There are a number of policies that can provide coverage relating to livestock mortality. Coverage disputes can arise when a claim occurs. This session will look at the policies that could be involved in a claim and the most common areas of dispute within first-party property policies and liability policies.
Notes

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# COMMON LIVESTOCK MORTALITY COVERAGE DISPUTES

IRMI Agribusiness Conference

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I. **Equine and Livestock Coverages**

Equine insurance policies (property insurance) can include the following.

- Mortality Insurance
- Endorsements: Loss of Use; Major Medical; Surgical-Only; Agreed Value; Guaranteed Renewal
- Herd policy
- Specified Perils
- Prospective Foal

II. **Standard Mortality Insurance Coverage Disputes**

A. **Policy Conditions**

1. **Violation of Policy’s “Notice” Conditions**

   By far, the policy provision that generates the most litigation is notice. Notice requirements vary among insurers. One policy sets it forth this way:

   Insured’s responsibility

   1. **Immediately notify US or YOUR agent by telephone or telegraph;**
   2. Employ a licensed veterinarian, at YOUR expense, to treat the animal;
   3. Secure proper care and, if required, allow the animal to be removed for treatment at YOUR expense.

   * * *

   We reserve the right to deny a claim if YOU do not comply with these conditions.

Emphasis added. Another mortality policy set forth the notice requirement in this manner:

   It is a condition precedent to any liability of the Company hereunder that:

   (a) the Insured shall at all times provide proper care and attention for each animal hereby insured, and

   (b) in addition, in the event of any illness, disease, lameness, injury, accident, or physical disability whatsoever of or to an insured animal the insured shall immediately at his own expense employ a qualified Veterinary Surgeon and shall, if required by the Company, allow removal for treatment, and

   (c) in the event of the death of an insured animal the Insured shall immediately at his own expense arrange for a post-mortem and autopsy examination to be made by a qualified Veterinary Surgeon, and
(d) in either event the insured shall immediately give notice by telephone or telegram to the
person or persons specified on the policy who will instruct a Veterinary Surgeon on the Company’s
behalf if deemed necessary.

And any failure by the Insured to do so shall render the Insured’s claim null and void and release the
Company from all liability in connection therewith, whether the Insured has personal knowledge of such
events or such knowledge is confined to the representatives of the Insured or other persons who have care,
custody or control of the animal(s).

Courts have sided frequently with insurers in holding that the insured’s violation of the notice requirement
140380 (N. D. Illinois, 9/30/2013)(this author was defense counsel on this case); *Jahn v. Great American
Assurance Company*, 2004 WL 765240 (N.D. Ill. 4/6/2004)(this author was defense counsel on this case);
*Hiscox Dedicated Corp. Member, Ltd. v. Wilson*, 246 F. Supp.2d 684, 693-94 (E.D. Ky. 2003); *Arigato
Insurance Co. of Ohio*, 401 N.Y.S.2d 682 (N.Y. Super. 1977); *Circle 4 Stables, Inc. v. National Surety
Corp.*, 451 S.W.2d 564, 567 (Tex. App. 1970); *Menard v. Citizens Ins. Co. of New Jersey*, 134 So.2d 85,
87 (La. App. 1966); *Hartford Live Stock Ins. Co. v. Henning*, 266 S.W. 912 (1924); *Hough v. Kaskaskia

In *Underwriters at Lloyd’s, London v. Harkins*, 427 S.W.2d 659, 664 (Tex. Civ. App. 1968), the
Court explained the importance of compliance with the notice requirement:

Only through immediate notice can the insurer investigate the causes of illness or death that are certainly
unique to livestock policies. Only through immediate notice can the insurer know, or have an opportunity
to know, that the animal will receive proper attention and treatment. Only through immediate notice can
the insurer protect itself from the unusual hazards that accompany the insuring of animal life, as contrasted
to the insuring of human life.

the court emphasized the perils of the insured violating the mortality policy’s notice condition:

We think, however, that whereas herein, an insured takes it upon himself to determine whether or not the
condition of the animal warrants the giving of notice to the insurer, as required by the policy, he does so at
the risk of forgoing a claim for liability against the insurer for the death of the animal as a result of the
condition or illness. The notice provision obviously is for the benefit of the insurer in that the company
may have the opportunity of securing its own chosen veterinarian to attend to the animal.

451 S.W.2d at 567.

**Most Recent Case - 2013**

In *Hauser v. Great American Assurance Co.*, 2013 U.S. Dist. LEXIS 140380 (N. D. Illinois, 9/30/2013), the Court enforced an equine mortality policy’s unique “immediate notice” condition. There, Great American insured a hunter/jumper mare under an Equine Mortality Broad Form Insurance policy. The mare was allegedly found to be "severely lame" during the policy period, but 15 days passed before the insurer was notified. The Court granted Great American's motion for summary judgment, finding that coverage was properly denied because the owner violated the policy’s general condition of
"immediate notice" and a 15-day delay was "not immediate." It also noted that "Illinois law strictly interprets notice provisions in equine insurance policies." As to whether the delay prejudiced Great American, the court explained that "an insurer does not have to show prejudice where a notice provision requires immediate notice." Also, rejecting the plaintiff’s allegation that he lacked personal knowledge of the horse’s lameness because the insured mare was under lease when the injury was allegedly sustained, the court cited policy language extending knowledge of adverse conditions to "your family members, representatives, agents, veterinarians, employees, bailees, co-owners, or other persons who have custody or control" of the insured horse.

The Issue of “Prejudice” to the Insurer by Late Notice

In most states when a violation of the notice requirement is at issue, the factor of prejudice to the insurer must factor in. This occurred in Wolfson v. Insurance Company of Florida, 451 So.2d 1005 (Fla. App. 1984), where a Florida court found genuine issues of material fact on the issue of whether the insurer was prejudiced by the insured’s late notice of a horse’s demise.

