2022 CLM Construction Conference
Sept 21st – 23rd 2022
San Diego, California

"Don't Mess With Texas – An Update on Need-to-Know New Developments in Texas Coverage and Liability Issues"

1. New Developments in Texas Coverage and Liability Issues

Texas has remained substantially unchanged over the past several years in its analysis of key legal concepts related to liability for construction claims. However, issues surrounding coverage for construction defects are very much in a state of flux. Texas legislature and courts have been busy clarifying, and in some instances altering, the law, ultimately impacting contract drafting, policy interpretation, and litigation strategies. Complex areas including: the duty to defend; allowances of extraneous evidence; clarification of Texas' Anti-Indemnity Statute; improper applications of Time-Limited Demands; and pursuit of design professionals and downstream contractors, has caused the industry to question the best approach to litigating these cases. Previously the sole *Lonergan* Doctrine follower, Texas' addition of Chapter 59 to the Texas Business and Commerce Code, and other key legislation, are leaving industry professionals scrambling on how to apply the new statutes. Moreover, increased costs of construction materials and shortages in the labor force have driven damages models north, expanding potential liabilities, and making it even more difficult for insurers to absorb the inflationary impact resulting in stalling of settlement discussions. This panel will discuss tips on how to successfully maneuver through the morass of new developments in law impacting Texas construction claims.

2. Liability issues arising from Texas construction defect claims

a. Contractual indemnity and the separate paths to risk transfer

i. Contractual indemnity

Contractual indemnity is one of the most significant methods of risk transfer utilized in construction contracts. Whether the client or insured is up or downstream, evaluating the indemnity provisions of the contract at issue is key to determining whether there will be an option to either transfer or at least share the risk if the contractor is upstream, or if the insured is downstream, whether the client will have increased exposure.

Tenders of the insured's defense and indemnity under the contract are typically the initial step to triggering a downstream contractor's obligation to share in the risk. However, with the onset of the Texas Anti-Indemnity Statute, the scope of risk being tendered as to certain types of claims has been

modified to only the Subcontractor's scope of work, or only for injuries to specific workers downstream. Additionally, a General Contractor may not want to tender or even pursue via litigation its risk to its downstream contractors, often citing to business relationships. Strategy then must be discussed as to the impact not pursuing implicated downstream contractor may have, which strategy the contractor's insurer may have a differing litigation plan.

ii. Additional Insured Tenders

While contractual indemnity is being pursued, practitioners representing upstream contactors must not forget to pursue separately tenders under additional insured obligations. Finding the client's certificates of insurance and policies is often a challenge and can impact a practitioner's expeditious pursuit of additional insured carriers. Moreover, the impact of the Texas Anti-Indemnity Statute has had a significant impact on certain cases and has left the state of recovery by an upstream contractor for defense fees and costs questionable under the law.

b. Anti-indemnity statute and commercial construction defect claims

i. Impact upon indemnification and additional insured issues

Texas Insurance Code Chapter 151 (aka the Texas Anti-Indemnity Statute) applies to all commercial construction contracts entered as of January 1, 2012. The application of the anti-indemnity statute is triggered if the primary/original commercial contract was executed on or after January 1, 2012, and is not dictated by the date of the subcontract or related agreement execution.

Chapter 151 is non-waivable and makes an indemnity provision in a commercial construction contract void and unenforceable as against public policy *to the extent* that it requires an indemnitor (downstream) to indemnify, hold harmless, or defend a party, including a third party, against a claim caused by the negligence or fault of the indemnitee (upstream), its agent, employee or any third party under the control/supervision of the indemnitee. The impact of this provision is that, for commercial construction contracts, only "limited form" indemnity provisions are allowed. In Texas, a limited form indemnity provision obligates a downstream contractor to indemnify the upstream contractor only to the extent of the downstream contractor's own negligence or fault.

