



## News & Updates

### WITH HURRICANE SEASON COMES NEW CASELAW — AND NEW CONCERNS

Natural disasters and catastrophes pose unique, massive, and complex challenges for insurers, claims professionals, and legal teams. Adding to that complexity is the continually evolving nature of the caselaw that sets the framework and boundaries for the timely, cost-effective, and good-faith resolution of claims — something for which all parties involved strive.

Now that summer is upon us — and with it, unfortunately, the season of hurricanes and other severe natural events — two recent court decisions highlight important risk management considerations for natural catastrophe-focused teams.

#### Wash. Case Highlights Importance of “Efficient Proximate Cause” Analysis

On April 27, 2017, the Supreme Court of Washington issued its opinion in *Xia, et al. v. ProBuilders Specialty Insurance Company RRG, et al.*, No. 92436-8. As background, ProBuilders issued a commercial general liability policy to Issaquah Highlands 28 LLC, a builder that constructed a new home purchased by the plaintiff. An incorrectly installed exhaust vent, attached to the hot water heater, was discharging carbon monoxide into the house.

ProBuilders’ third-party administrator denied coverage, relying on an absolute pollution exclusion and a townhouse exclusion. The trial court, relying on the townhouse exclusion, granted summary judgment to the insurer. The Court of Appeals, relying on the pollution exclusion, affirmed.

The Washington Supreme Court, however, reversed. Applying an “efficient proximate cause” analysis, it reasoned that the complaint clearly presented a potentially covered claim: negligent installation. The court held that ProBuilders had a duty to defend, and its denial of a defense without any “investigation of Washington law” was in bad faith.

The lesson from this case is twofold. Washington requires insurers employ the “efficient proximate cause” analysis when making such coverage determinations. It is prudent to employ such analysis, where Washington law applies, to property coverage issues. And, insurers had better know of their obligation to do so — at the peril of extracontractual liability.

#### Texas Clarifies “Rules” Demarcating Contractual and Extracontractual Damages

In *USAA Texas Lloyd’s Co. v. Menchaca* (14-0721, April 7, 2017), the Texas Supreme Court pronounced five rules addressing the insured-insured relationship, in the context of a Hurricane Ike homeowner’s claim. Agreeing that its prior decisions addressing the interplay between breach of contract claims and tort claims under the Texas Insurance Code had engendered confusion, the Texas Supreme Court announced five “rules”:

1. Generally, an insured cannot recover policy benefits for an insurer’s statutory violation if the insured does not have a right to those benefits under the policy.
2. An insured who establishes a right to benefits under an insurance policy can recover these benefits as actual damages under the statute if the insurer’s statutory violation causes the loss of the benefits.
3. An insured can recover benefits as actual damages under this code *even if* the insured has no right to those benefits, if the insurer’s conduct caused the insured to lose that contract right.
4. Extracontractual liability is distinct from liability for benefits under the insurance policy. An insured who was not entitled to policy benefits but who nonetheless has suffered an “independent injury” at the insurer’s hands may still have an extracontractual claim.
5. An insured cannot recover any damages based on an insurer’s alleged statutory violations unless the insured establishes either a right to benefits under the policy or an injury independent of a right to benefits.

The case attempts to bring clarity to an area of perpetual uncertainty: the line of demarcation between contractual and extracontractual damages. While decided under the Texas statute, other courts may find the general principles set forth to be helpful reference points.

### **Our CAT Team Stands Ready**

For more information on the impact of these cases or on developing a strategic plan to handle natural-catastrophe claims, contact a member of the CAT Team within Goldberg Segalla's Global Insurance Services Practice Group:

Jeffrey L. Kingsley (716.566.5434; [jkingsley@goldbergsegalla.com](mailto:jkingsley@goldbergsegalla.com))  
David L. Brown (336.419.4902; [dbrown@goldbergsegalla.com](mailto:dbrown@goldbergsegalla.com))  
Sharon Angelino (716.566.5411; [sangelino@goldbergsegalla.com](mailto:sangelino@goldbergsegalla.com))  
Christian A. Cavallo (973.681.7004; [ccavallo@goldbergsegalla.com](mailto:ccavallo@goldbergsegalla.com))  
Michael A. Hamilton (267.519.6833; [mhamilton@goldbergsegalla.com](mailto:mhamilton@goldbergsegalla.com))  
Louis H. Kozloff (267.519.6821; [lkozloff@goldbergsegalla.com](mailto:lkozloff@goldbergsegalla.com))  
Jonathan M. Kuller (609.986.1315; [jkuller@goldbergsegalla.com](mailto:jkuller@goldbergsegalla.com))  
John I. Malone, Jr. (336.419.4908; [jmalone@goldbergsegalla.com](mailto:jmalone@goldbergsegalla.com))  
Larry Mason (312.572.8444; [lmason@goldbergsegalla.com](mailto:lmason@goldbergsegalla.com))  
Jonathan L. Schwartz (312.572.8411; [jschwartz@goldbergsegalla.com](mailto:jschwartz@goldbergsegalla.com))

Attorney Advertising © 2018 Goldberg Segalla  
Prior results do not guarantee a similar outcome.

- New York
  
- Chicago
  
- Los Angeles
  
- Orange County
  
- Orlando
  
- West Palm Beach
  
- St. Louis
  
- Philadelphia
  
- Miami
  
- Baltimore
  
- Newark
  
- Garden City
  
- Hartford
  
- Princeton
  
- Greensboro
  
- Raleigh
  
- Buffalo
  
- Rochester
  
- Syracuse
  
- Albany
  
- White Plains

- London