

AFTER DON'S BUILDING: CHANGE IS THE ONE THING WE CAN BE SURE OF

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Chapter 2.2

I. INTRODUCTION

“The more things change, the more they remain insane.”

In 2008, the Texas Supreme Court completely changed the trigger of coverage theory for occurrence based Commercial General Liability (“CGL”) policies in Texas.¹ The Court held that, where damage occurs over multiple policy periods, coverage is triggered for any policy period in which actual damage transpires.

Unlike the manifestation theory, which implicates only the policy year when the damage is discovered, the “actual injury” theory triggers coverage for every policy period (and all of the policies) in which property damage occurs. The actual injury trigger increases the likelihood of cases involving the existence of multiple policies with different policy limits and multiple carriers. In turn, this will often lead to many coverage issues.

This paper will attempt to disentangle some of these interrelated issues and provide insight into the practical implications that may arise. Analyzing coverage for progressive loss often requires, at a minimum, four separate determinations:

1. What is the trigger of coverage?
2. What is the extent of coverage?
3. What is the burden of proof to show when and if the damage occurred?
4. What is the proper method of allocation among multiple periods of coverage?

¹ *Don’s Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008).

II. TRIGGER OF COVERAGE.

A. The World Before Don’s Building

For years, Texas courts, and courts in other jurisdictions, have struggled with how to interpret a CGL policy that provides coverage for property damage that “occurs during the policy period.” Specifically, the difficulties have ensued over what event triggers coverage under the policy. Courts have focused on four primary approaches:

1. “Manifestation”

For many years, manifestation was the most prevalent trigger used in Texas. This trigger imposes coverage only if the property damage becomes evident or discoverable during the policy term.² Various courts have created modified manifestation approaches, with some having the trigger turn on when the damage is *actually* discovered, and others looking to when the damage *could have been* discovered.³

² *Summit Custom Homes, Inc. v. Great Am. Lloyds Ins. Co.*, 202 S.W.3d 823, 827 (Tex. App.—Dallas 2006, pet. filed) (holding that “[i]f [property] damages are not manifested during the policy period, then there is no ‘occurrence’ during the policy period.”); *Cullen/Frost Bank of Dallas, N.A. v. Commonwealth Lloyd’s Ins. Co.*, 852 S.W.2d 252, 258 (Tex. App.—Dallas 1993) (holding that occurrence under CGL policies “takes place when the property damage manifests itself”).

³ See, e.g., *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 523 F. Supp. 110, 118 (D. Mass. 1981) (applying “pure” or “strict manifestation” rule which triggers coverage upon actual discovery of the injury); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 24 (1st Cir. 1982) (applying relaxed “manifestation rule” which triggers coverage in first policy period during which discovery of injury is possible).

While the manifestation theory often clearly identifies the implicated policy period, it is inconsistent with the language in most CGL policies. The policy language doesn't require that the property damage actually be manifested or discovered during the policy period but rather focuses on when the damage occurs.

2. "Exposure Theory"

Under the exposure theory, the trigger revolves around whatever event ultimately results in personal injury or property damage during the policy period.⁴ Coverage exists from the time of the underlying injury-causing event until the damage is complete.

Some courts have adopted this theory to give effect to the language in the standard occurrence policy which provides coverage for a "continuous or repeated exposure to conditions." But, this theory appears to be inconsistent with the language of most policies because it triggers coverage from the time of the injury-causing event even if no damage has yet occurred. Such an interpretation conflicts with the plain language of the policy which provides that damage must occur during the policy period.

3. Coverage Triggered at Time of the Injury-causing Event

This theory triggers coverage at the time of the underlying injury-causing event, even though no damage has yet occurred. The policy in effect at the time of the event covers all the ensuing damage.

⁴ See *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 2006 Tex. App. LEXIS 5950 (Tex. App.—Houston [14th Dist.] 2006, pet. granted) (adopting exposure rule in case involving coverage for EIFS claims under CGL policies); *Pilgrim Enters., Inc. v. Md. Cas. Co.*, 24 S.W.3d 488, 497-99 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (applying exposure rule under a CGL policy).

Many courts have found this theory to conflict with the plain language of the standard CGL policy because this trigger focuses on the time of the underlying event that eventually caused the damage and not on when the damage actually occurs.⁵

4. Actual Injury or Injury-in-fact

For the actual injury theory, coverage is triggered whenever the damage can be shown to have occurred, even if it is before the damage became apparent.⁶ Coverage exists in instances where an insured may be able to prove in retrospect that damage occurred during the policy period even though damage was not yet manifested at the time. Courts have increasingly adopted the actual injury trigger because it is consistent with the CGL policy requirement that damage must occur during the policy period.

B. The Rules of the Game Have Changed

For years, Texas courts applied the manifestation theory to determine the trigger of coverage in the property damage context under a liability policy. However, in 2008, this all changed. In *Don's Building, One*

⁵ See, e.g., *Prieto v. Reserve Ins. Co.*, 340 So. 2d 1282 (Fla. App. 1977); *Jenoff, Inc. v. New Hampshire Ins. Co.*, 558 N.W.2d 260 (Minn. 1997); *Dorchester Dev. Corp. v. Safeco Ins. Co.*, 737 S.W.2d 380 (Texas App. 1987).

⁶ *Transcon. Ins. Co. v. W.G. Samuels Co.*, 370 F.3d 755, 758 (8th Cir. 2004) ("The Kansas Supreme Court has adopted an injury-in-fact rule for purposes of determining when coverage is triggered under a CGL policy."); *Trizec Props., Inc. v. Biltmore Constr. Co.*, 767 F.2d 810, 813 (11th Cir. 1985) (holding under Florida law that actual injury rule applies to CGL policy); *Sentinel Ins. Co. v. First Ins. Co. of Haw.*, 875 P.2d 894, 915, 917 (Haw. 1994) (adopting injury-in-fact trigger "for all standard CGL policies," and also recognizing that continuous trigger rule may be employed where injury occurs continuously over a period covered by different insurers or policies).

Beacon Insurance Company (“One Beacon”) sought a declaration that it had no duty to defend or indemnify its insured, Don’s Building Supply, Inc. (“DBS”), in twenty-two lawsuits that various homeowners had filed against DBS and other defendants.⁷ The claims arose over the sale of defective EFIS, which had been installed in the various homes between 1993-1996, during which DBS was covered by general liability policies issued by Potomac Insurance Company of Illinois and assigned to One Beacon. Because the damage had been undiscoverable, the underlying lawsuits were not filed until 2003-2005.

