time of removal, the non-diverse defendant is improperly joined and its citizenship may be disregarded." The court reasoned that "a plain reading of the Code requires a court to dismiss the action against the agent when the insurer elects to accept all liability, regardless of whether the election occurred before or after the filing of the action."

Thus, the court denied Southbound's Motion for Remand and dismissed all claims against Amato.

FIFTH CIRCUIT UPHOLDS DISTRICT COURT DECISION THAT INSURER'S STOWERS DUTY APPLIED TO POST-JUDGMENT SETTLEMENT OFFER AND THE INSURER VIOLATED THAT DUTY

Recently, the U.S. Appeals Court for the Fifth Circuit upheld a decision by the U.S. District Court for the Southern District of Texas that ACE American Insurance Company ("ACE") violated its *Stowers* duty by not accepting a settlement offer at trial before the jury rendered a verdict and therefore had to contribute to the amount the excess insurer, American Guarantee and Liability Insurance Company ("AGLIC"), paid towards the post-judgment settlement amount. *Am. Guarantee and Liability Ins. Co. v. ACE Am. Ins. Co.*,

No. 19-20779 (5th Cir. March 4, 2021) involved a dispute between ACE and AGLIC that arose after a post-judgment settlement was reached in an underlying tort action.

The underlying tort action involved claims made by the surviving family of a man who died after his road bike collided with a stopped commercial truck. The family made a settlement offer purporting to be a *Stowers* offer on the eve of trial, which ACE rejected. The case proceeded to trial.

When the case wrapped up and was submitted to the jury—and after several adverse rulings at trial that severely, negatively affected the insured's defense and bolstered the family's case—the family made a second settlement offer purporting to be a *Stowers* offer, which ACE again rejected. The family made one final offer prior to the jury's verdict for the $2 million in limits under the ACE policy, which the family also purported to be a *Stowers* offer. ACE again rejected the offer.

The jury returned a $40 million verdict against the insured, which was reduced to $28 million after accounting for comparative negligence. Soon thereafter, the parties settled for $10 million, with ACE paying its $2 million in limits AGLIC contributing $8 million in excess. AGLIC then sued ACE, arguing that ACE violated its *Stowers* duty to the insured by rejecting the family's settlement offers.

On appeal, the Fifth Circuit upheld the trial court's ruling as to the third settlement offer but not the second. That is, Court held ACE had a *Stowers* duty under the third offer, that it had violated such duty by rejecting the offer, and that ACE was therefore responsible for paying the AGLIC the $8 million it had contributed to the post-judgment settlement.

The Fifth Circuit pointed out the second offer was ambiguous because it sought "1.9MM to $2.0MM *with costs*," and the record showed confusion as to whether "costs" meant litigation expenses and court costs, or just court costs.

With regard to the third offer, however, the Fifth Circuit emphasized that the offer was within the scope of coverage, within policy limits, and included terms that an ordinarily prudent insurer would accept, considering the likelihood and degree of the insured's potential exposure to an excess judgment—in other words, that it triggered a *Stowers* duty. ACE argued that adverse interests between the surviving wife and minor children existed because the wife was asserting claims individually and as next friend of her minor children. As such, ACE argued, the settlement would have required third-party approval by the court or a guardian ad litem, which made the offer inherently conditional.

In response, the Court noted that, if a settlement offer is accepted, the trial court must appoint a guardian ad litem to approve the settlement *if* the court perceives an adverse interest. Next, the Court distinguished the three cases ACE cited in support of its argument, essentially pointing out that the cases cited involved obvious "intrafamilial conflicts" that the record did not support existed in this case. Rather, the record showed that ACE refused the offer because "it was convinced it would win the case." Thus, a *Stowers* duty was triggered by the third settlement offer.

Moreover, the Court held that ACE breached its *Stowers* duty when it rejected the offer because, as the trial court found, when the family made their third demand, ACE had actual knowledge of the adverse rulings and evidence presented at trial that hurt the insured's case and bolstered that of the family, and such knowledge would have led a reasonable insurer to reevaluate its value of the case and accept the third offer.

Finally, because ACE did not make the argument to the lower court—and did not preserve the argument for appeal—the Court rejected ACE's argument that the trial court's adverse rulings should not be considered because a possibility existed that such rulings could be reversed on appeal.

FEDERAL COURT UPHOLDS TESTIFYING EXPERTS, INCLUDING MDJW'S CHRISTOPHER MARTIN, IN CASE INVOLVING DISPUTE BETWEEN A LAW FIRM AND ITS MALPRACTICE INSURER

A federal judge in Austin recently denied competing motions to strike filed by a law firm and its malpractice insurer, New York Marine and General Insurance Company ("NYM"). *Ryan Law Firm v. New York Marine and General Insurance Company*, No. A-19-CV-629-RP, 2021 WL 828494 (W.D. Tex. March 3, 2021) involved allegations by a law firm that NYM wrongfully failed to settle a malpractice suit and thus breached its contract with the law firm and acted in bad faith in handling the claim.

NYM retained one of MDJW's founding partners, Christopher Martin, to serve as its testifying expert and designated him as such on April 17, 2020. In that designation, Mr. Martin opined that there was no evidence of any Insurance Code violations, violations of any common law standards, or any other improper conduct by NYM. A few months later, the Court dismissed the law firm's bad faith claims. Mr. Martin issued his supplemental report on January 28, 2021, after the Court made several substantive rulings and depositions were taken regarding issues Mr. Martin raised in his first report. The law firm thereafter moved to strike Mr. Martin as an expert witness, while NYM filed its own motion to strike the law firm's testifying witness, Dina Cox.