Other courts have held that the specialized nature of equine insurance makes coverage forfeited when the insured violates the notice requirement – regardless of prejudice. The most cited case for this is Arigato Stables v. American Live Stock Ins. Co., 493 A.2d 584 (N.J. App. 1985). In that case the insured gave late notice to the insurer under a mortality policy. The question for a New Jersey appeals court was whether to extend its proof of prejudice requirement, that existed with other types of insurance, to the equine policy. Taking into account the unique and specialized nature of equine insurance, the Court declined to apply a prejudice factor:

We are satisfied that this policy . . . is specifically tailored to the peculiar circumstances of the Thoroughbred breeding business and that the court should not rewrite the terms of the contract for the parties. We are not dealing with a contract that will affect the rights of third policies who have liability claims . . . . It is clear that the conditions set forth in the policy serve a necessary purpose with respect to the risk assumed by the insurer.

Arigato, 493 A.2d at 585 (emphasis added).

2. “Sole Ownership” Conditions

The case of Old Reliable Fire Insurance Co. v. Alduro-Raynes Arabians, Inc., 717 S.W.2d 124 (Tex. App. 1986), involved an equine mortality policy issued with this condition:

It is further warranted by the Insured that at commencement of this insurance he is the sole owner of each animal hereby insured unless specifically stated in the attached Application, Schedule or Endorsement.

Another condition precedent of the policy, set forth in boldface type, was that “the insured’s failure to adhere to all conditions contained herein shall render the Insured’s claim null and void and release the Company from all liability in connection therewith . . . .” As issued, the policy insured Alduro-Raynes Arabians, Inc., on the life of an Arabian stallion. But an ownership dispute took place as to who was the true owner and litigation had been filed separately between principals of the insured entity. The insured
attempted to argue that the statement of ownership on the application was a mere representation and not a policy condition. Settling the issue, the Texas Court of Appeals sided for the insurer. It upheld the policy’s condition and ruled that the insurer did not waive this condition.

3. “Proper Care & Attention” Conditions

Mortality policies typically require the owner to give, or arrange to give, “proper care and attention” to the insured equine. One mortality policy states in this regard:

Insured’s responsibility

1. Immediately notify US or YOUR agent by telephone or telegraph;
2. Employ a licensed veterinarian, at YOUR expense, to treat the animal;
3. Secure proper care and, if required, allow the animal to be removed for treatment at YOUR expense.

We reserve the right to deny a claim if YOU do not comply with these conditions.

Emphasis added.

2013 Case

In North American Specialty Ins. Co v. Pucek, 709 F.3d 1179 (6th Cir. 2013), an insurer prevailed. There, plaintiffs insured a Thoroughbred race horse, "Off Duty." While in training, the horse became lame. Questions centered on of whether it was a candidate for humane destruction, as the owners wanted, or should undergo a fetlock arthrodesis surgery, as a veterinarian recommended. The insurer offered to pay for the surgery, but the owners instead euthanized the horse and submitted a claim. At issue was whether the owners’ refusal to consent to the surgery violated the policy’s condition of "proper care." 1 Although the owners argued that the horse was suffering 2 and that the arthrodesis exceeded "proper care," the court agreed with the insurer’s position that euthanasia was inconsistent with "proper care." The court also found that euthanasia violated the exclusion for "intentional destruction," even though this exclusion contained an exception that would allow coverage if the euthanasia qualified as "humane destruction." The problem was, the owners’ intentional destruction failed to meet the "humane destruction" exception to the exclusion 3 because no veterinarian’s statement supported a need for

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1 Policy language at issue set forth owner’s obligations in the event that the insured horse sustains an injury, illness, or disease during the policy. It stated, in part, that the insured is required to "[s]ecure proper care, and, if necessary, allow the horse to be removed at [the insurer’s] direction for treatment at [the owners’] expense."

2 In support, the owners videotaped the horse in that stall and gathered footage that, they believed, showed the horse’s condition. Id. By comparison, veterinary records existed generated roughly around the same time frame reflecting that the horse’s heart and breathing rates were within normal limits and the horse was "ambulating well around the stall."

3 The policy defined “humane destruction” as "[t]he intentional slaughter of a horse: a. When the horse suffers an injury or is afflicted with an excessively painful disease and a veterinarian appointed by [the insurer’s] Managing Underwriter certifies in writing that the horse is incurable and in constant pain, or presents a hazard to itself or its handlers; or b. when the horse suffers an injury and [the owners’] appointed veterinarian certifies in writing that the horse is incurable and in extreme pain, and that
"humane destruction" under the policy’s definition, which required that the insured horse be "incurable and in constant pain."

Other “Proper Care” Cases

This provision was directly at issue in a case that this author took to trial in 2004 in Ohio. The case, *Tezak v. American Bankers Insurance Company of Florida*, No.: 02P-000519, Geauga County, Ohio, Common Pleas Court (Judge H.F. Inderlied, Jr.), involved a policy of equine mortality insurance on the life of a Thoroughbred gelding. The policy also included an equine major medical endorsement. While both coverages were in effect, the insured horse became ill with colic. The plaintiff/insured’s regular veterinarian referred the horse to a veterinary surgeon. The plaintiff hauled her horse to the surgeon and even called the insurer to advise that the horse was being treated for colic. This was the only notice given to the insurer while the horse was alive. The surgeon recommended colic surgery, but the insured refused. Even though the plaintiff was fully insured for the cost of the surgery, she unilaterally decided that surgery was inappropriate and authorized only pain medication. The horse’s condition reached a point where euthanasia was the only option. Thereafter, plaintiff submitted her claim, which the company denied, in large part, due to violation the “notice” as well as “proper care” conditions. At trial, the judge granted this attorney’s motion for a directed verdict and dismissed the case (even though the same judge denied the insurer’s motion for summary judgment earlier).