The homeowners’ complaint against DBS alleged that the damage began to occur on the occasion of the first penetration of moisture behind the EFIS, which they say was within 6 months to 1 year after installation. “The alleged result of this ongoing moisture exposure was extensive damage to the homes, reduced property values, and the need to retrofit or replace the EIFS.”⁸

DBS requested a defense from One Beacon under three occurrence-based commercial general liability insurance policies. One Beacon initially provided a defense to DBS but then filed a declaratory judgment action “seeking a ruling that it had no duty to defend and indemnify under the CGL policies.”⁹ The issue of what triggers coverage under the policies was eventually brought before the 5th Circuit.

Concluding that this case involved important and determinative questions of Texas law, as to which there was no controlling Texas Supreme Court precedent,

the Fifth Circuit certified the following question to the Supreme Court of Texas:

When not specified by the relevant policy, what is the proper rule under Texas law for determining the time at which property damage occurs for purposes of an occurrence-based commercial general liability insurance policy?¹⁰

The Texas Supreme Court determined that property damage under a normal CGL policy occurs when actual physical damage to the property takes place.¹¹ Before reaching its decision, the Court surveyed Texas jurisprudence on the issue. The majority of Texas courts, including the Fifth Circuit, for many years had held that the duty to defend is triggered only if the damage allegedly became manifest or apparent during the policy period (the “manifestation theory”).¹²

The Court declined to follow the manifestation theory, noting that, in the case before it, the policy language “does not provide that the insurer’s duty is triggered only when the injury manifests itself during the policy term, or that coverage is limited to claims where the damage was discovered or discoverable during the policy period.”¹³ Based upon a strict interpretation of the policy, coverage is triggered if the “‘property damage’ occurs during the ‘policy period.’”

Although *Don’s Building* applied the actual injury theory to property damage, there is no reason that the trigger will not

⁷ *Don’s Bldg. Supply*, 267 S.W.3d 20.

⁸ *Id.* at 22-23.

⁹ *Id.* at 23.

¹⁰ *OneBeacon Ins. Co. v. Don’s Bldg. Supply, Inc.*, 496 F.3d 361, 365 (5th Cir. 2007)(this was one of two questions certified to the Court).

¹¹ *Don’s Bldg. Supply*, 267 S.W.3d at 24.

¹² *Id.* at 26-27.

¹³ *Id.* at 29.

apply for bodily injury. The coverage determinations and policy language for cases involving claims for bodily injury are identical to those involving property damage.¹⁴

After *Don's Building*, for progressive property loss, courts will apply the actual injury trigger to determine which policy periods are implicated. Out of this clarity arises the next issue for the insured. What is the extent of coverage available to pay for the progressive loss?

III. THE EXTENT OF COVERAGE

For the insured, the practical and direct effect of *Don's Building* is that, for cases involving progressive loss, the possible avenues for coverage have increased. This raises more questions. What are the limits of coverage? What options do the insured have? What is the liability of the insurers? Fortunately, Texas courts have addressed some of these issues. .

A. Garcia: The Insured's Prized Fighter

*Am. Physicians Ins. Exch. v. Garcia*¹⁵ involved allegations of physician malpractice allegedly spanning a number of years and triggering a series of liability policies issued by Insurance Corporation of America ("ICA") and American Physicians Insurance Exchange ("APIE").¹⁶ The insured physician was found negligent for conduct that extended throughout three policy periods.¹⁷

¹⁴ *Guar. Nat'l Ins. Co. v. Azrock Indus. Inc.*, 211 F.3d 239, 246 (5th Cir. 2000) (The policy definition of "occurrence" makes no distinction between personal injury and property damage).

¹⁵ *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 855 (Tex. 1994).

¹⁶ *Garcia*, 876 S.W.2d at 843-44.

¹⁷ *Id.* at 845.

The extended period of negligence was "a single claim involving indivisible injury" and was thus one occurrence as defined by the insurance policies.¹⁸ The Texas Supreme Court sought to determine the extent of coverage available to the insured. The Court reached four important conclusions.

First, in determining the total policy limits available, the court held that "[t]he consecutive policies, covering distinct policy periods, could not be 'stacked' to multiply coverage for a single claim involving indivisible injury."¹⁹

Second, the Court examined how if a single occurrence triggers more than one policy, covering different policy periods, then different limits may have applied at different times. "In such a case, the insured's indemnity limit should be whatever limit applied at the single point in time during *the coverage periods of the triggered policies when the insured's limit was highest. The insured is generally in the best position to identify the policy or policies that would maximize coverage.*"²⁰

Third, when the insured chooses which policy period to apply, the excess policies for that period are also implicated. The Court stated that "multiple policies may provide an aggregate limit under certain circumstances, such as if the insured purchased concurrent excess liability coverage."²¹ Thus, in considering which policy period provides the most coverage, consideration must be given to the umbrella and excess layers as well.

¹⁸ *Id.* at 853.

¹⁹ *Id.* at 853.

²⁰ *Id.* at 855.

²¹ *Id.*

Fourth, once the applicable limit is identified, all insurers whose policies are triggered must allocate funding of the indemnity limit among themselves according to their subrogation rights. *Id.*

At the time, *Garcia* was a monumental decision, and now, facing the increased possibility of cases involving consecutive policy periods, this decision has become even more vital for insureds seeking coverage. In addition, insureds and insurers should also be aware of two Austin Court of Appeals decisions which analyzed the holding in *Garcia*.

B. CNA Lloyds and SW Aggregates: Additional Weapons for the Insured

CNA Lloyds involved an underlying claim of dental malpractice alleged to have occurred over a period of two years.²² CNA Lloyds of Texas (“CNA”) and St. Paul Insurance Company (“St. Paul”) each provided malpractice insurance to the underlying defendant dentist under consecutive, non-overlapping policies. Following *Garcia*, the court held that, once triggered, both the St. Paul and CNA policies provided full coverage up to the policy limits.²³

The CNA court explained that “insurance policies . . . do not provide for a reduction of the insurer’s liability limits if an injury only partially occurs during a policy period. Instead, both policies contract to pay the sums the insured becomes legally obligated to pay, not merely a pro rata portion of that amount.”²⁴

²² See *CNA Lloyd’s of Texas v. St. Paul Ins. Co.*, 902 S.W.2d 657, 658 (Tex. App. — Austin 1995, writ dismissed).

²³ *Id.* at 661.