One of the most problematic issues arising from this statute is the language "to the extent of". Some practitioners take the position that the entire indemnity provision is "void" if the language of the contract does not specifically comply with the language of Chapter 151. However, others take the position that the writers of the statute included the language "to the extent of" to allow contracts which are overbroad and exceed the scope of what is allowed by the statute to only provide what is allowed by the statute. However, the Texas Supreme Court has not chimed in yet on this subject and thus this issue is a key discussion in cases in which the statute is applicable.

While the definition of a "construction contract" is broad under Chapter 151, including design, construction, alteration, renovation, remodeling, repair or the furnishing of material or equipment, currently, Texas has not applied the anti-indemnity statute to municipal construction projects nor residential construction contracts (single family home, townhouse, duplex, or land development related to residential projects). One question has arisen as to whether it applies to apartments or to mixed-use

buildings which included both residential and commercial businesses. The Texas Supreme Court has not addressed this issue either.

Moreover, the anti-indemnity statute has limited application to controlled insurance programs, only requiring that a controlled insurance program that provides general liability insurance coverage must provide completed operations coverage for a period of not less than three years.

While certain areas are grey under Chapter 151, it is at least clear that the Texas anti-indemnity statute does not apply to direct contractual privity claims between an upstream and downstream (i.e., over-action) for bodily injuries or death to employees of an indemnitor. This exception allows for continued contractual risk transfer by way of an over-action claim to the downstream contractor or employer of the injured party, even if the upstream contractor's sole negligence is involved. This may lead to the drafting of separate indemnity provisions within a construction contract, to address the broader scope of indemnification allowed under the law for bodily injury claims versus property damage.

The clarity of Chapter 151 is further compromised by the extension of it to limit the scope of any additional insured endorsement that the downstream is required to obtain. The statute mandates that any provision in a construction contract that requires the purchase of additional insured coverage, or any coverage endorsement, or provision within an insurance policy providing additional insured coverage, is void and unenforceable *to the extent* that it requires or provides coverage which is prohibited under Chapter 151. Accordingly, to comply with Chapter 151, an additional insured endorsement for property damage is limited to that arising from that downstream contractor's own negligence or fault. However, once again, the question has arisen and not yet been addressed by the Texas Supreme Court as to whether a contractual insurance provision that seeks more than that allowed under the statute is void, or merely limited to the extent of the statute's terms.

3. Residential Construction Liability Act "RCLA"

a. Application and early intervention

The Residential Construction Liability Act, or "RCLA" as it is more commonly referred to, is found in the Texas Property Code Section 27.004. Construction defect is broadly defined as concerning "design, construction or repair of new residence, or alteration or repair to existing residence. RCLA only applies to residential properties and is intended to encourage settlement or repairs.

b. Compliance Deadlines

Practically, the most challenging aspect of the RCLA process is the tight timeline of compliance requirements. While parties can agree to modify the timeline, the following depicts the typical timeline set forth by the statute:

Prior to Filing Suit	Inspection of Property	Settlement Offer	Repairs	Rejection of Settlement Offer	Supplemental Offer

60 days written notice of the claim	**35 days to make a written request to inspect the property**	**45 days to make a written offer of settlement to claimant after receipt of claimant's notice**	**45th day after the date the contractor receives written notice of acceptance of the settlement offer**	**25th day after the date claimant receives the offer, the claimant shall advise the contractor in writing and in reasonable detail of the reasons why the claimant considers the offer unreasonable**	**10th day after the date the contractor receives notice of claimant's rejection, the contractor may make a supplemental written offer of settlement**

c. Damages

If Claimant rejects what the trier of fact determines to be a "reasonable" offer, recovery under RCLA is limited to the either the (1) the fair market value of the contractor's last offer, or the amount of reasonable and necessary costs and attorneys' fees incurred *before* the offer was rejected. Moreover, the damages under RCLA are limited to the reasonable costs of repair to cure the defect(s); the cost to repair and/or replace the damaged personal property; the engineering and consulting fees; the temporary housing the reduction in current market value if due to structural failure; and attorney's fees. An important practice tip is to remember that inclusion of a "release" can be evaluated in the analysis of whether an offer by the contractor was "reasonable". If a contractor fails to make a reasonable offer under Subsection (b), the limitations on damages provided for in Subsection (e) shall not apply.