Intentional Mistreatment

In *Western Horse & Cattle Ins. Co. v. O’Neill*, 32 N.W. 581 (Neb. 1887), the insured mare reportedly died from disease, but the preponderance of the evidence showed was the result of abuse, including the owner’s beatings of the horse with an iron rod. Siding with the insurer, the court held the death was not covered since the plaintiff could not take advantage of his own wrong.

4. Policy Condition of “Sound Health”

Equine insurance policies usually include the general condition that “at the commencement of this insurance each animal hereby insured is in sound health and free from any illness, disease, lameness, injury or physical disability whatsoever.” This has generated litigation.

*Lasma Corp. v. Monarch Ins. Co. of Ohio*, 764 P.2d 1118 (Ariz. 1988), is a troubling case from the standpoint of the insurer. There, the insured parties bought an Arabian mare at auction for $580,000 and received a binder for “fall of the hammer” equine mortality insurance that included a “sound health” condition. Shortly after the sale, the mare was diagnosed with “shipping fever” (an upper respiratory infection), from which she allegedly recovered, but she later developed a serious respiratory infection from which she died. The mare also had a prior diagnosis of displaced soft palate (unrelated to her demise) and had equine strangles earlier in the year of the sale. None of this was known to the insurer, as it received a veterinary statement that the mare was in good health on the day of the sale.
Because of the horse’s prior, non-disclosed condition, the insurer cited the policy’s “sound health” condition and denied coverage. At trial, the jury was – oddly – instructed that the “sound health” condition would be satisfied if the insureds subjectively and “reasonably believed” that their insured mare was in sound health (as opposed to applying an objective standard of whether the mare really was in “sound health”). Adding to the problem, a Vice-President of the plaintiff’s insurance agency testified that if the insured party had no knowledge a health problem and if the agent of the insured had no knowledge of a health problem, the “sound health” condition within the policy cannot be applied to defeat coverage if the facts suggested otherwise later on.

In Lucini-Parish Insurance, Inc. v. Buck, 836 P.2d 627 (Neb. 1992), a case in which the insured horse died soon after application, the issue centered on whether the horse would have satisfied the policy’s general condition that “at the commencement of this insurance each animal hereby insured is in sound health and free from any illness, disease, lameness, injury or physical disability whatsoever.” (Another issue was whether the agent negligently failed to procure coverage.) Although a majority of the appellate court sided for the insured, a dissenting judge identified the issue that the nature of the horse’s illness would have rendered the horse in violation of this clause and no coverage would be afforded.

Whether an equine insurer could waive this policy condition was at issue in Tate v. Charles Aguillard Insurance & Real Estate, Inc., 508 So.2d 1371 (La. 1987). A Thoroughbred stallion named “BRITISH COLONIAL,” was insured under a Lloyd’s equine policy but was not sound at the policy’s commencement. The Court held that the insurer did not waive this condition.

5. Post Mortem Policy Requirements

The typical equine mortality policy form requires post mortem exams upon the death of an insured horse. Depending on the claim, some insurers may waive this requirement. Sample policy language is:

It is a condition precedent to any liability of the Company hereunder that:

* * *

(c) in the event of the death of an insured animal the Insured shall immediately at his own expense arrange for a post-mortem and autopsy examination to be made by a qualified Veterinary Surgeon.

* * *

And any failure by the Insured to do so shall render the Insured’s claim null and void and release the Company from all liability in connection therewith, whether the Insured has personal knowledge of such events or such knowledge is confined to the representatives of the Insured or other persons who have care, custody or control of the animal(s).

Emphasis added.

This author represented the insurer in Jahn v. Great American Assurance Company, 2004 WL 765240 (N.D. Ill. 4/6/2004). Great American denied a claim on a $125,000 equine mortality policy, in part, because the insured failed to comply with the policy’s post mortem requirement. The court found that the plaintiff’s failure to procure a post mortem report, combined with several other violations of the policy, justified the insurer in denying the claim.
B. Value Disputes

1. Insured Value – “Agreed Value” v. “Actual Cash Value”

Mortality policies are issued as either “Agreed Value” or “Actual Cash Value” policies. An example of an Agreed Value Endorsement is:

In the event of any misrepresentation of the horse's value or if the horse's fair market value during the coverage period was never equal to the stated limit of liability, the Company will only offer payment for the maximum fair market value attained by the horse during the time this endorsement is in effect, such offer not to exceed the maximum limit stated in the declarations or endorsements for the horse to which this coverage applies.

Sometimes, the insurer is tempted to invoke provisions like this and treat the value under an ACV analysis even if the policy is an “agreed value” policy because of evidence that the insured misrepresented the horse’s value and/or use on the application. Insurers are cautioned. Several years ago, an insurer that did this was challenged in California. The insurer lost and was forced to pay a substantial award.

In Millan v. Yorkshire Insurance Co., 884 F.2d 1392 (6th Cir. 1989), the insured sued her agent and the insurer for failing to provide “agreed value” coverage on a policy issued on the life of a horse. Though the plaintiff argued that the agent had a duty to give her information about “stated value”/agreed value coverage, the court found that this was not required under Indiana law. Accordingly, the ACV policy was enforced as written.

