

THOUGHT LEADERSHIP

News

FIFTH CIRCUIT AFFIRMS SUMMARY JUDGMENT IN WIND/HAIL CASE, ENFORCING CONCURRENT CAUSE DOCTRINE

Newsbrief

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The Fifth Circuit recently confirmed that in wind/hail cases, the insured must meet its burden of proof to establish not only that the reported hail damage occurred during the policy period, but also how much of the damage occurred during the policy period, and sent a message that federal courts can and should grant summary judgments on this issue. In *Certain Underwriters at Lloyd's of London v. Lowen Valley View, LLC*, NO 17-10914, 2018 WL 2727323 (5th Cir. June 6, 2018) (slip op.), the insured reported a hail claim, alleging a date of loss two years earlier. An engineering investigation revealed that there was a single hail event during the policy period which could have caused some of the damage, and the engineer admitted at one point that the date of loss alleged by the insured was the "most likely" date the observed damage occurred. However, there was also ample evidence that additional storms had occurred prior to the policy period and they almost certainly also caused some of the damage.

The trial court granted the carrier's motion for summary judgment based on the concurrent cause doctrine (i.e., when a covered and non-covered peril combine to cause damage, the insured bears the burden of demonstrating how much of the damage was caused solely by the covered peril). The Fifth Circuit agreed, stating, "Given the undisputed evidence of severe hail storms outside the coverage period, Lowen Valley's evidence does not afford the jury a reasonable basis on which to allocate the damage." The court went on to affirm the dismissal of the insured's extra-contractual claims as well, relying on *Menchaca* for the proposition that "an insured cannot recover any damages based on an insurer's statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent of a right to benefits."

Editor's note: This message that federal courts will enforce the Texas concurrent cause doctrine and require insureds to meet their legal burden of proof should make it easier, at least in federal courts, to obtain early resolutions of cases in which the policyholder sues without any reliable evidence that the alleged damage is in fact the result of a covered peril which occurred during the policy period.