²⁴ *Id.*

While *CNA Lloyds* involved the insurer’s duty to indemnify, *Southwest Aggregates*’ focused on the insurer’s duty to defend. The court held that, under Texas law, when coverage exists under consecutive liability policies for a claim falling partially within and partially outside the policy period of each policy, each insurer is obligated to fully defend and indemnify the insured, and the insured may select the policy under which it seeks coverage.²⁵

Of course, the insured’s selection of the most beneficial policy presumes that the property damage (or bodily injury) has occurred during that policy period. This begs the question of whose burden it is to demonstrate that property damage occurred during a given policy year.

IV. BURDEN OF PROOF: WHEN DID THE DAMAGE OCCUR?

Who has the burden to prove when the damage occurred? As the court in *Don’s Bldg. Supply* explained, “pinpointing the moment of injury retrospectively is sometimes difficult, but we cannot exalt ease of proof or administrative convenience over faithfulness to the policy language; our confined task is to review the contract, not revise it.”

As a threshold matter, the burden differs slightly depending on whether the insured is seeking a defense or indemnity.

A. The Duty to Defend

The allegations govern the determination of coverage for the insurer’s duty to defend. The insured’s burden is met if the complaint

²⁵ See *Texas Prop. & Cas. Ins. Guar. Assoc. v. Southwest Aggregates, Inc.*, 982 S.W.2d 600, 605-607 (Tex. App.—Austin 1998, no pet).

clearly provides that damage occurred within the policy period. Likewise, the insurer's burden is met if the complaint clearly provides that the damage did not occur within the policy period. However, if any ambiguity exists in the underlying complaint with regard to the timing of any occurrence or offense, it is construed in favor of the insured.²⁶

With regards to the insurer's duty to indemnify, the burden issue becomes more complicated.

B. The Duty to Indemnify

The insured generally bears the burden of showing that the damage occurred within the policy period.²⁷ While the insured has

²⁶ See, e.g., *Harken Exploration Co. v. Sphere Drake Ins., PLC*, 261 F.3d 466, 476–77 (5th Cir. 2001) (interpreting ambiguous allegations such that “a fair reading . . . suggests that at least some of the property damage . . . alleged occurred [during the Policy Period]”); *Bituminous Cas. Corp. v. Vacuum Tanks, Inc.*, 75 F.3d 1048, 1055 (5th Cir. 1996) (construing allegations liberally to find that “all of the underlying suits stated potential claims within the period of coverage”); *Clarendon Am. Ins. Co. v. Bay, Inc.*, 10 F. Supp. 2d 736, 747 n.8 (S.D. Tex. 1998) (denying insurer summary judgment where despite the fact that “the Court cannot ascertain with specificity which discrete claims fall within the prescribed time periods and which do not,” “it is clear that some of the [Underlying] claims arose during those windows of time”); *Gehan Homes, Ltd. v. Employers Mut. Cas. Co.*, 146 S.W.3d 833, 845-46 (Tex. App.—Dallas 2004, pet. granted) (liberally construing allegations that underlying plaintiffs suffered “past” bodily injury without identifying when in the past this occurred); *Burlington Ins. Co. v. Tex. Krishnas, Inc.*, 143 S.W.3d 226, 231 (Tex. App.—Eastland 2004, no pet. h.) (requiring insurer to defend “mishmash of legal theories and factual allegations” including allegations that fail to plead “when any specific event took place”).

²⁷ *Performance Autoplex II, Ltd. v. Mid-Continent Cas. Co.*, 322 F.3d 847, 854 (5th Cir. 2003) *Venture Encoding Serv., Inc. v. Atl. Mut. Ins. Co.*, 107 S.W.3d 729, 733 (Tex. App.—Fort Worth 2003, pet. denied); See also *Northern States Power Co. v. Fidelity &*

the initial burden to prove that damage occurred within the particular policy period, its unclear what exactly the insured must prove, and whether the insured may shift the burden.

Presumably, if the insured bears the initial burden to show that damage occurred within the policy period, and if a progressive loss to property is involved, then the insured may be required to establish some damage occurring within the period of all applicable consecutive policies. Since the duty to indemnify is determined by the actual facts establishing liability, the insured will be forced to meet its burden with the “actual facts.” This will include documents and fact witnesses. It is also conceivable that this burden can be met by the insured's use of experts. Once the insured meets this initial burden, then the burden would shift to the insurer to prove otherwise. Obviously, the insured's burden is heavier when it must establish damage within multiple policy years. However, there may be an easier alternative for insureds.

C. The Potential Game Changer

As mandated by the decision in *Garcia*, the insured has the ability to pick the particular policy period it wishes to implicate for coverage. The insurer whose policy is chosen is liable up to the extent of the full policy limits. Then, it is left up to the insurers to fight over the appropriate allocation among the applicable policies.

Casualty Co., 523 N.W.2d 657, 663-664 (Minn. 1994) (“In order to trigger a policy the insured must show that some damage occurred during the policy period. . . . It is sufficient in these cases, however, if the insured shows damage began on a particular date, X, and ended on, or was discovered at, a later date, Y, which period of time includes the policy periods for the policies at issue.”).

V. ALLOCATION OF LIABILITY

A. Insurer v. Insurer

In determining allocation rights between insurers, consideration must be given to the effect an “other insurance” clause may have on an insurer’s right to contribution. In addition, the insurer may have subrogation rights.

1. The Argument of the Parties Seeking Contribution

In *Garcia*, after holding that the insured was allowed to choose the policy period that maximizes coverage, the Court noted that “[o]nce the applicable limit is identified, all insurers whose policies are triggered must allocate funding of the indemnity limit among themselves *according to their subrogation rights*.”²⁹ As a consequence of *Garcia*, it has been the common practice of Texas insurers to fund settlements with their insureds and later exercise their contribution and/or subrogation rights to recover from other insurers when a claim was overpaid by one insurer.

According to *Garcia*, when more than one policy applies to a loss, the “other insurance” clauses in applicable policies are triggered, and the paying carrier may pursue subrogation rights against the non-paying insurer(s) so that the insurers’ ultimate responsibility for their common insured’s defense costs and/or indemnification is allocated between them according to their subrogation rights.³⁰ Thus, when multiple policies apply to a loss, the “other

To the extent that an insurer seeks to use an “other insurance” clause to limit coverage, arguably that insurer bears the burden to show the existence of other valid and collectible insurance.²⁸ This is so because the insurer has a statutory burden on any avoidance, exclusion or exception to coverage.