A case involving an insurer’s position that it issued an ACV policy on a Quarter Horse was American Bankers Ins. Co. v. Caruth, 786 S.W.2d 427 (Tex. App. 1990). Although that case is well known for the procedural issues and a damage award it generated (later reversed), nowhere did the appellate court comment on whether the policy was ACV or “agreed value.”

2. Valuation Disputes in ACV Policies

Valuation was at issue in Emerson v. American Bankers Ins. Co., 585 N.E.2d 1315, (Ill. App. 1992). The policy in that case was a $50,000 livestock insurance policy covering a Standardbred stallion named “Tough Cookie.” Plaintiffs secured appraisals of $50,000 and $55,000, but American Bankers had an appraisal at $10,000; it also had evidence of fraud in the application based on the number of mares represented to have been bred to the horse. A jury found in favor of plaintiffs and awarded them $45,000 on the claim for violation of a duty of good faith and fair dealing and $33,072.33 for the horse’s value. The Court struck the emotional distress claims.

Issues focused on determining ACV in Howell v. American Live Stock Ins. Co., 483 F.2d 1354, 1973 U.S. App. LEXIS 8017 (5th Cir. 1973) (Texas). There, the insurer and insured agreed that the death of a Thoroughbred named “Riches I Seek” was a covered loss, but the dispute was one of valuation and what evidence the insurer could introduce to prove it. The trial judge refused to let the insurer introduce evidence to show bias on the part of the horse's former trainer. The appellate court left the trial court’s ruling undisturbed finding that the former trainer’s estimate of the value of the horse -- was corroborated by two other witnesses so there was no need for elaboration.
C. Euthanasia/Humane Destruction

AAEP Euthanasia Guidelines

Issues commonly arise as to when and whether to euthanize an insured horse. The American Association of Equine Practitioners (“AAEP”) has issued criteria for consideration in evaluating the immediate necessity of intentional destruction of an equine. Its guidelines are designed to assist veterinarians and horse owners in making decisions about ending the life of an old, injured, or sick horse. The most recent guidelines issued in 2011 state:

In accordance with AVMA’s position on euthanasia of animals, the AAEP accepts that humane euthanasia of unwanted horses or those deemed unfit for adoption is an acceptable procedure once all available alternatives have been explored with the client. A horse should not have to endure conditions of lack of feed or care erosive of the animal’s quality of life. This is in accord with the role of the veterinarian as animal advocate.

The following are guidelines to assist in making humane decisions regarding euthanasia of horses:

• A horse should not have to endure continuous or unmanageable pain from a condition that is chronic and incurable.

• A horse should not have to endure a medical or surgical condition that has a hopeless chance of survival.

• A horse should not have to remain alive if it has an unmanageable medical condition that renders it a hazard to itself or its handlers.

• A horse should not have to receive continuous analgesic medication for the relief of pain for the rest of its life.

• A horse should not have to endure a lifetime of continuous individual box stall confinement for prevention or relief of unmanageable pain or suffering.

Techniques for Euthanasia – The following techniques for performing euthanasia of horses by properly trained personnel are deemed acceptable:

1. Intravenous administration of an overdose of barbiturates

2. Gunshot to the brain. Shearer JK, Nicoletti P. Humane euthanasia of sick, injured and/or debilitated livestock. University of Florida IFAS Extension)

3. Penetrating captive bolt to the brain. Shearer JK, Nicoletti P. Humane euthanasia of sick, injured and/or debilitated livestock. University of Florida IFAS Extension)

4. Intravenous administration of a solution of concentrated potassium chloride (KCl) with the horse in a surgical plane of general anesthesia.

5. Alternative methods may be necessary in special circumstances.

Special Considerations for the Insured Horse and Cases Involving Multiple Practitioners:
Each insurance policy for a horse is a contract between the horse owner and the insurance company and will dictate the specific terms and conditions concerning the payment of a mortality claim. Careful consideration should be given to possible “conflicts of interest” as referenced in the Ethical and Professional Guidelines in the AAEP Resource Guide and Membership Directory. The attending, consulting and referring veterinarians should follow the Ethical and Professional Guidelines under section IV, “Attending, Consulting and Referring,” as described in the AAEP Resource Guide & Membership Directory.


**Litigation Over Humane Destruction Issues**

In *Bunch v. Underwriters at Lloyd’s London*, 343 So. 2d 994 (La. 1977), the Louisiana Supreme Court ruled that the plaintiff violated an “intentional slaughter” exclusion when he euthanized his horse. This prevented him from entitlement to recover benefits under an equine mortality policy. The plaintiff in Bunch had veterinary support for the euthanasia decision. His veterinarian did this. Then he submitted the claim. The problem was, he never sought advance approval from the insurer. The Court held that the plaintiff had violated the policy’s “intentional slaughter” exclusion and that he failed to show – even with the veterinary support – that the animal was “suffering” from a disease that was “incurable and so excessive that immediate destruction is necessary for humane reasons.”

Similarly, in *Abraham v. Insurance Company of North America*, 84 A.2d 670 (Vt. 1951), the plaintiff/insured failed to fulfill a condition within equine mortality policy that required the insured to produce a certificate by a qualified veterinarian that “destruction was necessary in order to immediately relieve incurable suffering.” The insurer denied the claim. The court, siding with the insurer, held that the plaintiff’s failure to fulfill this veterinary certification prevented recovery under the policy.

*Preston v. National Grange Mut. Ins. Co.*, 317 A.2d 787 (N.H. 1974). This was a mortality case, not a “Loss of Use” endorsement case. The plaintiff dairy farmer sued to recover under a policy covering death or destruction of livestock resulting from attack by dogs. He testified that when he recovered his insured cattle, which had been gone for several months, they were so affected by being chased by dogs that they were of no further value as milk cows and had to be destroyed. The Court noted that the plaintiff insured his cattle as dairy cows. It explained that the term "destroy" in policies of insurance was often applied to an act that rendered the animal useless for its intended purpose though it did not literally demolish it. Accordingly, the court held that the policy covered the loss of cattle.

