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THE COURT OF APPEALS FOR THE FIFTH CIRCUIT 2003-2004 INSURANCE DECISIONS: A SURVEY AND AN EMPIRICAL ANALYSIS

*by Willy E. Rice**

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I. INTRODUCTION

The Fifth Circuit Court of Appeals decided twenty-four insurance related appeals between the Survey Period—June 2003 through May 2004.¹ Those cases originated in nine federal district courts. Again, the overwhelming majority of appeals concerned the interpretation and enforcement of insurance contracts.² Barring one case of first impression, most involved very familiar procedural and substantive conflicts.³ This year, federal preemption questions

1. The Fifth Circuit delivered twenty-four decisions. The cases are as follows: *Pedcor Management v. Nations Personnel of Texas*, 343 F.3d 355 (5th Cir. Aug. 2003); *Shocklee v. Massachusetts Mutual Life Insurance Co.*, 369 F.3d 437 (5th Cir. Apr. 2004); *In re Biloxi Casino Belle, Inc.*, 368 F.3d 491 (5th Cir. Apr. 2004); *In re Monumental Life Insurance Co.*, 365 F.3d 408 (5th Cir. Apr. 2004); *Adams v. Unione Mediterranea Di Sicurtà*, 364 F.3d 646 (5th Cir. Apr. 2004); *Northfield Insurance Co. v. Loving Home Care Co.*, 363 F.3d 523 (5th Cir. Mar. 2004); *New Orleans Assets, L.L.C. v. Woodward*, 363 F.3d 372 (5th Cir. Mar. 2004); *Hamburger v. State Farm Mutual Automobile Insurance Co.*, 361 F.3d 875 (5th Cir. Mar. 2004); *Mayo v. Hartford Life Insurance, Inc.*, 354 F.3d 400 (5th Cir. Mar. 2004); *Valmont Energy Steel, Inc. v. Commercial Union Insurance Co.*, 359 F.3d 770 (5th Cir. Feb. 2004); *Brown v. Protective Life Insurance Co.*, 353 F.3d 405 (5th Cir. Dec. 2003); *Corfield v. Dallas Glen Hills LP*, 355 F.3d 853 (5th Cir. Dec. 2003); *American International Specialty Lines Insurance Co. v. Canal Indemnity Co.* 352 F.3d 254 (5th Cir. Dec. 2003); *Arana v. Ochsner Health Plan (Arana II)*, 352 F.3d 973 (5th Cir. Dec. 2003); *Dehoyos v. Allstate Corp.*, 345 F.3d 290 (5th Cir. Sept. 2003); *Genesis Insurance Co. v. Wausau Insurance Cos.*, 343 F.3d 733 (5th Cir. Aug. 2003); *Westchester Fire Insurance Co. v. Haspel-Kansas Investment*, 342 F.3d 416 (5th Cir. Aug. 2003); *Medical Care America, Inc. v. National Union Fire Insurance Co.*, 341 F.3d 415 (5th Cir. Aug. 2003); *Ross v. CitiFinancial, Inc.*, 344 F.3d 458 (5th Cir. Aug. 2003); *Arana v. Ochsner Health Plan (Arana I)*, 338 F.3d 433 (5th Cir. July 2003); *American States Insurance Co. v. Synod of the Russian Orthodox Church*, 335 F.3d 493 (5th Cir. July 2003); *Sport Supply Group, Inc. v. Columbia Casualty Co.*, 335 F.3d 453 (5th Cir. July 2003); *American Indemnity Lloyds v. Travelers Property & Casualty Insurance Co.*, 335 F.3d 429 (5th Cir. June 2003); *Trinity Universal Insurance Co. v. Stevens Forestry Service, Inc.*, 335 F.3d 353 (5th Cir. June 2003); *ACS Construction Co. v. CGU*, 332 F.3d 885 (5th Cir. June 2003).

