Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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COURT CONCLUDES THAT INSURED FAILED TO STATE CLAIMS AGAINST ITS INSURANCE AGENT; AGENT WAS IMPROPERLY JOINED

Last week, the U.S. District Court for the Western District of Texas concluded that the Insured's insurance agent was improperly joined because the Insured failed to state claims against the agent. In *Go Green Botanicals, Inc. v. Drexler Ins. Serv. LLC and Tri-State Ins. Co. of Minnesota*, No. 5:22-CV-373-XR, 2022 WL 2286961 (W.D. Tex., June 23, 2022, mem. op.), Go Green alleged that it suffered covered losses under the Business Income Loss provisions of its insurance policy with Tri-State as a result of the COVID-19 shut-down orders, and that its claim for such losses was improperly denied. Go Green sued Tri-State and Go Green's insurance agent, Drexler, in state court, asserting claims of breach of contract, conspiracy, bad faith, and violations of the Texas Insurance Code (i.e., failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of Go Green's claim; failing to promptly provide a reasonable explanation for the denial of Go Green's claim; failing to affirm or deny coverage in a reasonable time; and refusing to conduct a reasonable investigation). Go Green's only factual allegation specific to Drexler was that Drexler "told Go Green that there was no coverage for their loss and they need not bother filing a claim."

Tri-State removed the lawsuit to federal court, contending that Drexler was improperly joined and, consequently, complete diversity existed between Tri-State and Go Green to establish federal jurisdiction. In response, Go Green filed a motion to remand to state court, which the U.S. District Court denied.

In denying remand, the Court concluded that Go Green failed to state any valid claims against Drexler. To that end, the Court concluded that Drexler was not the insurer under the insurance policy and, thus, there was no valid contract that would allow Go Green to recover from Drexler on a breach-of-contract claim. As to Go Green's claims of conspiracy and bad faith, the Court concluded that "nowhere in the petition [did] Go Green plead any facts that would enable this Court to reasonably infer that Drexler denied Go Green's claim or that Drexler conspired with Tri-State to do so. Instead, Go Green merely allege[d] that Drexler advised Go Green that its claim would not succeed." Further, "there [was] no plausible reason to believe that Drexler had the authority to deny the claim on Tri-State's behalf." As to Go Green's claims of violations of the Texas Insurance Code, the Court concluded that the Texas Prompt Payment Act only applies to insurers, not to insurance agents. Further, Go Green did not allege "any facts indicating that Drexler had the authority to grant or deny coverage under the Policy or to investigate Go Green's claim."

COURT CONCLUDES THAT CAR WASH DRAIN WAS OPEN AND OBVIOUS; AFFIRMS SUMMARY JUDGMENT IN FAVOR OF INSURED

Last week, the San Antonio Court of Appeals concluded that the drain holes in a self-service car wash bay were open and obvious conditions; thus the car wash company had no duty to warn of the drains. In *Corona v. Andy's Car Wash, Inc.,* No. 04-21-00324-CV, 2022 WL 2230945 (Tex. App.—San Antonio, June 22, 2022, mem. op.), the Coronas stopped at Andy's Car Wash to wash their car. Andy's Car Wash operated a do-it-yourself drive-through automated car wash. The car wash had drains in the concrete floor located in the middle of the car wash bays. The openings between the bars of the drain were described as large enough so that debris from the cars would not clog the drain, and large enough for a foot and leg to be able to step into the drain. Mr. Corona drove directly into the center of one of the self-serve car wash bays and parked over the drain. Mr. Corona washed the car while Mrs. Corona stood outside at the rear of the car. Mrs. Corona observed the soap and water running off the car into the drainage underneath the car. After finishing the wash, Mr. Corona drove toward the vacuuming area, while Mrs. Corona walked three feet behind the car as it moved toward the vacuuming area. Mrs. Corona was looking at her car, not the ground. She did not remember that the drain was there. As she walked, her entire left leg, up to her thigh and pelvic area, fell or sank into the exposed drain causing severe injuries.

Mrs. Corona sued Andy's Car Wash asserting a premises-liability claim. In response, Andy's Car Wash filed a motion for summary judgment, contending that the drain was open and obvious and that Mrs. Corona had subjective knowledge of the existence of the alleged dangerous condition; thus, Andy's Car Wash had no duty to warn her or protect her from the drain. The trial court granted Andy's Car Wash's motion, and Mrs. Corona subsequently appealed.