4. Coverage Issues in an Eight Corner World

a. The Eight Corners Rule

i. The Duty to Defend is based on allegations

Texas applies a strict complaint allegation or "eight corners" rule, looking solely to the petition and the policy to determine if there is a duty to defend. However, in February the Texas Supreme Court squarely addressed the issue in *Monroe Guaranty Ins. Co. v. BITCO Gen. Ins. Corp.,* 640 S.W.3d 195 (Tex. 2022).

For decades, the Texas Supreme Court had, for the most part, meticulously avoided clearing up the uncertainty in Texas insurance law concerning whether and under what circumstances extrinsic evidence is permissible to affect an insurer's duty to defend. Even though other Texas appellate courts had allowed extrinsic evidence under various circumstances over the years, under just about all the Texas Supreme Court cases an insurer's duty to defend was determined by the eight corners rule, under which the existence of a defense duty was determined by examining the factual allegations in the pleading against the insured and comparing them with the relevant policy provisions. If the facts alleged stated the possibility of covered damages, the insurer was obligated to defend. *Guide One Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 310 (Tex. 2006). Recognition of a fraud exception aside (*see Loyal Ins. Co. v. Avalos*, 610 S.W.3d 878 (Tex. 2020)), the court had been loath to adopt exceptions

to the eight corners rule and had avoided providing clarity to the bench and bar regarding the use of extrinsic evidence in litigating an insurer's defense duty.

The same was not true, however, of the federal courts deciding cases under Texas law. In *Northfield Ins. Co. v. Loving Home Care, Inc*, 363 F.3d 523 (5th Cir. 2004), the Fifth Circuit opined that if the Texas Supreme Court were to recognize an exception to the eight corners rule, then it would do so only:

> …when it is initially impossible to discern whether coverage is potentially implicated *and* when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case.

Northfield, 363 F.3d at 531 (emphasis in original).

In *Monroe*, on certified questions from the Fifth Circuit, the Texas Supreme Court was squarely presented with the issue of whether the *Northfield* exception was recognized by Texas law. The court answered by holding that extrinsic evidence is permissible to affect an insurer's duty to defend in some circumstances, but that those circumstances are slightly different from those that had been permitted by the Fifth Circuit. The court held that the eight corners rule is the initial inquiry used to determine whether a duty to defend exists. But:

> … if the underlying petition states a claim that could trigger the duty to defend, and the application of the eight-corners rule, due to a gap in the plaintiff's pleading, is not determinative of whether coverage exists, Texas law permits consideration of extrinsic evidence provided the evidence (1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved.

Monroe, 640 S.W.3d at 202-03.

BITCO and Monroe insured 5D, a drilling operator. Jones retained 5D to drill a commercial irrigation well on his farmland. Jones eventually sued 5D claiming that its operations caused damage to the aquafer under his property. Jones' pleading did not state when 5D's negligent acts occurred or when 5D started or stopped work. The pleading alleged that Jones' land was damaged in different ways but did not state when any of the alleged damage took place.

BITCO issued two consecutives one-year CGL policies to 5D, which were followed by a one-year CGL policy issued by Monroe. BITCO defended 5D but Monroe declined, contending that the damage took place before the inception of its policy and/or that 5D knew of damage before its policy incepted. BITCO and Monroe stipulated that 5D's drill bit stuck in the bore hole of the well during 5D's drilling in or around November 2014, approximately 10 months before BITCO's last policy ended and Monroe's policy began.