If one insurer admits some coverage, but argues that other insurance is also available, it seems reasonable to assume that the insurer has the burden to demonstrate that the “other insurance” clause limits coverage, i.e. there are other applicable policy periods. Thus, arguably, instead of the insured, that insurer now has the ultimate burden to demonstrate that damage occurred in other policy periods. If the insurer fails to prove that other policy periods apply, under *Garcia*, it will be required to provide full coverage.

The “selected” insurer will attempt to argue that other insurers must contribute based upon the “other insurance” clauses in the applicable policies. Thus, the fight may now shift to a dispute between the insurers to determine subrogation and allocation rights. This raises the next important question. How is liability allocated among insurers and can an insurer seek contribution or subrogation from other insurers?

²⁸ See TEX. INS. CODE ANN. § 554.002 (“In any suit to recover under an insurance . . . contract, the insurer . . . has the burden of proof as to any avoidance or affirmative defense that the Texas Rules of Civil Procedure require to be affirmatively pleaded. Language of exclusion in the contract or an exception to coverage claimed by the insurer . . . constitutes an avoidance or affirmative defense.”); *Nat’l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991); see also *State Farm Fire & Cas. Co. v. Reed*, 873 S.W.2d 698, 699 (Tex. 1993).

²⁹ *Garcia*, 876 S.W.2d at 855 (emphasis added).

³⁰ *Id.* (precluding stacking of consecutive liability policy limits and stating “[o]nce the applicable limit [of coverage] is identified, all insurers whose policies are triggered must allocate funding of their indemnity limit among themselves according to their subrogation rights”).

insurance” provisions in the policies determine how liability is to be apportioned between insurers, but do not affect the relationship between the insurers and their insured.³¹

To determine the relative obligations of the insurers, a Court must consider the meaning and applicability of the “other insurance” clauses in the policies at issue. For example, in *Garcia*, the Texas Supreme Court conditioned its statement that insurers must allocate the funding of the indemnity limit among themselves on the “subrogation rights” of the insurers.³² Further, in *CNA Lloyds*, the court concluded that the “plain language of each policy’s ‘other insurance’ clause renders those clauses applicable to this cause for apportionment purposes.”³³

Of course, the continuing viability of *Garcia* has recently been cast into question by the Texas Supreme Court’s subsequent decision in *Mid-Continent Insurance Co. v. Liberty Mutual Ins. Co.*³⁴ *Liberty Mutual* is arguably distinguishable from *Garcia*, however, because *Liberty Mutual* involves concurrent coverage whereas *Garcia*, like *Don’s Building*, involved consecutive coverage.

2. The Argument of Insurers who Refuse Contribution Obligations: *Liberty Mutual*

In *Liberty Mutual* the Court held that the standard “other insurance” clause in a traditional commercial general liability policy (1) limited the insurer’s obligation to indemnify its insured, for a claim concurrently covered by other insurance, to a “pro-rata” share; and (2) precluded a claim for contribution and/or subrogation to recover amounts paid in excess of such pro-rata share by one insurer from its concurrent co-insurer.³⁵

In November 1996, while negotiating signs and dividers on a westbound piece of Texas highway, Tony Cooper collided with a car driven by James Boutin and occupied by his family.³⁶ The Boutin family sought recovery for their injuries, resulting from the accident, from, among others, the general contractor of the highway project, Kinsel Industries (“Kinsel”). *Id.* Kinsel in turn looked, for defense and indemnification from the Boutins’ claims, to three policies of insurance: (1) general and excess liability policies purchased directly by Kinsel from Liberty Mutual Insurance Company (“Liberty Mutual”); and (2) a policy purchased from Mid-Continent Casualty Company (“Mid-Continent”) by Kinsel’s signage subcontractor, Crabtree Barricades (“Crabtree”), which also named Kinsel as an additional insured.³⁷

In responding to the Boutin lawsuit, Liberty Mutual and Mid-Continent did not dispute coverage but disagreed on Kinsel’s proportionate liability for the anticipated damages and the value to be placed on the Boutins’ claim for settlement purposes. *Id.*

³¹ *Southwest Aggregates*, 982 S.W.2d at 606.

³² 876 S.W.2d at 855.

³³ 902 S.W.2d at 660; *see also Southwest Aggregates*, 982 S.W.2d at 605 (interpreting *CNA Lloyds* to have held that “an insurer’s duty to indemnify its insured is not reduced when there is concurrent coverage among consecutive insurers, because there is nothing in the policies that provides for a reduction of the insurer’s liability if an injury occurs only in part during a policy period.” (emphasis added)).

³⁴ 236 S.W.3d 765 (Tex. 2007)

³⁵ *Id.* at 775.

³⁶ *Id.* at 768–69

³⁷ *Id.*

at 769–70. As a result, consistent with Liberty Mutual’s assessment of Kinsel’s proportionate liability at 60% and total anticipated damages of between \$2 and \$3 million, the case settled for \$1.5 million, of which Liberty paid \$1.35 million and Mid-Continent paid \$150,000, reflective of its estimate that Kinsel was only 10% liable for the Boutins’ damages. *Id.* Mid-Continent paid an additional \$300,000 to settle Crabtree’s liability for the accident.

In a subsequent suit by Liberty Mutual against Mid-Continent to recover the disproportionate amount paid by Liberty Mutual in settlement of Kinsel’s liability, the trial court ordered Mid-Continent to pay half of the Boutin settlement, less amounts already contributed, within Mid-Continent’s \$1 million policy limit, or, in other words, \$550,000. *Id.* at 770. On appeal before the Fifth Circuit, the court certified the following to the Texas Supreme Court:

If there [Assuming the foregoing facts], is any actionable duty owed (directly or by subrogation to the insured’s rights) to the insurer paying the \$1.35 million by the underpaying insurer to reimburse the former respecting its payment of more than its proportionate part of the settlement?

The Texas Supreme Court answered this question in the negative holding that, Liberty Mutual did not have a right of contribution against Mid-Continent because the “other insurance” clauses in Mid-Continent’s and Liberty Mutual’s policies rendered each carrier’s obligations several and independent of one another.³⁸ Because a claim for contribution requires (1) “that the several insurers share a common

obligation or burden”; and (2) “that the insurer has made a compulsory payment or other discharge of more than its fair share of the common obligation or burden,” the Court concluded that “[w]ith independent contractual obligations, [Liberty Mutual] and [Mid-Continent] do not meet the common obligation requirement of a contribution claim.”³⁹

Moreover, where an insurer’s policy contains a “pro-rata” clause, the Court reasoned that “the co-insurer paying more than its contractually agreed upon proportionate share does so voluntarily; that is, without a legal obligation to do so.”⁴⁰ Therefore, in short, Liberty Mutual was denied “contribution” from Mid-Continent for amounts paid to settle the Boutin lawsuit.⁴¹

Liberty Mutual was also denied recovery under a subrogation theory. Noting that an insurer’s right of subrogation is derivative of those rights maintained by the insured and that Mid-Continent’s payment, however disproportionately small, enabled Kinsel to fund the settlement of the Boutin Lawsuit entirely through insurance proceeds, the majority concluded that Kinsel, and therefore Liberty Mutual, “had no right, after being fully indemnified, to enforce Mid-Continent’s duty to pay its pro-

³⁸ *Id.* at 772 (“[T]he [pro rata] clause makes the contracts several and independent of each other.”).