Finally, an ancient, but interesting, case stands for the proposition that an insured cannot “hasten the death of the horse” and then seek payment under an equine mortality policy. In *Tripp v. Northwestern Live-Stock Insurance Co.*, 59 N.W. 1 (Iowa 1884), the plaintiff owned a horse that was insured under an equine mortality insurance policy, but he euthanized it two hours before the policy was scheduled to lapse. The insurer denied his claim, invoking provisions in the mortality policy that excluded intentional slaughter. The plaintiff later sued. Ruling in favor of the insurer, the Iowa Supreme Court stated:

The entire contract of insurance shows that it was not intended that defendant should be liable for any willful act which tended to hasten the death of the horse insured, but that it should be relieved from liability by such act.

* * *
The burden was on the plaintiff to show that the disease from which the horse suffered was the cause of, and not merely a pretext for, his death during the life of the policy and that he has wholly failed to show. We conclude that the district court rightly directed a verdict for the defendant and its judgment is affirmed.

59 N.W.1 (emphasis added).

In *Western Horse & Cattle Ins. Co. v. O’Neill*, 32 N.W. 581 (Nebraska 1887), the insurer properly denied coverage when the preponderance of the evidence showed that the insured horse died from abuse, including beatings with an iron rod by the owner. The court also reasoned that the plaintiff could not take advantage of his own misdeeds.

D. Designated Use

In *Harrison v. Great American Assurance Company*, 227 S.W.3d 890 (Tex. App. 2007), the plaintiffs sued their equine mortality insurer for breach of contract after it denied coverage for the death of a Thoroughbred filly. Under the policy, the filly was classified as a “pleasure horse” instead of a “racehorse,” the switch having been made at the request of one of the co-owners in an attempt to reduce the insurance premium while the filly recuperated from surgery. However, when the filly resumed race training, the insured owners never changed back the classification. The filly was injured in race training and was euthanized. Great American denied the mortality claim because the filly was in race training at the time of the loss and was not a “pleasure horse.” [The policy did not define “race horse” or “pleasure horse” but stated that the insurer was not liable if the insured horse was “used . . . for a purpose which is not specified in the [policy] in respect of such animal.”] Litigation followed, and the insureds asserted that the terms “pleasure horse” and “racehorse” were not defined in the policy and were ambiguous. They also argued that because the filly had not yet entered a race, she was not a “race horse.” The trial court granted the insurer’s motion for summary judgment ( siding for the insurer), and the appellate court affirmed. Utilizing dictionary definitions, it found that the policy terms were not ambiguous. To accept the plaintiffs’ position, that the filly was in race training but still gave the owners “pleasure,” would improperly interchange the classifications and render the policy’s classification meaningless.

E. Policy Term and Extended Coverage Expired for Reported Conditions

Equine mortality policies often provide these days that if the insured reports an illness, injury, or condition during the policy term, the insurer will extend coverage for a certain period, typically 60 or 90 days, to allow for the possibility that the insured horse might need to be euthanized within that extended period. Disputes have centered around these provisions.

Policy Term Expired

In *Juker v. American Livestock Ins. Co.*, 637 P.2d 79 (Idaho 1981), the insured racehorse owner was denied recovery under a livestock mortality policy for euthanizing the horse. The policy insured against loss occurring while the policy was in force, but 12 days before coverage expired, the horse sustained severe injury. About 4 days after the policy expired, the plaintiff owner reported the injury. 80 days after expiration of the policy, the veterinarian advised that the horse needed to be euthanized for humane reasons. The insurer did not consent to destruction and denied coverage primarily because the loss occurred after the policy expired. The court noted that the policy had no extension under the
circumstances (nowadays, of course, many equine insurance policies do). Since there was no covered loss during the policy period, there could be no recovery, and the insurer prevailed.

**Policy Term – Extended Coverage**

In *Insurance Corporation of Hannover v. Polk*, 262 S.W.3d 120 (Tex. App. 2008), the plaintiffs, who co-owned a Thoroughbred racehorse named “Smart Score,” insured the horse through the defendant insurance company for a $40,000 equine mortality insurance policy. The policy had a 30-day extension clause that stated: “This insurance is extended to cover the death of any animal insured occurring within 30 days after the expiration date [of the policy] as a result of any accident occurring, or illness or disease manifesting itself, during the [policy period].” Emphasis added. During the policy term, the horse fractured his right knee and was scheduled for arthroscopic surgery on July 2, 2003. A few days after the surgery, horse was discharged, and the attending veterinarian reported that it had a good prognosis for life and might even be sound enough to return to racing. However, twelve days later (July 14, 2003), and about nine days after discharge from the surgical facility, the horse was diagnosed with colitis and had to be euthanized within hours. Ultimately, the horse died within the 30-day extension period but the question was whether the death from colitis was sufficiently connected to the lameness condition that had manifested during the policy period. The defendant insurance company believed that the two were not connected and offered to pay the policy limit applicable to the new term, which was only $5,000.