On appeal, the Court affirmed the trial court's grant of summary judgment, concluding that "the evidence support[ed] the conclusion that the drain was objectively observable to a reasonable person walking through the car wash bay." The Court reasoned that it was "undisputed that the drain [was] large, located in the middle of the concrete floor of the car wash bay, and [was] not concealed." Further, Mrs. Corona admitted that she would have seen the drain if she had been looking down as she walked behind her car. "Because the drain holes were open and obvious conditions on the premises, Andy's Car Wash had no duty, as a matter of law, to warn against them." Notably, because the Court concluded that the allegedly dangerous condition was open and obvious, the Court did not address whether Mrs. Corona had subjective knowledge of the condition.

EXCLUDED DRIVER STILL EXCLUDED EVEN AFTER NAME CHANGE - INSURER DID NOT HAVE TO PLEAD FOR REFORMATION OF THE POLICY

An appellate court in El Paso recently affirmed a trial court's declaration that a named driver exclusion applied even after a name change and that the insurer needn't seek to have the policy reformed to do so. *Donias v. Old American Cty. Mutual Fire Ins. Co.*, et al., No. 08-20-00207-CV, 2022 WL 2128065 (Tex. App.—El Paso June 14, 2022) involved a claim for defense and indemnity coverage arising out of a motor vehicle accident involving Felicia Donias ("Ms. Donias") and another driver. The policy was issued to Leticia Godoy and added a vehicle for her son Michael Godoy but excluded his fiancé Felicia Donias naming her in the exclusion as Felicia Godoy.

On August 6, 2014, Ms. Donias was involved in an automobile accident that led to a personal injury lawsuit being filed against her. The Officer's Crash Report listed Felicia Donias as a 26-year-old female with a birthdate of May 2, 1988. But it was after the accident that Ms. Donias married Ms. Godoy's son Michael when she officially changed her last name to Godoy. The automobile insurance policy for the vehicle driven by Ms. Donias included a named driver exclusion for "Felicia Godoy," and Ms. Godoy's birthdate was listed as May 2, 1988.

After the accident, the insurer, Old American County Mutual Fire Insurance Company ("Old American"), contacted the named insured Ms. Godoy by phone and she acknowledged Ms. Donias was her daughter in law and was "not on her policy." The next day, Old American issued a letter denying coverage to Felicia Donias / Godoy accident based on the named driver exclusion.

A 2016 lawsuit against Ms. Donias resulted in a $25,381.01 damage award for the other driver involved in the accident. Ms. Donias then filed a lawsuit against Old American and other parties, seeking a declaratory judgment that Old American owed her a duty to defend and seeking damages for breach of contract and extra-contractual claims. Ms. Donias' case underwent a bench trial, and Ms. Donias objected to the trial court hearing any evidence to support a reformation of the insurance policy based on mutual mistake, claiming that name in the exclusion was different from her real name. The trial court entered findings of fact, including that Felicia Donias—now known as Felicia Godoy—was the driver of the vehicle that caused the 2014 accident. In response, Felicia Donias / Godoy argued that the policy excluded "Felicia Godoy," not "Felicia Donias," and Old American could not seek reformation of the policy because it did not specifically ask the court for such relief in its pleadings. In response, the trial court stated that it was not seeking a determination on the reformation issue and instead was interpreting the contract to give effect to the parties' intentions, and it was clear that the parties intended that Ms. Donias be an excluded driver. Therefore, the trial court concluded that Ms. Donias was not entitled to relief against the defendants and entered findings of fact, including that Felicia Donias—now known as Felicia Godoy—was the driver of the vehicle that caused the 2014 accident. The trial court also found that Felicia Godoy was an excluded driver under the Old American policy. Ms. Donias appealed and argued that the trial court erred by reforming the policy without a specific pleading requesting reformation.

The appellate court first pointed out that neither party was challenging the trial court's decision to hear evidence about matters outside the "eight corners" of the insurance policy and the automobile accident Plaintiff's petition nor whether the court could receive extrinsic evidence that Ms. Godoy and Ms. Donias are one in the same for the purposes of the duty to defend issue.

Next, the appellate court reviewed the record and agreed with Old American that nothing supported Ms. Donias' assertion that a reformation of the policy occurred. Instead, the trial court stated it was not making a determination on the reformation issue and simply found that the intent of the contracting parties was clearly to exclude Ms. Donias / Godoy from coverage, given that she was one and the same person. As a result, the appellate court affirmed the trial court's judgment that Old American did not owe automobile coverage to Ms. Donias / Godoy.

