Client Alert: Fifth Circuit Guidance for Newly-Offered Expert Opinions and the Concurrent Causation Doctrine in Insurance Coverage Cases

Publications

April 20, 2023
By: Brian S. Scarbrough, Cianan M. Lesley

The United States Court of Appeals for the Fifth Circuit's recent opinion in *Majestic Oil, Inc. v. Certain Underwriters at Lloyd's, London Subscribing to Policy Number W1B527170201,* No. 21-20542 (5th Cir. Mar. 17, 2023), offers important guidance for practitioners in insurance coverage cases faced with offering new or supplemental expert opinions after the expert report deadline. Moreover, the opinion provides insight into how a recent articulation of Texas' concurrent causation doctrine could affect insurance cases where the cause of damage is at issue.

The question underpinning *Majestic Oil* was whether Hurricane Harvey or an earlier January 2017 storm damaged Majestic Oil's roof such that it started to leak. Majestic Oil's first-party property insurance policy issued by Lloyd's covered damage caused by "[r]ain or wind driven rain which enters the insured building or structure through an opening created by the force of a [n]amed [s]torm," but according to the Firth Circuit, the policy did not cover "pre-existing damage, ongoing damage, or wear and tear." *Majestic Oil*, slip op. at 1–2 (alteration in original). After Hurricane Harvey—a named storm—Majestic Oil's roof began leaking, but the parties disputed whether the damage to the building predated the storm. *Id*. at 2–3. A Lloyd's claims adjuster and a structural engineering expert hired by Lloyd's determined that the damage predated Hurricane Harvey, and Lloyd's denied the claim. *Id*. Meanwhile, Majestic Oil hired its own expert, who authored a report. *Id*. at 3. The report stated that while the earlier January 2017 storm could not "be ruled out as initially contributing to the roof vulnerability," it was "more likely than not that" Hurricane Harvey caused the damage. *Id*.

At his deposition, Majestic Oil's expert "refined his theory" and ruled out the January 2017 storm as the cause of the damage. *Id*. In other words, at his deposition, the expert concluded that only Hurricane Harvey caused the damage to Majestic Oil's property. *Id*. In doing so, the expert referenced a previously unconsidered weather report that he discovered while researching an unrelated case. *Id*.

Shortly after the deposition, Majestic Oil's expert authored a second expert report that reiterated his conclusion that Hurricane Harvey—not the January 2017 storm—caused the damage to Majestic Oil's property. *Id*. at 4. However, the second report was offered six months after the deadline for expert reports, and Lloyd's moved to strike the second report as "untimely because it contained a new opinion." *Id*. In response, Majestic Oil argued that the report was supplemental. *Id*. The district court agreed with Lloyd's and struck the second report. *Id*.

Lloyd's then moved for summary judgment, which Majestic countered, in part, with an affidavit from its expert. *Id*. The affidavit restated the expert's conclusion that Hurricane Harvey caused the damage instead of the January 2017 storm. *Id*. The district court struck the affidavit as a "sham affidavit" and, relying in part on Texas's concurrent causation doctrine, granted summary judgment for Lloyd's. *Id*. Specifically, under the district court's reading of Texas' concurrent causation doctrine, the district court "faulted" Majestic Oil's expert for "failing to exclude the January 2017 storm as a potential cause of the damage" and found that Majestic Oil "otherwise failed to show that the damage was attributable to" Hurricane Harvey. *Id*. Majestic Oil appealed the decision.

While the appeal was pending, the Fifth Circuit commented on Texas' concurrent causation doctrine in *Advanced Indicator Manufacturing, Inc. v. Acadia Insurance*, 50 F.4th 469 (5th Cir. 2022). Specifically, it held that under that doctrine, "when covered and non-covered perils combine to create a loss, the insured is entitled to recover that portion of the damage caused solely by the covered peril." *Advanced Indicator & Mfg., Inc. v. Acadia Ins. Co.*, 50 F.4th 469, 476–77 (5th Cir. 2022) (quoting *Dallas Nat'l Ins. Co. v. Calitex Corp.*, 458 S.W.3d 210, 222 (Tex. App. Ct. 2015)). The Fifth Circuit placed the burden on the insured to segregate damage attributable solely to a covered peril and to offer evidence demonstrating either that a loss came solely from a covered cause or by which a jury may reasonably segregate covered loss from non-covered loss. *Id*. at 477.