2. See discussion *infra* Parts II-VI.

3. See discussion *infra* Parts II-VI.

and conflicts over subject matter jurisdiction appeared in several cases.⁴ But surprisingly, the Fifth Circuit also decided six class-action or class-certification cases, and the court decided two conflicts involving allegedly widespread racial and ethnic discrimination in the sale and marketing of various insurance contracts.⁵

More particularly, among the procedural questions, litigants petitioned the Fifth Circuit to resolve the following: (1) whether a federal district court's in personam jurisdiction, venue, and liability-apportionment rulings were proper;⁶ (2) whether under federal law "complete diversity" of citizenship requires a court to consider the citizenship of every underwriter's subscribing to a Lloyd's of London insurance contract when the lead underwriter only sues on its own behalf;⁷ (3) whether the Employee Retirement Income Security Act (ERISA) preempts a state declaratory-judgment proceeding to determine whether an employer's equitable-subrogation claims are meritorious;⁸ (4) whether an insured has standing to commence a punitive, class-action suit against credit-life insurers under the Federal Civil Racketeer Influenced and Corrupt Organizations (RICO) Statute;⁹ (5) whether insured African-Americans sufficiently satisfied the "class definition" requirements to commence a class-action, racial-discrimination suit against industrial-life insurers under the Civil Rights Act of 1866;¹⁰ (6) whether the McCarran-Ferguson Act preempts non-Caucasians from citing the Civil Rights Act of 1866 and the Fair Housing Act of 1968 in commencing a class-action suit against an insurer who allegedly used discriminatory credit scoring to sell more expensive property insurance contracts to non-Caucasians;¹¹ and (7) whether a district court properly certified a large class of self-funded ERISA health plans for an arbitration hearing.¹²

Among the recurring substantive questions, appellants asked the Fifth Circuit to decide the following: (1) whether a corporate employer, a self-proclaimed beneficiary, has an insurable interest under a corporate-owned life insurance contract;¹³ (2) whether insurers were liable for a "bad-faith"¹⁴

4. See discussion *infra* Parts II.C-F, III.A, IV.C.

5. See discussion *infra* Parts II.B, III.C, IV, V.C.2.

6. See discussion *infra* Part II.E.

7. See discussion *infra* Part II.F.

8. See discussion *infra* Part III.A.

9. See discussion *infra* Part IV.A.

10. See discussion *infra* Part IV.B.

11. See discussion *infra* Part IV.C. See also Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts' Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration, and Insolvency Statutes with the McCarran-Ferguson Act-1941-1993*, 43 CATH. U. L. REV. 399, 411-13 (1994) (discussing the development of the McCarran-Ferguson Act, the allocation of state and federal power under the Act, and the meaning of "business of insurance" as that phrase appears in the Act).

12. See discussion *infra* Part III.C.

13. See discussion *infra* Part II.C.

14. See discussion *infra* Part II.A-B. See also Willy E. Rice, *Judicial Bias, the Insurance Industry*

refusal to pay first-party coverage and indemnification claims;¹⁵ (3) whether insurers were liable for a bad-faith refusal to defend against third-party claims;¹⁶ and (4) whether an insurer was liable for arguably breaching a statutory duty to reimburse a commercial property owner for damages associated with their first-party claims.¹⁷ More striking, the overwhelming majority of the appeals involved substantive questions about whether insurers have a duty to pay, settle, defend, and indemnify insureds in underlying third-party personal injury suits or whether the insurers need only indemnify the insureds.¹⁸ Additionally, within this category, the Fifth Circuit agreed to decide five, four, and three conflicts involving third-party injuries to persons,¹⁹ property,²⁰ and businesses, respectively.²¹

To repeat, the Fifth Circuit's twenty-four opinions covered a fairly broad range of procedural and substantive questions. Therefore, Parts I through IV present a more thorough review of relevant facts and questions appearing in each decision. To obtain even greater insight into and appreciation of the appellate court's deliberations, the author conducted a content analysis of the

and Consumer Protection: An Empirical Analysis of State Supreme Courts' Bad-Faith, Breach-of-Contract, Breach-of-Covenant-of-Good-Faith and Excess-Judgment Decisions, 1900-1991, 41 CATH. U. L. REV. 325, 337-40 (1992) (outlining the origin of the bad faith doctrine and discussing the continuing judicial conflicts surrounding the application of the doctrine and the standard of proof that one must satisfy to prevail under the doctrine).

15. See, e.g., *DeLeon v. Lloyd's London, Certain Underwriters*, 259 F.3d 344, 354 (5th Cir. 2001) (observing and reporting the following:

Article 21.55 [of the Texas Insurance Code] requires the prompt payment or resolution of claims according to a defined timetable. This timetable is only triggered by the filing of a "claim," defined as "a first party claim made by an insured or a policyholder under an insurance policy or contract or by a beneficiary named in the policy or contract that must be paid by the insurer directly to the insured or beneficiary."