FIFTH CIRCUIT COURT OF APPEALS CONCLUDES THAT INSURER'S DUTY TO DEFEND WAS NEVER TRIGGERED BY THE INSURED

In *Moreno v Sentinel Insurance Co. Ltd.*, No. 20-20621, 2022 WL 1791949 (5th Circuit, June 2, 2022, mem. op.), Moreno worked as a painter for N.F. Painting, Inc. on a project in which N.F. Painting contracted with homebuilder Beazer Homes. While working, Moreno fell from a ladder and sustained injuries. Moreno subsequently filed suit against N.F. Painting and Beazer Homes for alleged negligence.

N.F. Painting was insured by Sentinel Insurance Company, Limited ("Sentinel"). However, after being served with Moreno's suit, N.F. Painting hired its own attorney, Lopez, rather than reporting or tendering the suit to Sentinel, because N.F. Painting believed that there would be no coverage because Moreno was an employee of N.F. Painting (and the policy excluded coverage for bodily injury to employees).

Beazer Homes was an "additional insured" under the Sentinel policy. Beazer Homes promptly notified Sentinel of the lawsuit, by forwarding to Sentinel a copy of Beazer Homes' Demand and Tender for Defense and Indemnity letter addressed to N.F. Painting. Upon receipt of this letter, Sentinel sent multiple correspondences to N.F. Painting and Lopez requesting that they contact Sentinel to discuss the claim. Conversations and responses eventually ensued, including Lopez emailing Sentinel the state court petition in response to Sentinel's request for the same, but neither N.F. Painting nor Lopez requested that Sentinel defend and indemnify N.F. Painting.

Next, Sentinel sent a letter to N.F. Painting and Lopez disclaiming coverage under the policy based on Moreno's status as an employee, and informing N.F. Painting that "if there are new allegations or additional information that you feel may alter [Sentinel's]

position as to the coverage, please forward that information to us for consideration."

Subsequently, Moreno filed a First Amended Petition alleging, for the first time, that he was injured while working "as an independently contracted painter." This Petition was not sent to Sentinel. Seven months later, Moreno and N.F. Painting submitted an Agreed Judgment, which was signed by the state court judge, and decreed, among other things, that Moreno was an independent contractor and was entitled to recover a total of $1,627,541.35 in damages from N.F. Painting.

One month later, Moreno, proceeding as a third-party beneficiary to the insurance policy, sued Sentinel seeking damages in the amount awarded against N.F. Painting in the Agreed Judgment. In response, Sentinel sought summary judgment contending that its duty to defend N.F. Painting was never triggered.

The Fifth Circuit concluded that Sentinel's duty to defend N.F. Painting was never triggered because N.F. Painting never sought a defense from Sentinel. "That another insured, Beazer Homes, notified Sentinel of the suit against it and demanded a defense by Sentinel, as N.F. Painting's insurer, did not obligate Sentinel to also undertake N.F. Painting's defense." Texas law requires a request from the *insured* for whom a defense would be provided, not someone else, to trigger the duty to defend."

The Fifth Circuit further concluded that Lopez's email to Sentinel attaching a copy of Moreno's initial state court petition (in response to Sentinel's request) did not trigger a duty to defend. "An insured's transmittal of suit papers to the insurer triggers the duty of defense because, in the ordinary case, the documents are sent with the expectation that having the documents will enable and cause the insurer to promptly provide (or at least fund) the insured's defense against the claims asserted against it. This, however, is not the ordinary case. Rather, … given N.F. Painting's initial determination that the Sentinel policy did not cover Moreno's claims, Attorney Lopez's continued representation of N.F. Painting, and the absence of any contemporaneous communications regarding N.F. Painting's defense, … [Lopez's email] cannot reasonably be construed to convey an expression of expectation, intent, or desire by N.F. Painting to have Sentinel assume its defense." "It is these additional facts that distinguish this case from the mom and pop hardware store scenario … where the insureds' prompt forwarding of the lawsuit papers to the insurer ordinarily would, without more, trigger the insurer's duty of defense."

Finally, the Fifth Circuit rejected Moreno's argument that Sentinel's letter disclaiming coverage demonstrated that Sentinel understood N.F. Painting expected Sentinel to provide it with a defense and, thus, an express request for a defense was unnecessary, concluding that the letter could not reasonably support that inference. Also, N.F. Painting never contacted Sentinel to discuss the possibility that the newly alleged independent-contractor status would impact Sentinel's earlier assessment of the policy's coverage.