³⁹ *Id.*; see also *Hicks Rubber Co.*, 169 S.W.2d at 148 (“[I]t is also the general rule that, if each of several insurers contracts to pay such proportion of the loss as results from the destruction of the thing insured, none of such insurers has any right to contribution from the others, nor will the payment of the whole loss by any of them discharge the liability of the others.”).

⁴⁰ *Id.*

⁴¹ *Id.* at 773 (“There is no contractual right of contribution between them, and the presence of the pro rata clauses in the CGL policies precludes an equitable contribution claim.”).

rata share of a loss.”⁴² Liberty Mutual thus recovered nothing from Mid-Continent.

The Court’s delineation of a co-insurer’s rights of contribution and subrogation, or lack thereof, clearly have important implications for insurers. Yet, the Court’s rationale facially portends consequences for Texas insureds as well—particularly with respect to the analysis of Liberty Mutual’s sought-after contribution claim.

Although the Court acknowledged with respect to the subject policies’ “pro-rata” clauses that “[t]he effect is not the same with respect to the insured’s right of recovery,”⁴³ the *dicta* suggesting that an insurer whose policy contains a so-called “pro-rata” clause is not liable for more than its “proportionate share” has given pause to insureds who heretofore had always regarded the “other insurance” provisions in their policies as governing only the relationship between co-insurers without affecting the insurer’s obligations vis-à-vis the insured.⁴⁴

Furthermore, as a practical matter, insurers, reluctant to occupy the unhappy position of *Liberty Mutual*, have in some cases refused to pay more than a portion of

an insured’s loss on the basis that either payments in excess of a proportionate share would be deemed “voluntarily” made, or no recourse, may be had, through contribution, from any co-insurer for amounts paid in excess of such “pro-rata” share.

Equally troubling is the fact that the basic implication of the majority’s rationale, if not Justice Wainwright’s decision itself, is apparently contrary to the Court’s prior precedent, as well as the law of the intermediate appellate courts, which, consistent with the insuring terms of many policies, imposes an absolute obligation by an insurer to pay all of an insured’s loss within its policy limits regardless of the existence of “other insurance.”

3. What Now?

The Court for the Eastern District of Louisiana best explains the impact *Liberty Mutual* may have on the *Garcia* decision and its progeny:

In conclusion, the [*Liberty Mutual*] decision has a number of direct and relevant effects on allocation in Texas law. First, any permission for insureds to invoke “vertical exhaustion” or “spiking” even among primary policies is revoked because the possibility of reallocation by subrogation is gone. Second, there cannot be *Keene*-type allocation among policies with “other insurance” clauses because the initial allocation between primary policies is “several,” not “joint and several.” *Keene* allocation depends on a multi-year “joint and several” obligation to pay. If primary policies are “severally” liable,

⁴² *Id.* at 775–76 (“We hold, therefore, that a fully indemnified insured has no right to recover an additional pro rata portion of settlement from an insurer regardless of that insurer’s contribution to the settlement.”).

⁴³ *Id.* at 772

⁴⁴ See, e.g., *CNA Lloyds of Tex. v. St. Paul Ins. Co.*, 902 S.W.2d 657, 661 (Tex. App.—Austin 1995, writ dismissed) (holding that notwithstanding the presence of pro-rata “other insurance” clauses, “insurance policies in the instant case, like those analyzed in *Keene*, do not provide for a reduction of the insurer’s liability limits if an injury only partially occurs during a policy period. Instead, both policies contract to pay the sums the insured becomes legally obligated to pay, not merely a pro rata portion of that amount.”); accord *Md. Cas. Co. v. South Tex. Medical Clinics*, 2008 Tex. App. LEXIS 279 (Tex. App.—Corpus Christi Jan.10, 2008, pet. denied).

then the only possible allocation formula is a *pro rata* allocation such as the Fifth Circuit has repeatedly ruled is proper under Texas law.⁴⁵

Now, arguably, based upon *Garcia* and *Liberty Mutual*, in cases where multiple insurance policies apply, and *pro rata* clauses exist, insurers must now allocate settlement funding prior to payment on behalf of the insured, rather than to later seek contribution/subrogation rights from other insurers in a later action. Otherwise, insurers, which pay more than their fair share, will lose their subrogation rights if the insured later becomes fully indemnified and will lose their contribution rights if the policies contain *pro rata* clauses.

However, despite the apparent inconsistency between the fundamental analysis underlying the holdings in *Garcia* and *Liberty Mutual*, as a practical matter, insureds and insurers occupy remarkably similar positions vis-à-vis one another before and after *Liberty Mutual* for four primary reasons—

1. *Liberty Mutual* and *Garcia* can be harmonized, particularly where an insurer wrongfully denies coverage, thereby forfeiting the “other insurance” condition of its policy, or otherwise fails to establish the existence of other available, valid and collectible insurance;
2. *Stowers* provides a modicum of protection for insureds confronted with “*pro rata*”

contribution to qualifying settlement demands;

3. Hope remains that co-insurers may find alternative means of allocating their respective liabilities to those foreclosed by *Liberty Mutual*; and
4. “Other insurance” clauses only apply where there is concurrent coverage, not in instances where multiple policy periods are implicated, i.e. consecutive coverage.

a. “Other Insurance” Clauses are Limited to Insurers

First, *Liberty Mutual* and those cases caught in its wake are arguably limited to a ruling on the viability of claims for contribution and subrogation between carriers. No case following *Liberty Mutual* has so far concluded on the basis of a policy’s “*pro rata*” clause that an insurer’s liability to its insured is reduced to a proportionate share. As will be discussed below, this is consistent with Texas decisions since *Garcia*.