Ruling for the horse owners, the trial court ordered the insurer to pay actual damages of $40,000 and extra contractual damages of $120,000 (the trial court held these were recoverable based on plaintiff’s claims for violations of the Texas Insurance Code, ch. 41) as well as the plaintiffs’ attorney fees, interest, and court costs. The insurer appealed. Affirming the trial court, the appellate court found that the evidence was sufficient to support judgment for the plaintiff. The appellate court also upheld the trial court’s finding that the insurer violated its duty of good faith and fair dealing and committed unfair claims settlement practices in violation of the Texas Insurance Code and the Texas Deceptive Trade Practices Act. The appellate court also noted that it was possible the insurer’s claim investigator untimely relied on an opinion he received as to whether the surgery brought on the colitis condition before the claim was denied. Rather, the opinion of the attending veterinarian who conducted the surgery, who opined that the horse’s surgery could not have led to the colitis condition, arguably arrived after the insurer had already denied the claim. As to the quantum of damages assessed by the trial court, the appellate court ruled that the trial court improperly quadrupled actual damages when Texas law allowed tripling, at most.

An extension provision was also at issue in *Horton v. American Home Assurance Company*, 245 So.2d 136 (Fla. App. 1971), where the insured race horse was injured at the track on September 11, 1968. A veterinarian recommended euthanasia. However, the insurer, with approval of the insured, instead elected to have a different veterinarian perform surgery on the horse. About 5 months later, the insured sought renewal of the policy, which was denied, and on September 27, 1969, the horse suffered a serious leg injury found to be related to the earlier injury. Euthanasia was performed. Seeking a Declaratory Judgment on the issue of coverage, the insurer took the position that the extension provision prevented coverage because the horse did not die within the 60 day extended period. However, a majority of the appellate court sided against the insurer:

It is our view that the insurance company having conceded that the injury was sufficient to justify the destruction of the animal the right to recovery under the policy became fixed, and the fact that
the agreed upon destruction was postponed for a humane reason does not as a matter of law defeat the policyholder’s rights.  

The dissenting judge suggested that because the insured consented to the surgery – rather than insisting on euthanasia during the 60 day extension – he effectively took his chances and forfeited any claim for mortality benefits within the time limits set within the policy.

F. Loss Payee Issues With Leases

When a lessee procures equine mortality insurance on the horse at issue, the question can arise as to the insurable portion that lessee holds and, accordingly, what proceeds the lessee can properly receive. In Agricultural Insurance Company v. Matthews, 2002 WL 31039344 (N.Y. App. 9/12/2002)(unpublished), the insured was a lessee who had not exercised an option to buy the horse at issue. The lease established the horse’s value at $55,000, with annual lease payments of $15,000, payable up front at the beginning of the year. As the agreement provided, if the lessee chose to purchase the horse, lease payments would be credited toward the purchase price. During the policy term, the horse perished in a barn fire. The appellate court held that the insured could only claim the portion applicable to the annual pre-payment of his leasehold interest and the lessee was entitled to the balance.

G. Policies Extending “Automatic” Coverage to After-acquired Horses

A unique issue arose in Clarendon National Insurance Co. v. Roberts, No. CA02-1205 (Ark. App. 6/18/2003), in which the insureds purchased a race horse for $20,000 during a claiming race but within seconds the horse became injured and was euthanized that day. The insurer, Clarendon, insured other horses belonging to these insureds, and their existing policy contained an extension provision that provided for coverage “automatically” of subsequently-acquired horses, even horses purchased through claiming races or auctions. The insurer argued that the insureds were not entitled to payment and that coverage did not exist because the policy provided that the insurer must receive “notice that insurance is desired within 5 calendar days from the time of acquisition and in consideration of the premium paid.” The insurer also pointed out the fact that no premium had been paid or received at the time of loss. The policy, the appellate court found, was ambiguous and construed it against the insurer. Also, despite the fact that the insured had not tendered the premium, the Court analogized the situation to auto policies and held that those policies applied “automatic” coverage on after-acquired vehicles in consideration for the premium paid on the previously-owned vehicles. This should, too.

III. Fraud in the Application

In Cotham v. Hartford Fire Ins. Co., 392 F. Supp. 1039, 1974 U.S. Dist. LEXIS 8002 (W.D. Tenn. 1974), the plaintiff sought to insure a Quarter Horse stallion named “Mr. Untouchable” before it perished in a fire. The Hartford denied coverage because this statement was found to be false: “Has any company ever rejected an application for insurance or cancelled a policy on . . . the described animal?” Answer: “No.” The plaintiff had been denied coverage from an agency, Harding and Harding. Even if plaintiff did not know the answer was false when he gave it, the Court still found that coverage was properly denied.
IV. Limited Perils Policies

With insurance policies involving limited perils, policy language and applicable state law might obligate the insured to prove that the loss occurred within one of the named perils. The failure to do so could justify an insurer in denying payment.

A. Limited Peril “Wild Animal” Attacks

A limited perils policy was at issue in Greene v. Truck Ins. Exch., 114 Idaho 63, 753 P.2d 274, (Idaho App. 1988). There, Farmers Insurance Group issued a policy containing this endorsement:

Death or Injury by Wild Animals. Insurance provided hereunder on cattle is extended to include loss resulting from attack by wild animals or dogs (except dogs owned by the insured and dogs on the premises with the knowledge and consent of the insured or an employee of the insured).

Plaintiffs never saw a wild animal attacking their livestock herd, but one evening they found that the dairy cows were outside the corral and were "so upset we couldn't do anything with them." The next morning, plaintiff Mr. Greene discovered that a section of barbed wire fence, supported by five "railroad tie" fence posts, had been flattened. He also found that some of the herd had been "cut up bad" with damage to their udders, chests, and bellies. Later, Mr. Greene found one of his colts lying dead in a nearby pasture. It had been "eaten from its shoulders out over its neck to its head." Plaintiffs sought coverage under the “Wild Animal” endorsement, but the insurer denied coverage because of circumstantial and indirect evidence of a wild animal attack. Plaintiffs produced expert testimony of people experienced with wild animals and dairy cows; they correlated the facts with a possible cougar attack, and an expert connected mastitis to a wild animal attack. The appellate court found that the insurer wrongly denied coverage but found that its denial did not constitute “bad faith” because the claim was “fairly debatable.”