COURT SHOOS INSURED'S ARGUMENT THAT A DEER IS AN UNINSURED MOTORIST

The Houston Court of Appeals recently concluded that the insured's Uninsured/Underinsured Motorist Coverage provision did not cover his personal injuries resulting from a collision with a deer. In *Ayanbadejo v Goosby and Allstate Fire & Casualty Co.*, No. 14-20-00264-CV, 2022 WL 1671150 (Tex. App.—Houston, May 26, 2022, mem. op.), Ayanbadejo asserted personal injury coverage claims associated with his collision with a deer, contending that his claim was covered under his Uninsured/Underinsured Motorist Coverage. More particularly, he contended that a deer is analogous to an uninsured motorist, relying on a 96-year-old case, *Am. Auto. Ins. Co. v. Baker*, 5 S.W.2d 252 (Tex. Civ. App. 1928), in which the court concluded that an animal could be an "object" under the terms of the policy and determined that vehicle's property damage was covered. In response, Allstate moved for summary judgment, which the trial court granted.

On appeal, the Court began its analysis by noting that Ayanbadejo's arguments "affront reality, logic and convention, [and] are scattershot free-flowing accusations and ideas." The Court held that the Uninsured/Underinsured Motorist Coverage provision did not cover the deer collision. The Court reasoned that the policy only provided coverage when Ayanbadejo would be entitled to recover from "the owner or operator of an uninsured motor vehicle", and Ayanbadejo provided no proof to suggest any owner or operator of an uninsured motor vehicle was associated with the deer.

COURT CONCLUDES INSURER HAD NO DUTY TO DEFEND - UNDERLYING LAWSUIT ALLEGED CLAIMS OF DEFECTIVE PRODUCT, NOT PROPERTY DAMAGE

Recently, the U.S. District Court of the Southern District of Texas concluded that the insurer had no duty to defend because the underlying lawsuit did not claim covered property damage. In *MT. Hawley Ins. Co. v. J2 Resources LLC*, No. 4:20-CV-2540, 2022 WL 1785483 (S.D. Tex., June 1, 2022, mem. op.), J2 Resources LLC ("J2"), a seller of industrial pipes, sold Buckeye Partners, L.P. ("Buckeye") piping for a project. According to Buckeye, the pipe was defective (i.e., exhibited extensive chipping and coating failure, and the coating was not adhering to the pipe and also failing in flexibility), and Buckeye had to remove all the pipe, replace that pipe, and reinstall new pipe to complete the subject project. J2 refused to pay for the removal and replacement of the defective pipe, so Buckeye sued J2 to recover the original purchase price and costs associated with the inspection, investigation, removal, replacement, and reinstallation of the pipe to complete the project. Buckeye's pleadings did not allege that the pipe was damaged after it was installed or that the defective pipe caused damage to any other property.

Mt. Hawley filed suit seeking a declaration and summary judgment that it need not defend or indemnify J2 in Buckeye's lawsuit against J2, arguing that Buckeye's lawsuit did not involve property damage as the policy defines that term.

The Court agreed with Mt. Hawley. The policy defined "property damage" as "physical injury to tangible property, including all resulting loss of use of that property ... or loss of use of tangible property that is not physically injured." The Court began its analysis by noting that "under a standard commercial general liability policy like the one here, 'physical injury requires tangible, manifest harm and does not result merely upon the installation of a defective component in a product or system.'" The Court concluded that Mt. Hawley had no duty to defend because the underlying lawsuit did not claim covered property damage. The court reasoned that "Buckeye's pleadings alleged that the pipe sold by J2 was defective because of "a manufacturing defect that existed prior to the pipe being delivered to Buckeye" and "Buckeye's pleadings did not allege that the pipe was damaged after it was installed or that the defective pipe caused damage to any other property." Further, "the relief that Buckeye sought was limited to the original purchase price and costs associated with the inspection, investigation, removal, replacement, and reinstallation of pipe to complete the project."

FIFTH CIRCUIT CONCLUDES THAT "REEFER TRAILER" IS A "VEHICLE" – SPOILED MEAT NOT A COVERED LOSS UNDER EQUIPMENT BREAKDOWN POLICY

The Fifth Circuit recently concluded that an unhitched trailer was a "vehicle" under an Equipment Breakdown Policy and, thus, the spoiled beef stored in the trailer was not a covered loss. In *Kiolbassa Provision Co., Inc. v. Travelers Property Casualty Co. of America*, No. 21-51033, 2022 WL 1800884 (5th Circuit, June 2, 2022, mem. op.), Kiolbassa operated a smoked meat business out of San Antonio, Texas. In August 2019, Kiolbassa ran out of storage space in its warehouse and loaded 49,016 pounds of organic beef trim onto an unhitched trailer with a mounted refrigeration unit– the "reefer trailer". The refrigeration unit malfunctioned and the beef spoiled, causing Kiolbassa to lose $167,000 worth of product. Kiolbassa then filed an insurance claim under its Equipment Breakdown Policy with Travelers. Travelers denied coverage under the policy.

