# FIFTH CIRCUIT REJECTS AN INSURER'S ATTEMPT TO ALLOCATE DEFENSE COSTS PRO RATA OVER MULTIPLE POLICIES


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The 5th Circuit affirmed a trial court ruling that allowed the insured to select a single policy with a low deductible for a multiple policy property damage claim. In light of the Texas Supreme Court's decision in *Don's Building Supply, Inc.v. One Beacon Ins. Co*., adopting injury-in-fact for triggering policies for long tail property damage claims, insurers are increasingly dealing w/ multiple policies covering property damage claims. As opposed to a manifestation theory, which triggers a single policy regardless of whether the property damage was ongoing for an extended period of time, the injury-in-fact theory often implicates multiple policies over consecutive years.

Here, the insurer wanted to pro rate the defense costs over five policy periods and charge the insured with deductibles pursuant to each policy (at least one policy did not contain a deductible). Conversely, the insured wanted to select one policy with no deductible. Since the insured prevailed in the liability trial, only defense costs (and not indemnity) were at issue.

After finding that the plaintiff indeed sued the insured for property damage after a pleading amendment, the Fifth Circuit ruled that:

**"Texas courts have rejected the pro rata method for calculating an insurer's duty to defend when more than one policy is triggered by a claim. [citations omitted]. The reasoning behind this rule is that, when an insurer's policy is triggered, 'the insurer's duty is to provide its insured with a complete defense. This is because the contract obligates the insurer to defend its insured, not to provide a pro rata defense' [citation omitted]. Accordingly, the district court did not err by permitting defendants to select any one of the triggered policies for their defense."**

Interestingly, the Fifth Circuit determined that the opinion should not be published and is not precedent except under limited circumstances under its Rule 47.5.4. Pursuant to this rule, an unpublished opinion is not precedent (except for res judicata, collateral estoppel or law of the case), but parties can cite to the decision.

Since this issue has not been directly decided by the Texas Supreme Court (although a Texas Supreme Court decision cited to *Keene* on a non-related issue of stacking policies under the Texas Stowers doctrine), you can't definitively say that Texas law recognizes joint and several allocation among multiple policies for the same risk. However, the Fifth Circuit's rejection of pro rata allocation for defense costs is consistent with the developing trend we are experiencing under Texas law.