In Qualls v. Farm Bureau Mut. Ins. Co., 184 NW2d 710 (Iowa 1971), the plaintiff farmer's heifers died of pseudorabies, and the Court found that it was covered under the defendant insurer's policy which extended coverage to loss of livestock resulting from "attack by dogs or wild animals." There, the insured contended that this provision was intended to include losses proximately caused by such attacks, and that the heifers’ disease was proximately caused by a diseased wild animal's bite. The court noted that in insurance law it was generally understood that where the peril insured against set other causes in motion which, in an unbroken sequence and connection between the act and final loss, produced the result for which recovery was sought, the insured peril was regarded as the proximate cause of the entire loss. The court concluded that the deaths of the plaintiff's heifers, if they were shown to be the result of an infection incurred by a bite or attack by a wild animal, was a loss contemplated by the defendant insurer's policy. Acknowledging that evidence of a “wild animal” attack was not strong, due to the physical condition of the heifers, the court noted that plaintiff’s veterinarian who treated the heifers testified that this disease was generally transmitted through a bite from a wild animal or from a hog infected by a wild animal suffering from the disease.

B. Limited Peril “Theft” Policies

A bad check can be “theft” for purposes of a policy in St. Paul Mercury Ins. Co. v. Tri-State Cattle Feeders, Inc. 628 S.W.2d 844 (Tex. App. 1982), writ ref n r e, in part, disapproved, on other grounds, 638 S.W.2d 868 (Tex. 1983). There, the policy covered theft, but excluded escape or “mysterious disappearance.” Defendant’s 138 head of cattle were purchased with a buyer’s bad check that the bank
dishonored. The insurer contended that the transaction was not "theft" within the meaning of the policy, but the policy did not define "theft." The Court applied the criminal law meaning and noted that criminal conviction was not conclusive evidence of theft in a civil suit on the policy but was persuasive evidence. The court explained that the insurer's argument would have been pertinent to a "theft by check" offense under the penal code, but the theft theory upon which the insured relied was a broader form of "theft using deception" under a different section of Texas law. The feedlot recovered.

A forged check given for 50 head of cattle constituted theft under the defendant insurer’s policy – that covered for “theft” but excluded “mysterious disappearance, inventory shortage, wrongful conversion, embezzlement, and escape” in Steinbach v. Continental Western Ins. Co., 237 N.W.2d 780 (Iowa 1976).

Overruling an insurer’s position that the insured’s hogs and heifers "mysteriously disappeared" and therefore fell within an exclusion, the court in Wiley v United Fire & Casualty Co., 220 N.W.2d 635 (Iowa 1974), found in favor of coverage. The policy insured the plaintiff against loss of livestock by theft. But what caused the loss? In determining that a jury verdict was supported by evidence, the court considered facts that included: fencing was in good condition; a loading chute on could be reached from the road without opening any gates or fences; neighbors never saw any of plaintiff’s animals loose; plaintiff visited the premises daily to inspect and feed the animals; a neighbor testified that after dark in late April she saw a large unfamiliar truck coming out of the plaintiff's building site. The court concluded that there was sufficient evidence for the jury to have found that the loss was caused by theft and rejected the insurer’s reliance on the "mysterious disappearance” exclusion to bar coverage. The farmer won.

Butler v. National Live Stock Ins. Co., (Ill. App. 1916). The insured registered Belgian stallion was left in a proper stall in good health and condition about 11:00 a.m., but was found dead in the stall at 6:00 p.m. This stallion was insured with a policy protecting “against loss of livestock by theft.” No evidence showed that the horse died from a cause “in the fine print of the policy.” The court held that once the plaintiffs proved that the loss was covered, the burden shifted back to the defendant insurer to prove that death was not covered by the policy. The plaintiff prevailed.

C. Limited Peril – Lightning Policies

Hartford Fire Ins. Co. v. Thompson, 175 F.2d 10 (8th Cir. 1949)(Nebraska law). 49 of the plaintiff/insured’s herd of 51 cattle perished after an afternoon thunderstorm with lightning where lightning was seen to have struck the ground 3 or 4 times, and carcasses showed marks like a “brand” or “brown streaks like singed hair.” Conflicting evidence existed as to whether lightning killed the cattle, but the jury found that lightning was the cause.

Hallihan v. Home Ins. Co., 267 Ill. App. 343 (Ill. App. 1932). This was a limited perils policy that included lightning. The jury found that lightning injured plaintiff’s insured horses. The morning after a severe rain and electrical storm, three formerly healthy horses were found blinded, scratched from running into a barbed-wire fence, and excited. Also, part of the pasture fence had been knocked down. Conflicting evidence existed as to whether the blindness resulted from electrical shock from the storm or from “moon blindness,” a disease. The court held that the jury could consider that the horse’s changed condition overnight sufficiently proved coverage under that policy. [NOTE: A case with comparable facts, However, no coverage was found when the insured failed to prove that lightning caused the injuries to horses in Wilson v. Hawkeye Ins. Co., 30 N.W. 22 (Iowa 1886), went the other way. There, a colt and
mare insured against lightning and high wind were found following a wind and lightning storm, but the court found that the plaintiff horse owner failed to prove that the injuries were attributable to wind or lightning.]