First, the law firm argued that, because its bad faith claims had been dismissed and Mr. Martin's report included opinions as to whether NYM acted in bad faith, Mr. Martin's initial report was irrelevant. In response, the Court noted that Mr. Martin's report touched on many other issues, including the unreasonableness and prematurity of the law firm's settlement amount with its client, the reasonableness of NYM in refusing to reimburse the law firm for its voluntary settlement, and NYM's reasonableness in handling the defense of the claim, among others. The Court then found that such opinions were relevant to the law firm's breach of contract claim, which was the sole remaining issue in the case.

Second, the law firm claimed Mr. Martin's supplemental report should be stricken because it was untimely, given that they believed it was a "new" report and not a true supplementation. The Court roundly rejected that argument as well, holding that Mr. Martin properly supplemented his initial report after the Court issued substantive rulings and additional depositions had been taken that Mr. Martin incorporated into his initial report, and the supplemental report covered the same issues raised in the initial report.

Finally, the law firm insisted that Mr. Martin's opinions in the supplemental report were speculative. The Court held that whether such opinions were speculative was an issue to be addressed during cross-examination, not a basis for disqualification. Thus, the Court denied the law firm's motion to strike Mr. Martin as a testifying expert.

The Court also quickly disposed of NYM's motion to strike Dina Cox, which argued Ms. Cox's opinions were unreliable because she "cherry-pick[ed] certain facts and ignore[d] other crucial evidence," holding that such issues could be addressed on cross-examination and were not a proper basis for disqualification.

FIFTH CIRCUIT AFFIRMS DISTRICT COURT'S RULING GRANTING SUMMARY JUDGMENT IN FAVOR OF INSURED IN HURRICANE HARVEY DISPUTE

Recently, the U.S. Appeals Court for the Fifth Circuit affirmed the summary judgment the district court granted in favor of Playa Vista Conroe ("Playa Vista") regarding a Hurricane-Harvey related property damage claim made by Playa Vista with its insurer. *Playa Vista Conroe v. Ins. Co. of the West*, No. 20-203, 2021 WL 836715 (5th Cir. March 5, 2021) centered on a coverage dispute that arose after Hurricane Harvey hit the Texas coast in August 2017.

To prevent the Lake Conroe Dam from overflowing and failing, the San Jacinto River Authority released massive amounts of water from the dam, which Playa Vista claimed destroyed 22 of its boat slips. Playa Vista filed a notice of loss and made a claim under its policy. The insurer denied coverage, stating that the policy did not cover flooding caused by a hurricane or tropical storm.

Playa Vista subsequently filed notice and sent its insurer a pre-litigation demand letter under Ch. 542A of the Texas Insurance Code. When the insurer reiterated its denial of coverage, Playa Vista filed suit in state court. The case was removed to federal court, where the parties filed cross-motions for summary judgment. The district court denied the insurer's motion and granted Playa Vista's, resolving the breach of contract claim but leaving the issue of damages and attorney's fees for trial.

Two weeks prior to trial, the parties entered a stipulation in which they agreed Playa Vista insured $190,827.50 in damages and $50,000 in attorney's fees. The district court approved of and entered the stipulation. Playa Vista moved for final judgment, and the district court awarded it the damages and fees pursuant to the stipulation. The insurer then sought leave to file a second motion for summary judgment, arguing that the stipulation rendered the policy's exclusion for "acts or decisions . . . of any person, organization or governmental body" applicable. The district court denied the motion, and the insurer appealed.

On appeal, the Fifth Circuit held that Playa Vista established coverage, and the insurer failed to prove an exclusion applied. Playa Vista pointed to provisions in the policy that stated the insurer would not pay for loss or damage to docks unless a stated value was listed in a certain subsection or if a sub-limit of insurance in the Declaration or in an endorsement to the policy existed. Next, Playa vista showed that the Declaration included a provision that allocated a $220,000 sublimit of insurance for coverage of boat slips. The Fifth Circuit concluded that such evidence established coverage, and the burden switched to the insurer to show an applicable exclusion.

The insurer pointed to three potential exclusions. The Fifth Circuit held them all to be irrelevant. First, the exclusion regarding "damage resulting from waterborne material involved in [a] flood" also included language that it was essentially inapplicable if flood coverage was endorsed or made a part of the policy, which was the case. Second, the exclusion regarding not paying for loss or damage caused by a flood arising from a hurricane or tropical storm did not apply because the policy's definition of "flood" did not apply to Playa Vista's boat slips because they existed on water, not on normally dry land—as the policy's definition specified. Third, the exclusion for flood damage to blat slips and docks did not apply because it only applies to "floods," and the policy's definition of "flood" excluded flood damage to property that normally appears on water rather than dry land. As the Court stated, "[I]t was [the insurer's] policy to draft, so [the insurer] must assume the perils of its chosen language.

Further, the Fifth Circuit held that, even if the "flood" exclusions applied, Playa Vista's summary judgment evidence show that the boat slips were not destroyed by a "flood"; rather, they were destroyed by a suction effect created by the water being released from the dam at such a high volume, which caused debris from all over Lake Conroe to be violently whipped around and destroy the boat slips as water drained out of the Lake.

Finally, as to the insurer's argument that the "governmental body" exclusion applied given that Playa Vista had agreed that the San Jacinto River Authority's release of water from the Lake Conroe Dam at an unprecedented rate and volume caused the debris to collide into the boat slips and docks, the Fifth Circuit concluded that the insurer's attempt at a legal "gotcha" must fail because the insurer failed to rely on the governmental body exclusion or raise it as an issue in its motion for summary judgment.

Given the above, the Fifth Circuit affirmed the district court's decision to grant Playa Vista's summary judgment.