

PRESENTED AT

The University of Texas School of Law
21st Annual Insurance Law Institute

November 10-11, 2016
Houston, Texas

**2016 Texas Update:
Hail and Windstorm First Party
Property Claims**

Daniel P. Buechler
Thompson, Coe, Cousins & Irons, LLP
700 N. Pearl Street, 25th Floor
Dallas, Texas 75201
Phone (214) 871-8200 | Fax (214) 871-8209

Robert D. Green
Green Trial Law
440 Louisiana St., Suite 1930
Houston, Texas 77002
Phone (713) 654-9221 | Fax (713) 654 2155

INDEX

I.	Concurrent Causation Issues.....	1
	a. Policyholder’s Burden of Proof on Coverage.....	1
	b. Anti-Concurrent Causation Clauses.....	4
II.	Appraisal.....	5
	a. Scope of Appraisal: <i>State Farm v. Johnson</i>	5
	b. Effect of Paying an Appraisal Award.....	7
	c. Waiver.....	9
	d. Abatement of Suit.....	10
	e. Challenging an Appraisal Award.....	11
III.	Extra-Contractual Liability and Damages.....	14
	a. Bona Fide Disputes.....	14
	b. Independent Injury Requirement.....	18
	c. Pleading Standard for Determination of Improper Joinder.....	21
IV.	Prompt Payment Statute.....	22
V.	Prompt Notice.....	24
VI.	Contractual Limitations Period.....	27
VII.	Law and Ordinance Coverage.....	28

**2016 TEXAS UPDATE:
HAIL AND WINDSTORM FIRST PARTY PROPERTY CLAIMS**

I. CONCURRENT CAUSATION ISSUES

a. Policyholder's Burden of Proof on Coverage

Weather-related property insurance claims often raise questions about the timing of a particular loss. For example, numerous hail storms can impact a roof over its lifetime, which can make it difficult to determine which damage was caused by a particular storm during a particular coverage period. Likewise, storm damage often overlaps with other types of damage that may not be covered or may be excluded, such as mechanical damage, defective maintenance, long-term deterioration, earth movement, and surface water infiltration.

In general, under Texas law, an insured bears the initial burden of showing coverage, and the insurer bears burden of proving applicability of any exclusion. *See, e.g., Venture Encoding Serv., Inc. v. Atl. Mut. Ins. Co.*, 107 S.W.3d 729, 733 (Tex. App.—Fort Worth 2003, pet. denied); TEX. INS. CODE §554.002 (Vernon 2006). Accordingly, the insured must first prove that the claim itself falls within the insuring agreement of the policy before an insurance company will be held liable for breach of its duty to satisfy a claim presented by its insured. *See Data Specialties, Inc. v. Transcontinental Inc. Co.* 125 F.3d 909, 911 (5th Cir. 1997) (citing *Employers Cas. Co. v. Black*, 744 S.W.2d 940, 944 (Tex. 1988, overruled on other grounds by *State Farm Fire and Casualty v. Gandy*, 925 S.W.2d 696 (Tex. 1996)). This also means the policyholder must provide proof that the loss occurred during an insurer's coverage period. *New Hampshire Ins. Co. v. Martech USA, Inc.*, 993 F.2d 1195, 1200 (5th Cir. 1993).

Texas recognizes the doctrine of concurrent causes, which provides that when covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril(s). *Travelers Indemn. Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971). To this end, the insured must present some evidence upon which the jury can allocate the damage attributable to the covered peril. *Lyons v. Millers Casualty Ins. Co.*, 866 S.W.2d 597, 601 (Tex. 1993) (citing *Paulson v. Fire Ins. Exch.*, 393 S.W.2d 316, 319 (Tex. 1965)); *see also All Saints Catholic Church v. United Nat'l Ins.*, 257 S.W.3d 800, 802 (Tex. App.—Dallas 2008, no pet.) (finding the insurer was only obligated to pay for certain broken tiles after a hail storm, not the entire roof). In other words, the policyholder has the burden to provide evidence capable of enabling a trier of fact to segregate his covered damages from non-covered damages. *See, e.g. Nat'l Union Fire Ins. v. Puget Plastics Corp.*, 735 F. Supp. 2d 650, 669 (S.D. Tex. 2010) (“failure to provide evidence upon which a jury or court can allocate damages between those that resulted from covered perils and those that did not is fatal to an insured party's claim”). “Because allocation is central to the claim for coverage, an insured's failure to carry the burden of proof on allocation is fatal to his claim.” *State Farm Lloyds v. Kaip*, 05-99-01363-CV, 2001 WL 670497, at *1 (Tex. App.—Dallas June 15, 2001, pet. denied). A plaintiff must attempt to segregate the loss caused by the covered peril from the loss caused by the excluded peril, and to secure a jury finding on the amount of damage attributable to the different causes. *Id.*