Another limited perils policy that covered lightning was Williams v. American Ins. Co., 196 Ill. App. 370, (Ill. App. 1915), where a jury found that the insured horse died from a lightning strike, which was a covered cause of loss. Evidence showed that the insured horse was previously in good condition, but after a severe thunderstorm, the horse was discovered to have its hind leg broken above the hock, bone splintered, a small sliver sticking through the flesh, and dark streaks on its legs that resembled burns. Also, its hind end was paralyzed. The horse was found in or near a newly found hole in the ground that was 10” or 12” deep, one foot in diameter that appeared to have been recently made by an explosive force. (Wouldn’t THAT have been a “fun” jury duty…)

D. Vandalism/Malicious Mischief

In Holsapple v. Country Mut. Ins. Co., 445 N.E.2d 909 (Ill. App. 1983), the Court found sufficient evidence that the plaintiff’s insured hogs died from “malicious mischief or vandalism,” which were among the limited perils covered under a livestock policy. Based on evidence of record, the plaintiff’s farm had 270 hogs in a pig nursery building, but at the time of the occurrence at issue, plaintiff discovered that the lights and ventilating fans in the building were off and 197 hogs were dead. The plaintiff testified that humidity inside the pig nursery building had once caused the breakers to trip and the ventilating fans to stop operating, and on another occasion a packed feed auger caused the breaker box to trip. The court found circumstantial evidence of vandalism and malicious mischief; the pig farmer won.

Jennings v. Farmers Mut. Ins. Assoc., 149 N.W.2d 298 (Iowa 1967). Plaintiff’s insured cows perished after licking paint out of open cans that someone placed next to the fence. The insurance policy at issue stated: “Provisions applicable only to vandalism and malicious mischief: The term vandalism and malicious mischief as used herein is restricted to and includes only willful or malicious physical injury to or destruction of the described property.” Emphasis added. In dispute was whether the plaintiff presented enough circumstantial evidence that whoever put the paint cans at the fence did so “willfully or maliciously.” Based on numerous facts, the court sided for the plaintiff/insured.

E. Other Limited Perils

In Donovan v. Hartford Fire Insurance, 2002 WL 31866249 (Neb. App. 2002), a limited perils mortality policy restricted coverage to death resulting from certain “Covered Causes of Loss” that included “(a) Explosion; (b) Smoke; (c) Windstorm; (d) Riot or civil commotion; (e) Aircraft; (f) Theft; and (g) Physical attack by dogs or wild animals.” The problem was, the insured horse, named “Duke,” was found dead and a veterinarian determined the cause to be a piece of wood shaped like a stake, possibly from a fence board, piercing the horse’s chest cavity causing it to bleed to death. Because the insured failed to connect the cause of death to any of the listed “Covered Causes,” but merely relied on his own speculation, the insurer denied his claim. The trial court granted the insurer’s motion for summary judgment stating that the insured “has the burden to prove by the greater weight of evidence that the loss of Duke was a covered loss under the policy, but [Donovan] can offer no evidence as to the conditions that existed at the time Duke and the piece of wood came into contact.” The Nebraska Court of Appeals affirmed.
In *Benassi v. Cincinnati Ins. Co.*, 388 N.E.2d 280 (Ill. App. 1979), the defendant insurer's homeowner's policy provided for coverage of livestock against death or destruction directly resulting from or made necessary by, among other things, fire, lightning, windstorm, theft, flood, earthquake, collapse of buildings or other structures, drowning, shooting, or attack by dogs or wild beasts. However, the plaintiff/insured’s horse suffered a broken hind leg during a cattle cutting training session, and the insured shot it soon after, killing the horse. The insured then sued for policy benefits. The Court sided for the insurer and explained that the term "shooting" was intended to be read in conjunction with the other accidental perils enumerated in the provision. Here, the shooting was not accidental but intentional.

*Donnelly v. Underwriting Members of Lloyd’s*, 117 P.2d 419 (Cal. App. 1941), *subsequent op. on reh’g.*, 125 P.2d 530 (1941), the equine policy provided that the insurer agreed to indemnify the owner against the death by natural causes, fire, lightning, accident, or act of God or man, as well as from the necessity of its destruction arising from any of the above causes. However, the plaintiff’s insured race horse sustained a bone fracture and was euthanized after becoming unfit for racing. The court rejected the owner’s claim that destruction was necessary and sided for the insurer that no benefits were payable.

V. **Loss of Use Endorsements**

*Thompson v. Diamond State Ins. Co.*, 2007 WL 1745612 (E.D. Tex. 6/15/2007)(unpublished), involved a dispute arising under an equine loss of use insurance policy that the plaintiffs received on their American Quarter Horse. The policy required that at its commencement the insured horse be in sound health and free from any lameness, injury or physical disability whatsoever and that all current and prior conditions have been disclosed to the insurer. The policy also required that the condition giving rise to a claim may not be a result of an injury, illness, or disease that existed before the effective date of coverage. The plaintiff horse owners filed a claim when the horse suffered what they contended was a career-ending leg injury in 2004 for which the horse had received surgery a few months before the policy renewed. The horse has sustained an injury to the same leg the year before. The court found that the 2004 injury was a pre-existing condition that the plaintiffs failed to disclose to the insurer on the renewal application; because the policy’s condition precedent was not satisfied based on the horse’s pre-existing condition, no coverage existed. The court also found that because the plaintiffs failed to satisfy the policy’s condition precedent, the insurer could declare the policy null and void.

In *Russell v. American Bankers Ins. Co.*, 543 F. Supp. 233 (N.D. Ill. 1982), the court ruled that the insured horse’s recurrence of an arthritic condition was outside the coverage under a Loss of Use Policy. The condition had originally developed during the policy period but had been successfully treated by surgery after the termination date of the policy, the court explained, noting that the horse had not been destroyed even 6 months after the suit was filed. Declaring that the claim was not within the policy's coverage, the court entered summary judgment for the insurer.
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