Although the Texas Supreme Court recognized an exception to the eight corners rule as outlined above, it then held that the extrinsic evidence proffered by the insurers did not meet the test it had

created. While the court explicitly recognized that extrinsic evidence of the date of an occurrence is generally permissible, the extrinsic evidence offered by BITCO and Monroe, *i.e.,* evidence of when 5D's drill bit was stuck in the bore hole, did not pass the test because the date of the property damage, in the court's view, overlapped with the merits. The court stated that "[a] dispute as to when property damage occurs also implicates whether property damage occurred on that date, forcing the insured to confess damages at a particular date to invoke coverage, when its position may very well be that no damage was sustained at all." *Monroe*, 640 S.W.3d at 204. The court reasoned that to argue Monroe was under a duty to defend, 5D would be placed in the position of arguing that some of Jones' alleged damages occurred after November 2014. In the court's view, this would undermine 5D's liability defense, which would best be served by claiming there was no damage in November 2014 or at any time thereafter. *Id*. Therefore, the court declined to allow extrinsic evidence in the form of the stipulation to be used to determine Monroe's defense duty.

COMMENTS:

While the court's opinion certainly answered some questions about the use of extrinsic evidence to determine the duty to defend, it raised others. Perhaps the most confusing statement in the court's opinion is: "[i]n cases of continuing damage like the kind alleged here, evidence of the date of property damage overlaps with the merits." *Monroe*, 640 S.W.3d at 204. Many, perhaps even most, construction defect cases involve continuing damage. Is the continuing damage involved in a water intrusion case or in a foundation movement case different, for purposes of overlapping with the merits of the underlying lawsuit, from the continuing damage involved in the underlying lawsuit in *Monroe*? If an insurer or an insured wants to use extrinsic evidence to show when a construction project began or when work ended, then *Monroe* seems to approve of such use under those circumstances. If, however, extrinsic evidence is sought to be used to show that specific damage happened or did not happen at a particular time in a continuing damage case, then *Monroe* arguably limits resolution of the parties' duty to defend dispute to the factual allegations, or lack thereof, in the pleadings.

ii. Eight Corners and Additional Insureds

Where additional insured coverage is at issue, however, the court will also look to the contract, if the policy coverage is dependent on a contractual obligation. *In re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015).

The Fifth Circuit in *Lyda Swinerton Builders, Inc. v. Oklahoma Surety Co.*, 877 F.3d 600, 612 (5th Cir. 2017) arguably expands the scope of the eight-corner's rule about coverage for additional insureds. In *Lyda Swinerton*, the Fifth Circuit found that a general contractor qualified as an additional insured on the insured subcontractor's CGL policy based on general allegations of defects in the work completed by the subcontractor. *Id.* at 613.

iii. The language of the additional insured endorsement matters

There is myriad of different forms of additional insured endorsements. "Arising out of" is still construed broadly, and requires only some causal nexus. "Caused, in whole or in part," is slightly narrower, and should afford no coverage for the sole negligence of the additional insured. Other endorsements have attempted to limit coverage to the extent caused by the named insured, or to purely vicarious liability. So, the ultimate indemnity obligation will depend on both the facts and the specific policy language.

Where more than one insurer has an additional insured obligation, as in the case of multiple subcontractors, the indemnity obligation may vary among insurers.

Bottom Line: The lines are not clear. An insurer may want to review whether there are allegations specifically related to the insured's scope of work. In addition, since the lack of a duty to defend does not preclude an indemnity obligation, the facts may impact whether an insurer chooses to defend, regardless of the lack of a specific allegation regarding the named insured or its work.

iv. No duty to defend unless insured request defense

Under Texas law, there is no duty to defend any insured until that insured provides notice and tenders suit papers. *Nat'l Union Fire Ins. Co. v. Crocker*, 246 S.W.3d 603 (Tex. 2008). Therefore, an insurer has no obligation for pre-tender fees. And tender by one insured is not sufficient as to another insured. The Fifth Circuit recently reaffirmed that this remains the law in Texas in *Moreno v. Sentinel Ins. Co., Ltd.*, 2022 WL 1791949 (5th Cir. (Tex.) June 2, 2022).