For example, in *State Farm Lloyds v. Kaip*, Kaip reported a hail claim under her “all-risk” homeowner policy issued by State Farm. *Id.* After inspecting the roof, State Farm found evidence of a single hail strike and claimed the rest of the damage to the roof was due to excluded deterioration. Kaip had her roof replaced at her own cost and sued State Farm. The case was tried to a jury which found that the roof damage was covered and that State Farm had breached its duty of good faith and fair dealing. On appeal, the Dallas Court of Appeals focused on the issue of concurrent causes, noting that the jury had heard evidence from Kaip's own expert who testified that the damage was caused by hail (including prior hail storms) and premature deterioration, and therefore had admitted that the condition of Kaip's roof was caused, at least in part, by excluded perils. In addition, the court of appeals noted that Kaip's expert had testified that it would be difficult to when asked to quantify and segregate the causes of the damage, and that he could not rule out that some of the deterioration on Kaip's roof was caused by something other than hail. Viewing the evidence in the light most favorable to the jury verdict, the court of appeals concluded Kaip's expert's testimony raised the issue of concurrent causation, and that Kaip was therefore required to prove to what extent her claim was covered. Kaip, however, did not attempt to segregate the damage caused by the excluded perils from the damage caused by hail. Accordingly, because Kaip did not attempt to quantify the amount of loss caused by the hail and to secure a jury finding on the amount of damage attributable to hail, the court found that she failed to meet her burden of proof and rendered a take nothing judgment in favor of State Farm. *Id.*; see also *Wallis v. United Services Auto. Ass'n*, 2 S.W.3d 300, 303 (Tex. App.—San Antonio 1999, pet. denied) (reversing a jury verdict for the plaintiff where the policyholder provided no evidence of the relative amount of damage from covered versus non-covered perils).

More recently, in *Hamilton Properties*, District Judge Jane Boyle of the United States District Court for the Northern District of Texas, Dallas Division granted summary judgment to an insurance carrier on a hail claim after determining the insured had failed to satisfy its burden to segregate damage attributable to a covered peril from damage attributable to a non-covered peril. *Hamilton Properties v. Am. Ins. Co.*, 643 Fed. Appx. 437 (5th Cir. 2016). In *Hamilton Properties*, the insured reported roof damage to its hotel, allegedly resulting from a July 8, 2009, hailstorm in Dallas County. The insured claimed its representatives first noticed problems with ceiling tiles falling and water entering the building shortly after the July hailstorm. *Id.* After investigating the claim, the insurer determined the roof was experiencing potential problems with wear and tear, aging, latent defect, corrosion, and other excluded forms of deterioration. The insurer's investigation also revealed that there was evidence of other prior storms that may have impacted the subject property outside of the relevant policy period. Hamilton Properties filed suit against the insurer, AIC, claiming that all of the damage it was seeking was caused by the July 2009 hailstorm. After expert and fact witness discovery was completed, AIC moved for summary judgment. In reviewing the evidence in the light most favorable to Hamilton Properties, however, Judge Boyle determined there was a lack of evidence to support Hamilton Properties' contention. Because Hamilton Properties failed to allocate damages between the July 2009 hailstorm and those damages that were caused by other perils not covered under the policy (including prior storms), Judge Boyle granted the insurer's motion for summary judgment. *Id.* On appeal, a three-judge Fifth Circuit panel affirmed the summary judgment, holding again that “Hamilton's failure to provide evidence upon which a jury or court could segregate covered damages from uncovered damages is fatal to its claim.” *Id.* at 442.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: 2016 Texas Update: Hail and Windstorm First Party Property Claims

Also available as part of the eCourse

[2016 Insurance Law eConference](#)

First appeared as part of the conference materials for the
21st Annual Insurance Law Institute session
"Hail and Windstorm First Party Property Claims"