As recently as 2008, a year after *Liberty Mutual*, the Thirteenth District Court of Appeals in Corpus Christi rejected the notion that an insurer’s obligation to pay defense costs, for example, was limited to the insurer’s “time on the risk.” In *Maryland Casualty Company v. South Texas Medical Clinics, P.A.*,⁴⁶ the court of appeals noted that “under Texas law, an insurer’s duty to defend its insured on a claim occurring partially within and partially

⁴⁵ *American Home Assurance Co. v. Liberty Mutual Ins. Co.*, 2008 WL 440303 (E.D. La. 2008);

⁴⁶ 2008 Tex. App. LEXIS 279 (Tex. App.—Corpus Christi January 10, 2008, pet. denied).

outside of the policy period is not reduced pro rata by the insurer's 'time on the risk' or by any other formula."⁴⁷

Citing *South Texas Medical Clinics*, Justice Smith recognized the fundamental distinction between an insurer's claim for contribution and an insured's claim for coverage when she wrote that "when more than one policy applies to a loss, the 'other insurance' provisions provide a scheme by which the insurers' liability is to be apportioned, . . . [b]ut the mechanism of pro rata apportionment among insurers does not affect the contractual relationship between insurer and insured that requires the insurer to provide full indemnification."⁴⁸

Although *South Texas Medical Clinics* did not specifically address *Liberty Mutual*, neither did *Liberty Mutual* address or even mention *Garcia*. Thus, the court's rationale in *South Texas Medical Clinics* and its reliance on *Garcia* and *Southwest Aggregates* belies the implication that *Liberty Mutual* limits an insurer's obligation to pay an insured's claim.

By its terms, the traditional "other insurance" clause only applies "if other valid and collectible insurance is available to the insured" ⁴⁹ Yet, the binary quality of the provision does not appear to account for the varying ways in which an insurer may respond to a liability claim. For example, "[w]hen an insurer is faced with the dilemma of whether to defend or refuse to defend a proffered claim, it has four options: (1) completely decline to assume the insured's defense; (2) seek a declaratory judgment as to its obligations and rights; (3)

defend under a reservation of rights or a non-waiver agreement; and (4) assume the insured's unqualified defense."⁵⁰

Accordingly, when only one insurer accepts its duty to defend, the existence of "other valid and collectible insurance" may very much be in question. In the absence of other available, valid and collectible insurance, an insurer presented with a covered claim must provide a complete defense and pay "all sums" that the insured becomes legally obligated to pay, consistent with *South Texas Medical Clinics* and *Garcia* and notwithstanding *Liberty Mutual*.

An insurer which seeks to use an "other insurance" clause to limit coverage has the burden to demonstrate the existence of other viable insurance.⁵¹ Moreover, if the insurer from whom the insured seeks coverage has breached its contractual duties, that insurer may not enforce the policy's conditions, including those relating to "other insurance" against the insured.⁵²

⁵⁰ *Katerndahl v. State Farm Fire & Cas. Co.*, 961 S.W.2d 518, 521. (Tex. App.—San Antonio 1997, no writ).

⁵¹ See TEX. INS. CODE ANN. § 554.002.

⁵² See, e.g., *Rhodes v. Chicago Insurance Co.*, 719 F.2d 116, 120 (5th Cir. 1983) ("An additional consequence of a breach of the duty to defend is the inability to enforce against the insured any conditions in the policy; the insured is no longer constrained by "no action" or "no voluntary assumption of liability" clauses. A consequence of breach, therefore, is that an insurer who wrongfully fails to defend its insured is liable for any damages assessed against the insured, up to the policy limits, subject only to the condition that any settlement be reasonable."); cf. *Gulf Ins. Co. v. Parker Prods., Inc.*, 498 S.W.2d 676, 679 (Tex. 1973) ("The insurance company may ordinarily insist upon compliance with this condition for its own protection, but it may not do so after it is given the opportunity to defend the suit or to agree to the settlement and refuses to do either on the erroneous ground that it has no responsibility under the policy.").

⁴⁷ *Id.* at *27 (citing *Southwest Aggregates, Inc.*, 982 S.W.2d at 607).

⁴⁸ *Southwest Aggregates*, 982 S.W.2d at 607 (quoting *Keene*, 667 F.2d at 1050).

⁴⁹ *Liberty Mutual Ins. Co.*, 236 S.W.3d at 769.

As a result, in the circumstance in which an insurer has wrongfully denied coverage, thereby forcing the insured to independently settle a covered claim, in a subsequent suit to obtain indemnification for the settlement, the insurer would be unable to rely on an “other insurance” clause to limit its liability to a “proportionate share,” or at a minimum, it would be the insurer’s burden, in a case in which it is defending a claim for breach of contract, to plead and prove coverage under “other insurance.” Thus, in this instance, consistent with *Garcia*, as illustrated by *South Texas Medical Clinics*, and without commuting *Liberty Mutual*, the insured is entitled “to identify the policy or policies that would maximize coverage,” *i.e.*, “the single point in time during the coverage periods of the triggered policies when the insured’s limit was highest,” and obtain full indemnification, within that limit, for its covered liability.⁵³

b. Stowers Protects the Insured

Second, even where, as in *Liberty Mutual*, two or more insurers unquestionably provide coverage for some portion of the insured’s liability, and it is only the relative amounts of each insurer’s coverage that is in dispute, the insurer(s) in control of settlement owe their collective insured a duty to exercise that “degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business,” which may require the payment of amounts in excess of the so-called pro-rata share purportedly owed pursuant to an “other insurance” clause.⁵⁴ Indeed, the Texas Supreme Court recently recognized that an

insurer, exercising control over settlement, owes a *Stowers* duty to its insured, even where coverage or the ultimate amount of insured damages is subject to uncertainty.

In *Excess Underwriters at Lloyd’s, London v. Frank’s Casing Crew & Rental Tools, Inc.*⁵⁵, an oil & gas contractor sought recovery from its primary and excess liability carriers after a drilling platform installed by the contractor in the Gulf of Mexico collapsed, and the contractor’s customer, ARCO/Vastar (“ARCO”) sued. The contractor’s primary carrier agreed to defend the contractor, Frank’s Casing, while its excess carrier, Lloyds, issued a reservation of rights asserting that certain of ARCO’s claims were not covered by its policy.⁵⁶

At various points prior to trial in the underlying case, Frank’s Casing and Lloyds engaged in separate settlement negotiations with ARCO. Then, on the second day of trial, with the encouragement of Frank’s Casing’s in-house counsel, ARCO made a demand within policy limits, which Frank’s Casing communicated to Lloyds along with its own so-called “*Stowers*” demand that Lloyds accept the offer.⁵⁷ In response, Lloyds agreed to fund the settlement in excess of the remaining primary policy’s limits, subject to a reservation of its right to contest coverage at a later date. Frank’s Casing answered with a second “*Stowers*” demand, which Lloyds accepted, again subject to a right to seek reimbursement from Frank’s Casing.⁵⁸

After Frank’s Casing approved the settlement with ARCO, as required by the Lloyd’s policy, coverage litigation ensued

⁵³ *Garcia*, 876 S.W.2d at 855.