b. An insured's entitlement to independent counsel

In Texas, if a conflict of interest exists between the insurer and the insured, the insured has the privilege of rejecting the representation offered by the insurer and hiring counsel of its own choosing to be paid for by the insurer. An insurer's issuance of a reservation of rights can create a potential conflict of interest, but it does not by itself create such a conflict. "Instead, the test to apply is whether 'the facts to be adjudicated in the [underlying] lawsuit are the same facts upon which coverage depends.'" *Graper v. Mid-Continent Cas. Co.*, 756 F.3d 388, 392 (5th Cir. 2014) (citing *N. Cnty. Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685, 689 (Tex. 2004)). Moreover, a conflict of interest does not arise just because facts that could be *developed* in the underlying litigation are the same facts upon which coverage depends.

c. Allocation issues amongst Carriers

i. Application of other insurance provisions for consecutive policies

In Texas, "other insurance" clauses in insurance policies apply only when the coverages at issue are concurrent. Generally, for multiple insurance policies to provide concurrent coverage, the policies must cover the same risk and the same period. Therefore, a primary policy and additional insured policy will be subject to other insurance clause comparison, but consecutive policies will not. In addition, "other insurance" clauses do not typically apply to the duty to defend.

ii. Targeted tenders and insurer contribution rights

Texas allows an insured to target the policy, or policies, that will best cover its claim. This method of allocation is based on the Insuring Agreement provision which states that "[w]e will pay *all sums* that the insured becomes legally obligated to pay as damages…" With this language, an insurer becomes jointly and severally liable with other triggered insurers.

Where there is excess coverage, the insured can "spike" in the targeted year, vertically exhausting the entire line of coverage without regard to other primary coverage that may exist for other periods of

time. While not entirely clear, Texas Supreme Court dicta indicates the targeted insurers could still exercise rights of subrogation and seek horizontal exhaustion.

In the construction defect arena, the Supreme Court of Texas applied the "all sums" allocation method in *Lennar Corp. v. Markel Am. Ins. Co.*, 413 S.W.3d 750 (Tex. 2013). In that case, Lennar underwent a program of removing EIFS on hundreds of homes after water damage was discovered. While Lennar litigated coverage with many of its insurers, by the time of trial, only Markel was left, with an umbrella policy for a single year. Most of the damage to the homes likely began before or during Markel's policy period and continued after the policy expiration. The Court reasoned that, while coverage under Markel's policy was limited to property damage that occurred during the policy, the policy also covered damage from a continuous exposure to the same harmful conditions. Therefore, if any damage occurred during the policy period, coverage extended to the "total amount" of loss suffered as a result, not just the loss incurred during the policy period.

iii. Continuing occurrences and the impact of endorsements limiting coverage

Texas employs an injury-in-fact trigger, but recognizes that an occurrence can continue through multiple policy terms. *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008). Even if there is a continuing trigger, and multiple insurers are implicated, the respective defense and indemnity obligations are often impacted by standard and manuscript endorsements that may eliminate coverage for an otherwise implicated period. These include exclusions for work on projects that began prior to policy inception, pre-existing or continuing injury exclusions—that may or may not require knowledge on the part of the insured--and elimination of the subcontractor exception to exclusion l. If additional insured coverage is at issue, the scope of that coverage may also vary. Where one or more insurers have eliminated coverage, the other insurers will still likely have an obligation to defend, and to indemnify for the periods with no coverage.

e. Contribution between insurers

i. The Mid-Continent rules

Contribution claims against co-insurers were cast in doubt by the Texas Supreme Court's decision in *Mid-Continent Ins. Co. v. Liberty Mutual Ins. Co*., 346 S.W.3d 765 (Tex. 2007). Liberty insured the general contractor on a highway project for the State of Texas. One of the subcontractors was responsible for the signs and dividers on the project. Liberty issued a $1 million primary policy, and a Liberty affiliate issued a $10 million excess policy to the general contractor. Mid-Continent insured the subcontractor under a nearly identical $1 million policy under which the general contractor was an additional insured. Both primary policies had identical "other insurance" clauses providing for pro rata sharing.