The dispute centered on whether the reefer trailer was a "vehicle." In defining the term "Covered Equipment," the policy provided that it "does not mean" any equipment that is "mounted on or used solely with any *vehicle*." Travelers argued that the reefer trailer was a vehicle, making its denial of coverage appropriate. Kiolbassa argued that the reefer trailer was not a vehicle because the trailer was not able to "move on its own"—it was not attached to a semi-truck and was therefore stationary.

The Fifth Circuit concluded that the reefer trailer fell plainly within the ordinary meaning of the term "vehicle" (consulting dictionaries as the policy did not define the term). The court rejected Kiolbassa's argument that the definition of "vehicle" should be limited to a conveyance that can move on its own. "First, that limitation is not consistent with the common understanding of the word 'vehicle.' Self-propulsion is not a vehicle's defining feature, and whether it can fulfill that function at the time in question is irrelevant to its definition or classification. Second, additional contextual clues point to the reefer trailer being a vehicle: the Texas Department of Transportation considers trailers to be vehicles, the trailer was registered with the Texas Department of Motor Vehicles, and the trailer was accordingly assigned a Vehicle Identification Number." Because the reefer trailer was a "vehicle", Kiolbassa's claim was not covered, and the court affirmed summary judgment in favor of Travelers.

DALLAS COURT OF APPEALS REVERSES LOWER COURT ORDER ALLOWING DEPOSITION OF UM/UIM INSURER'S CORPORATE REPRESENTATIVE

The Court of Appeals in Dallas recently concluded that a Dallas County trial court erred by denying an insurer's motion to quash the deposition of its corporate representative and motion for protective order in a dispute stemming from an uninsured (UM)/underinsured (UIM) claim. *In Re Home State Cty Mut. Ins. Co. d/b/a Safeco and Najeeba Aneesa Sabour*, NO. 05-21-00873-CV, 2022 WL 1467984 (Tex. App.—Dallas May 10, 2022) involved a claim by an insured against his insurer ("Safeco") seeking to recover UIM benefits after settling with the alleged underlying tortfeasor for his $30,000 policy limits.

After the insured sought to take the oral deposition of Safeco's corporate representative, Safeco moved to quash the deposition, arguing that the deposition was not relevant or proportional to the proceedings and that the deposition topics were overly broad and beyond the scope of discovery. The trial court denied the motion, Safeco appealed, the court of appeals declined to hear the appeal, and the Texas Supreme Court denied review of the appellate court's decision. The Texas Supreme Court subsequently issued its decision in *In re USAA General Indemnity Co.*, 624 S.W.3d 782 (Tex. 2021), which addressed the scope of discovery an insured may pursue from an insurer in a UM/UIM case. In *USAA*, the Texas Supreme Court emphasized that the scope of discovery in UM/UIM cases differs from that in other insurance disputes because whether the insured is entitled to benefits hinges on showing the liability of a third-party motorist. As such, the Texas Supreme Court held, in relevant part, that deposition topics to an insurer in a UM/UIM dispute can include information supporting the insurer's legal theories and defenses, but topics generally inquiring into the UIM policy or claims-handling processes were beyond the scope of discovery and improper. Additionally, the *USAA* court supported the proposition that a UM/UIM insurer could foreclose a corporate representative's deposition by showing that the need for the deposition was not proportional to the needs of the case. In other words, if a UM/UIM insurer produced documents or referenced previously produced documents providing the information in its possession regarding the issues in the UM/UIM case and, combined with a lack of personal knowledge of the liability facts, the insurer could show that a corporate representative's deposition would "provide little if any additional benefit in relation to the cost" of the deposition.

The insured in this case used *USAA* as a guide and served an amended notice of deposition to Safeco's corporate representative. In response, Safeco produced over 1,000 pages of documents, including the unprivileged portions of its claim file. At the hearing on Safeco's motion to quash, the insured argued Safeco just performed a "document dump" in an attempt to avoid the deposition, and Safeco argued that the documents it produced were in line with the holding in *USAA* and the deposition was both no longer relevant and no longer proportional to the needs of the case. The trial court denied the motion to quash, and Safeco appealed.