⁵⁴ *G.A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544, 545 (Tex. Comm’n App. 1929, holding approved).

⁵⁵ 246 S.W.3d 42, 44 (Tex. 2008).

⁵⁶ *Id.* at 44.

⁵⁷ *Id.* at 44–45.

⁵⁸ *Id.* at 45.

wherein Lloyd's prevailed on cross-motions for summary judgment and obtained a judgment awarding Lloyd's reimbursement for over \$7 million of the \$7.5 million settlement amount in the case brought by ARCO.⁵⁹

However, before the judgment was final in the coverage matter, the Texas Supreme Court issued its opinion *Texas Association of Counties County Government Risk Management Pool v. Matagorda County*⁶⁰, finding that no right of reimbursement exists absent "consent[] to the settlement and the insurer's right to seek reimbursement."⁶¹ Following *Matagorda*, both the trial court and the court of appeals denied Lloyd's any recovery against Frank's Casing for the ARCO settlement.

After a circuitous appellate process involving a dramatic reversal on re-hearing, a 5-4 majority led by Justice O'Neill concluded that no right of reimbursement exists or would be implied under the circumstances of the case.⁶² Importantly, the overriding premise underlying this result was the notion that a *Stowers* duty can exist notwithstanding uncertainty over the precise amount of coverage owed by an insurer.

Thus, an insurer that relies on *Liberty Mutual* and/or the existence of an "other insurance" clause to limit coverage and thereby denies a demand that is "(1) . . . within the scope of coverage; (2) . . . within the policy limits; and (3) . . . such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment," does so at its own peril and risks

⁵⁹ *Id.*

⁶⁰ 52 S.W.3d 128 (Tex. 2000)

⁶¹ *Frank's Casing*, 246 S.W.3d 45.

⁶² *Id.* at 54 ("We hold that the excess underwriters have not established a right to reimbursement under Texas law . . .").

exposure to the significant penalties associated with breach of the *Stowers* duty.⁶³

Therefore, *Stowers* provides a clear incentive for insurers in control of settlement, including those whose policies contain "other insurance" provisions, to respond to offers of settlement with more than pro-rata contributions, but, if necessary, with the full limits of their policies.

Likewise, if an insurer denies coverage or fails to demonstrate the existence of other available, valid and collectible insurance, nothing, including *Liberty Mutual*, prevents an insured from seeking recovery of "all sums," which the insured becomes legally obligated to pay, within the insurer's policy limit, as damages because of covered claims. That is not to say that an insurer, whose policy occupies "the single point in time during the coverage periods of the triggered policies when the insured's limit was highest" is without recourse and must shoulder the burden of coverage alone.

c. *Carriers Should Agree to Alternative Allocation Methods*

Indeed, under *Garcia*, "[o]nce the applicable limit is identified, all insurers whose policies are triggered must allocate funding of the indemnity limit among themselves according to their subrogation rights." Therefore, third, while *Liberty Mutual* appears to foreclose allocation by "subrogation," as Justice Wainwright narrowly interpreted the concept, enterprising insurers are bound to seek and ultimately find alternative means of apportioning liability among themselves for commonly insured damages. Again, *Liberty Mutual* is limited in its holding to claims of contribution and equitable and legal

⁶³ *Garcia*, 876 S.W.2d at 849.

subrogation. Neither *Liberty Mutual* nor those cases following its holding have eliminated alternative avenues of recovery, including, for example, unjust enrichment and *quantum meruit*.

For example, while *Frank's Casing* forecloses any right of reimbursement under such theories of liability by an insurer from its insured, the Court's rationale does not mandate the same result in a claim asserted by one co-insurer against another. Indeed, in the context of a claim for reimbursement asserted against a policyholder, Justice O'Neill's analysis centered on the respective burdens or risks placed on carriers and insureds in responding to a third-party settlement demand in a case where insurance coverage for the third-party's claims is disputed.

Ultimately, the O'Neill majority determined that in accordance with *Matagorda*, as between the insurer and insured, the insurer should bear the risk inherent in responding to a settlement demand where there are "coverage uncertainties" because "the insurer is in the business of analyzing and allocating risk and is in the best position to assess the viability of its coverage dispute."⁶⁴ Where the parties to a reimbursement claim are both insurers the corresponding calculus of risk is arguably changed in such a way that a right of reimbursement should be granted among co-insurers, whether through a claim for unjust enrichment, *quantum meruit* or otherwise.

⁶⁴ *Id.*; see also *id.* at 47 (citing *Matagorda*, 52 S.W.3d at 136 ("The Court in *Matagorda County* weighed the varying risks that arise in this context and decided that insurers, on balance, are better positioned to handle them 'either by drafting policies to specifically provide for reimbursement or by accounting for the possibility that they may occasionally pay uncovered claims in their rate structure.'")).

Of course, the ability of an insurer to recoup settlement payments made in excess of a self-styled pro-rata share of the insured's liability or even in the absence of a right of recovery cannot supersede the terms of an insurance policy requiring the insured to pay "all sums" that the insured becomes legally obligated to pay as damages because of covered claims, regardless of whether some portion of the insured loss or damage occurred outside of the insurer's policy period and during the period of "other insurance."