During construction of the highway, a driver crossed over the center barrier into oncoming traffic and hit another car head-on. Liberty Mutual and Mid-Continent both accepted defense of the general contractor. At mediation, Liberty Mutual agreed to settle for $1.5 million and demanded that Mid-Continent contribute half, but Mid-Continent only paid $150,000. Liberty paid $1.35 million, $350,000 over its primary policy limits, and retained the right to seek recovery from Mid-Continent for Mid-Continent's pro rata share. Additionally, Mid-Continent settled the claims against the subcontractor for $300,000, leaving $550,000 in available limits. The district court awarded Liberty Mutual the remaining

$550,000 limit of Mid-Continent's $1 million policy. On appeal, the Fifth Circuit certified questions to the Texas Supreme Court, regarding the subrogation and contribution rights between the insurers.

In responding to the certified questions, the Texas Supreme Court concluded that there was no right of reimbursement. The court determined that Liberty Mutual was seeking a right of contribution from Mid-Continent. Under Texas law, a right of contribution exists when two or more insurers bind themselves to pay an entire loss, but one pays the whole loss. *General Ins. v. Hicks Rubber*, 169 S.W.2d 142 (Tex. 1943). The right of contribution requires that several insurers share a common obligation or burden and that the insurer seeking contribution has made a compulsory payment of more than its fair share of that common burden. When "other insurance" is "pro rata", however, the direct claim for contribution between co-insurers disappears because the "pro rata" clause makes the contracts several and independent from each other; each co-insurer contractually agrees with the insured to pay its pro rata share of the loss, but does not contractually agree to pay another co-insured's pro rata share. Since the Liberty Mutual and Mid-Continent policies contained pro rata other insurance clauses, the two insurers agreed with their common insured to pay a proportionate share of the insured's loss up to $1 million. But the co-insurers did not create a similar contract between themselves.

Liberty Mutual also asserted a right to subrogation. The court found however, that because the insured had been fully indemnified for its $1.5 million loss, it had no right to enforce Mid-Continent's duty to pay its pro rata share of the loss.

ii. The limitations of the Mid-Continent rule

In subsequent cases, the Fifth Circuit has restricted the scope of *Mid–Continent* to apply only to the specific facts of that case. In *Trinity Universal Insurance Co. v. Employers Mutual Casualty Co.,* the Fifth Circuit made it clear that *Mid–Continent* does not apply to defense costs. 592 F.3d 687 (5th Cir. 2010).

Subsequent cases have further restricted *Mid-Continent*, holding it does not apply to an insurer who has denied defense, or where the coverage is consecutive, where insurance applies at different levels.

f. Confusion over "rip and tear"

In contrast to several states, Texas has recognized coverage for at least some costs to access defective work or products. In *U.S. Metals, Inc. v. Liberty Mut. Group, Inc.*, 490 S.W.3d 20 (Tex. 2015), the Texas Supreme Court issued an opinion based on certified questions from the Fifth Circuit. At issue was the coverage for the cost to replace defective flanges. To access the flanges, it was necessary to destroy welds, gaskets, insulation, and coating on the diesel units. Liberty denied coverage. The Fifth Circuit certified questions regarding the meaning of "physical damage" and "replacement" in the exclusions related to "your product" and impaired property. The Court held that incorporation of a defective product was not property damage. The damage to the flanges, including cutting out the welds, and the downtime, were excluded by the impaired property exclusion. The damage to the insulation and gaskets, however, involved replacement, not restoring a product to use, and was not excluded. The Court's analysis had been difficult to apply as the line between repair and replacement is not always clear. In subsequent cases, courts have held that the cost of repouring a foundation was not covered, but the cost to reinstall the forms, reinforcing bar, and angle iron that secured was, *Lauger Cos. v. Mid-Continent Cas. Co.*, 2017 U.S. Dist. LEXIS 121709 (S.D. Tex. Aug. 2, 2017); and that destruction of partial