In its appeal, Safeco argued that, unlike the insurer in *USAA*, it supported its proportionality objection by producing documents and referencing previously produced documents that provided all the information in its possession regarding the issues at stake in the UM/UIM case and that information, combined with the corporate representative's lack of personal knowledge, showed that a corporate representative deposition would provide little, if any, benefit to the proceedings in relation to the cost of the deposition. The appellate court agreed and concluded that the trial court abused its discretion by denying Safeco's motion to quash. It therefore ordered the trial court to vacate its order denying Safeco's motion to quash and motion for protective order and enter an order granting the motions.

FIFTH CIRCUIT REFUSES TO 'WATER DOWN' TEXAS PRINCIPLES OF CONTRACT INTERPRETATION AND AFFIRMS DISTRICT COURT DISMISSAL OF INSURED'S LAWSUIT SEEKING INSURANCE COVERAGE FOR DAMAGES RESULTING FROM RAIN

The Fifth Circuit Court of Appeals recently upheld a Texas district court decision to grant an insurer's motion for summary judgment in an insurance coverage dispute. *Bradford Realty Services, Inc. v. Hartford Fire Ins. Co.*, No. 21-11047, 2022 WL 1486779 (5th Cir. May 11, 2022) involved an insurance claim by an insured for damages to its property that appeared after a heavy rainstorm resulted in the pooling of rainwater on the property's roof. The drains on the roof that would normally remove the rainwater were clogged, so it remained, entered the interior of the property, and caused damage.

The insured filed a claim, and the insurer ("Hartford") denied coverage because the damage was caused by rain that did not enter the building through damage caused by the storm and therefore fell into the policy's exclusion for damage caused by rain. The insurer then filed suit in federal district court, arguing that the policy's rain exclusion did not apply and the "drain backup coverage" provision covered the loss. The parties filed competing motions for summary judgment, and the district court granted Hartford's motion, dismissing the claim. The insured then appealed.

On appeal, the insured argued that the policy provided coverage for damage caused by water backing up from a drain, and the evidence showed that the drains on the roof were clogged such that water accumulated on the roof and eventually reached a "rooftop air handling unit" and leaked inside the building, causing damage.

The Fifth Circuit, applying substantive Texas law on contract interpretation, first stressed that the "drain backup coverage" provision states that the coverages provided in that section "are added unless otherwise indicated in the Property Choice Schedule[,]" and the "Property Choice" portion of the Policy contains the rain exclusion. In addition, the rain exclusion states that the limitations therein "apply to all policy forms and endorsement." As a result, the drain backup coverage could not apply in light of the rain exclusion.

As for whether the "drain backup coverage" provision was instead an exception to the rain exclusion, as the insured argued in the alternative, the Fifth Circuit held that the plain, unambiguous language of the two listed exceptions to the rain exclusion only concerned losses that resulted from damage to the property's roof or walls through which the rain entered, and that was not present here.

Finally, when considering whether the rain exclusion itself applied, the Fifth Circuit noted it must consider whether the pooled rainwater is "rain" or "water" under the policy. After noting that there was "no reservoir of precedent" to guide them and the "sprinkling" of caselaw dealing with similar rain exclusions did not address the precise issue before the court, the Fifth Circuit concluded it must make predict what the Texas Supreme Court might do with a case such as this one. The insured argued that water is only "rain" when it is actively falling from the sky and becomes "water" once it hits the roof, so the rain exclusion could not apply. In making this argument, the insured relied on a case in which rain was held to become "water" after it hit and pooled on the ground—not a roof like in this instance. In response, Hartford and the trial court relied on a case in which the rain exclusion would have been held to be meaningless if rain became water upon landing because water only damages property after it strikes a surface. The Fifth Circuit agreed with Hartford and the trial court and held that the damage in this case was caused by "rain" not "water." According to the Fifth Circuit, to hold otherwise would render the rain exclusion meaningless because rain cannot damage anything when it is mid-air, only when it lands and "soaks, splashes or otherwise touches that thing" and "if rain becomes water on contact with a surface, then the rain exclusion excludes nothing." Because Texas law requires every contractual provision to be given meaning, the Fifth Circuit held that the rain exclusion applies to the rainwater that was pooled on the roof of the property and caused the damage. As such, it affirmed the district court's decision to grant summary judgment in favor of Hartford.