On appeal, the Fifth Circuit evaluated whether the district court properly excluded the second report and affidavit of Majestic Oil's expert. While the Fifth Circuit reasoned that the district court did not abuse its discretion in determining that the second report was new rather than supplemental, it also reasoned that the district court failed to properly apply the Federal Rules of Civil Procedure (FRCP). *Majestic Oil*, slip op. at 6. Specifically, the Fifth Circuit held that the district court did not evaluate three of the four factors[1] relevant under FRCP 37(c)(1)—the importance of the information, potential prejudice in allowing the information, and the availability of a continuance to cure prejudice—before determining that the second expert report should be excluded. *Id*. at 6–7. Similarly, the Fifth Circuit held that the district court improperly struck the affidavit because the affidavit was consistent with the expert's deposition testimony. *Id*. at 8. However, the Fifth Circuit explained that "as a practical matter" the affidavit "rises and falls" with the expert's second report "as the two repeat the same conclusions." *Id*. Under these holdings, the Fifth Circuit vacated the district court's summary judgment order and remanded. *Id*. at 9.

In remanding the case, the Fifth Circuit revisited its opinion in *Advanced Indicator* on concurrent causation. Specifically, it opined that whether *Advanced Indicator* "breathes new life into Majestic's

sole causation theory it advances on appeal is a question, like the admissibility of" the expert's second report and affidavit "for the district court to consider anew, once the summary judgment record is properly settled." *Id*.

The Fifth Circuit's opinion in *Majestic Oil* serves as reminder to practitioners about the importance of expert opinions in insurance coverage cases, particularly in cases where an expert offers a new or revised opinion after the deadline for expert reports. Because the Fifth Circuit's opinion demonstrates that courts should not allow one factor to displace others when evaluating whether to exclude new or revised expert opinions, litigants faced with new expert reports after the deadline would be wise to consider and address all four factors that courts must examine.

Moreover, as the Fifth Circuit previewed, it is possible that the concurrent causation doctrine, as articulated in *Advanced Indicator*, could affect the district court's decision on remand. *Id*. The district court initially "faulted" Majestic Oil's expert for "failing to exclude the January 2017 storm as a potential cause of the damage and found that Majestic otherwise failed to show that the damage was attributable" to Hurricane Harvey. *Id.* at 4. However, in *Advanced Indicator*, the Fifth Circuit explained that an insured could "carry its burden by putting forth evidence demonstrating that the loss came solely from a covered cause or by putting forth evidence by which a jury may reasonably segregate covered and non-covered losses." *Advanced Indicator,* 50 F.4th at 477. Thus, the district court will likely have to consider whether a failure to exclude the January 2017 storm warrants a grant of summary judgment or whether Majestic Oil can satisfy its evidentiary burden to segregate loss.

Footnotes

[1] The fourth factor, which the district court did consider, is the explanation for the failure to identify the information.

Related Attorneys

Brian S. Scarbrough
Partner
bscarbrough@jenner.com
+1 202 637 6306

Cianan M. Lesley
Associate
clesley@jenner.com
+1 312 840 7353

Related Capabilities

Insurance Recovery and Counseling

© 2026 Jenner & Block LLP. Attorney Advertising. Jenner & Block LLP is an Illinois Limited Liability Partnership including professional corporations. This publication, presentation, or event is not intended to provide legal advice but to provide information on legal matters and/or firm news of interest to our clients and colleagues. Readers or attendees should seek specific legal advice before taking any action with respect to matters mentioned in this publication or at this event. The attorney responsible for this communication is Brent E. Kidwell, Jenner & Block LLP, 353 N. Clark Street, Chicago, IL 60654-3456. Prior results do not guarantee a similar outcome. Jenner & Block London LLP, an affiliate of Jenner & Block LLP, is a limited liability partnership established under the laws of the State of Delaware, USA and is authorised and regulated by the Solicitors Regulation Authority with SRA number 615729. Information regarding the data we collect and the rights you have over your data can be found in our Privacy Notice. For further inquiries, please contact dataprotection@jenner.com.

Stay Informed