construction to correct problems in a slab was excluded, *Vinings Ins. Co. v. Byrdson Servs*., LLC, 2016 U.S. Dist. LEXIS 92533 (E.D. Tex. June 17, 2016). On the other hand, downtime from a faulty generator was not covered. *Colony Ins. Co. v. Rentech Boiler Sys*., 2018 U.S. Dist. LEXIS 46780 (N.D. Tex., Mar. 1, 2018). In addition, the Court in *U.S. Metals* did not address the issues of trigger or occurrence, which can often affect construction defect claims.

g. Third Party Attorney's Fees

The Texas Supreme Court Case has placed into question whether third party attorney's fees are covered by a commercial general liability policy. *Anadarko Petroleum Corp. v. Houston Cas. Co.*, 2019 Tex. LEXIS 53. The Texas Supreme Court opined:

> "We have explained that, in the insurance context, 'liability insurance' generally covers 'damage the insured does to others.' *Members Mut. Ins. Co. v. Hermann Hosp.*, 664 S.W.2d 325, 327-28 (Tex. 1984) (holding that uninsured-motorist coverage did not protect the insured from liability for damages cause to others). We have also held that an insured's defense expenses are not 'damages' a third party sustains and 'claims.' *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 17 (Tex. 2007). Even in the broader common, ordinary sense, 'damages' are '[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury.' *In re Xerox Corp.*, 555 S.W.3d 518, 529 (Tex. 2018) (quoting *Damages*, Black's Law Dictionary (10th ed. 2014)), thus 'attorney's fees are generally not damages, even if compensatory,' *Id*. (citing *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 173 (Tex. 2013)). The policy at issue here consistently uses the terms liability, damages, and defense expenses consistent with these common legal meanings. *Anadarko Petroleum Corp. v. Houston Cas. Co.*, 2019 Tex. LEXIS 53, HN 6.

The impact upon Insured's can be significant. Evaluation of the Insured's potential exposure at trial to attorney's fees should be in every insurer and defense counsel's analysis of settlement values and damages at trial.

6. Changes in the Texas Judiciary and Challenges with Venue

Texas is the second largest geographically state in the union, with only Alaska being larger. Texas shares with California in leading as: the largest populated state in America; most culturally and ethnically diverse, including not only racial diversity but also industry, linguistic and ethnic diversity. It's important to understand these jurisdictional issues when handling claims in Texas, especially when evaluating the jury pool and any predisposition of the judge.

Changes are ongoing within the Texas Judiciary. With 254 counties, Texas practitioners and insurers are arguably faced with broader inconsistencies in rulings than any other state. Judicial ideology can swing significantly between cities only miles apart and thus claims cannot be evaluated based upon regions and instead must be specifically assessed at the local level. Seasoned judges are retiring or have lost their seats with greater numbers seemingly due in part not only to the challenges of the COVID pandemic but

also due to more sociopolitical division in the state of Texas than it has experienced in decades. At an increasing rate, judges with few years of private practice or governmental service, and some with no civil trial experience, are being presented with complex, multi-party construction defect cases, overlayed with substantive coverage issues and a multitude of experts, creating even more uncertainty at trial.

While the impact was previously more noticeable at the State level, Federal Courts are not immune from this change in the judiciary. Practitioners are challenged with differing Appellate Court rulings that can significantly impact the global posture of litigation including split authority in case law.