However, while the viability of alternative means of allocation remains to be seen, a legal vehicle for offsetting what might otherwise seem like an unfair burden of coverage, including one arguably inconsistent with a so-called pro-rata clause, should, as a practical matter alleviate the pressure insurers may feel to forsake their insureds in settlement in favor of the pro-rata approach that seemingly underlies *Liberty Mutual*.

d. Concurrent v. Consecutive Policy Periods

Lastly, the *Liberty Mutual* decision was based on the application of the "other insurance" clauses within the applicable policies. However, "[o]ther insurance" clauses only apply when the coverages at issue are "concurrent."⁶⁵ Two or more policies must "generally cover the same

⁶⁵ *Nutmeg Ins. Co. v. Empls Ins. Co.*, 2006 U.S. Dist. LEXIS 7246, 35-36 (N.D. Tex. Feb. 24, 2006) (citing *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 206 (5th Cir.1996); *CNA Lloyds of Tex. v. St. Paul Ins. Co.*, 902 S.W.2d 657, 659-60 (Tex.App.—Austin 1995, writ dism'd by agr.); *St. Paul Fire & Marine Insurance Co. v. Vigilant Insurance Co.*, 919 F.2d 235, 241 (4th Cir. 1990) ("other insurance" clause does not apply when there is consecutive coverage, instead, "other insurance" clauses apply only when more than one insurance policy provides concurrent coverage).

property and interest therein against the same risk in favor of the same party” for the policies to be concurrent.⁶⁶

In contrast, Justice Cornyn’s decision in *Garcia* permitting the insured to select the policy under which it would be indemnified and requiring triggered insurers to “allocate funding of the indemnity limit among themselves according to their subrogation rights,” was explicitly made to apply “[i]f a single occurrence triggers more than one policy, covering different policy periods” *Garcia*, 876 S.W.2d at 855 (emphasis added). Accordingly, while, following *Liberty Mutual*, pro-ratio among “concurrent” carriers may be appropriate, where consecutive policies apply to a single occurrence, *Garcia*’s invitation to insureds and insurers, to respectively pursue vertical exhaustion of indemnity coverage and to obtain allocation by subrogation, may consistently be answered.

Of course, policyholders must contend with language in *CNA Lloyds* and *SW Aggregates* describing consecutive policies as providing concurrent coverage. Arguably, these cases have misapplied the principles of concurrent and consecutive coverage. The policies in those cases clearly provided consecutive coverage to the insured. Thus, even though the legal principles in *SW Aggregates* and *CNA Lloyds* are applicable, by finding that consecutive policies can constitute concurrent coverage, the court may have misconstrued the concepts of concurrent and consecutive coverage. This has led to further confusion.

In *Liberty Mutual*, the two primary policies provided overlapping or concurrent coverage.⁶⁷ Meanwhile, the *Garcia*

decision, was explicitly made to apply “[i]f a single occurrence triggers more than one policy, covering different policy periods” *Garcia*, 876 S.W.2d at 855 (emphasis added). Thus, the *Liberty Mutual* holding should be limited in cases of concurrent policies because the other “insurance clause” only applies to concurrent coverage.

B. Apportionment Between the Insured and Insurer

Generally, “under Texas law, an insurer’s duty to defend its insured on a claim occurring partially within and partially outside the policy period is not reduced pro rata by the insurer’s time on the risk or by any other formula.”⁶⁸ “The insurer’s duty is to provide its insured with a complete defense . . . not to provide a pro rata defense.” *Id.* This principle also applies with respect to the duty to indemnify.⁶⁹

The “other insurance” rationale is usually inapplicable in the case of apportionment between an insurer and insured. First, “other insurance” provisions are usually not triggered where there is no coverage for specific periods.⁷⁰ Where a claim is not covered under other insurance and/or where other insurance does not apply to the loss on the same basis, the other insurance provisions are not triggered, and there is no basis for allocation.

⁶⁸ *Southwest Aggregates, Inc.*, 982 S.W.2d at 606.

⁶⁹ See *CNA Lloyds* 902 S.W.2d at 661

⁷⁰ *Id.* at 660 ((1) St. Paul’s other insurance clause provides that “[a] professional liability claim that’s covered under this agreement may also be covered under other insurance. If it is, we’ll pay that portion of the total amount of insurance covering the claim.” (2) CNA’s other insurance clause provides that “[w]hen both this insurance and other insurance apply to the loss on the same basis, . . . the company shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision . . .”).

⁶⁶ *State Farm Fire & Cas. v. Griffin*, 888 S.W.2d 150, 155 (Tex. App.—Houston. [1 Dist.] 1994, no writ).

⁶⁷ 236 S.W.3d at 768–69.

Further, “the mechanism of pro rata apportionment among insurers does not affect the contractual relationship between insurer and insured that requires the insurer to provide full indemnification.”⁷¹ “[D]etermining what method should be used to apportion liability *among insurers* is a distinct issue from whether pro rata apportionment alters the insurer’s duty to indemnify or defend *its insured*.” (emphasis in original).⁷²

It must be noted, however, that there is authority from the Fifth Circuit which suggests that allocation between an insurer and insured is appropriate.⁷³ However, not only were all of these cases decided before *CNA Lloyds* and *Southwest Aggregates*, each of these cases relies for its decision on the Sixth Circuit’s opinion in *Ins. Co. of N. Am. v. Forty-Eight Insulations*⁷⁴. The Texas Supreme Court has implicitly rejected the *Forty-Eight Insulations* standard.⁷⁵

The *Liberty Mutual* Court noted that with regards to “pro-rata” clauses, “[t]he effect is not the same with respect to the insured’s right of recover.”⁷⁶ However, the rationale that an insurer is not liable for more than its “proportionate share,” is cause for concern to insureds who always believed the “other insurance” provisions in their policies did not affect the insurer’s

obligations vis-à-vis the insured.⁷⁷ However, for now, it appears that the pro rata clause does not inhibit the insured to seek full recovery.

VI. CONCLUSION

In conclusion, while the Don’s Building decision has created clarity as to what trigger of coverage applies in Texas, it has increased the probability of disputes arising over other related issues such as burden and allocation. The confusion is only exacerbated by the *Liberty Mutual* decision. The confusion will likely continue until the Texas Supreme Court clarifies these important issues.

⁷¹ *Southwest Aggregates, Inc.*, 982 S.W.2d at 606

⁷² *Id.* at 607.

⁷³ . See, e.g., *LaFarge Corp. v. Hartford Cas. Ins. Co.*, 61 F.3d 389, (5th Cir. 1995), *overruled on other grounds by Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 241 F.3d 396 (5th Cir. 2001); *Gulf Chem. & Metallurgical Corp. v. Assoc. Metals & Minerals Corp.*, 1 F.3d 365 (5th Cir. 1993); *Clemtex, Inc. v. Southeastern Fid. Ins. Co.*, 807 F.2d 1271 (5th Cir. 1987); *Porter v. Am. Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981) (applying Louisiana law).

⁷⁴ 633 F.2d 1212 (6th Cir. 1980)

⁷⁵ See *Garcia*, 876 S.W.2d at 854-55; see also *Sw. Aggregates*, 982 S.W.2d at 605.

⁷⁶ *Id.* at 772.

⁷⁷ See, e.g., *CNA Lloyds* 902 S.W.2d at 661; *South Tex. Medical Clinics*, 2008 Tex. App. LEXIS 279.