(citations omitted)).

16. See discussion *infra* Part V.A.2; see also *General Star Indem. Co. v. Vesta Fire Ins. Corp.*, 173 F.3d 946, 949-50 (5th Cir. 1999) (observing and reporting the following:

Texas law recognizes only one tort duty in the context of third party claims against an insured, that being the duty owed by a primary insurer to its insured, as set forth . . . in the landmark case of *G.A. Stowers Furniture Co. v. American Indemnity Co.* [15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved)]. In *Stowers*, the Texas Commission of Appeals held that an insurer which, under the terms of its policy, assumes control of a claim, becomes the agent of the insured and is held to the degree of care and diligence that an "ordinarily prudent person would exercise in the management of his own business." Although *Stowers* focused specifically on an insurer's obligation to settle within the limits of its policy, the duty owed by an insurer to its insured has since been broadly interpreted by the Texas Supreme Court to include the full range of obligations arising out of an agency relationship. A breach of the *Stowers* duty . . . gives rise to a cause of action in negligence against that insurer . . .

(citations omitted)).

17. See discussion *infra* Part III.B.

18. See discussion *infra* Parts II-VI.

19. See discussion *infra* Part V.A.

20. See discussion *infra* Part V.B.

21. See discussion *infra* Part V.C.

decisions, generated some percentages, and performed a limited empirical analysis of the findings.

Part V presents several tables that illustrate the types of legal questions, legal theories, plaintiffs, defendants, first- and third-party victims, and insurance contracts associated with the controversies.²² Part V also highlights and compares the dispositions of the cases within each of the nine federal district courts and in the Court of Appeals for the Fifth Circuit.²³

II. FIRST-PARTY INSURANCE CONTRACTS: STATE COMMON-LAW CLAIMS & DECISIONS

A. *Automobile Insurance: Whether Under Texas's Law an Insurer Acts in "Bad Faith" and Breaches the Implied Covenant of Good Faith and Fair Dealing by Refusing to Pay Uninsured Motorists Benefits Before a Jury Clearly Determines the Proximate Cause of the Insured's Injuries*

The facts in *Hamburger v. State Farm Mutual Automobile Insurance Co.*²⁴ are quite simple. State Farm insured Perry Hamburger under an automobile policy.²⁵ Among several clauses, the insurance contract contained two clauses that are pertinent: a personal-injury protection (PIP) provision and an uninsured or underinsured motorist (UIM) provision.²⁶ Under the PIP clause, an insured motorist receives "reasonable and necessary" medical and rehabilitative services where an accident proximately causes the insured's bodily injury.²⁷ On the other hand, the UIM provision required the insurer to pay those damages that its insured was legally entitled to recover from the third-party owner or operator of another vehicle.²⁸ But there was a proviso: The third party must be uninsured or underinsured,²⁹ and the third-party's behavior must proximately cause the accident and the insured's injuries.³⁰

22. See discussion *infra* Part V.

23. See discussion *infra* Part V.

24. *Hamburger v. State Farm Mut. Auto. Ins. Co.*, 361 F.3d 875 (5th Cir. Mar. 2004).

25. *Id.* at 878.

26. *Id.*

27. *Id.* at 878 n.1.

The PIP provision provides benefits because of bodily injury, resulting from a motor vehicle accident, sustained by a covered person. The benefits consist of reasonable and necessary medical and funeral expenses, loss of income, and reasonable expenses incurred for obtaining services that a covered person normally would have performed.

Id.

28. *Id.* at 878 n.2.

29. See *id.* at 880. "Hamburger's UIM coverage requires State Farm to 'pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by a covered person.'" *Id.*

30. *Id.* "Texas courts construe the phrase 'legally entitled to recover' in UIM provisions to mean that 'the insured must establish the uninsured motorist's fault and the extent of the resulting damages

During the policy period, another motorist collided with Hamburger's automobile.³¹ Hamburger suffered a herniated disc in his neck, which required surgery; he strongly asserted that the third-party operator of the other vehicle caused the accident and his injuries, which exceeded \$50,000.³² To settle Hamburger's complaints, the third-party driver's insurer—Old American Insurance Company—paid the \$25,000 policy limit.³³ Shortly thereafter, Hamburger filed a claim with his insurer, State Farm, for the additional \$25,000-plus damages.³⁴ State Farm limited Hamburger's payment to \$10,000 under the PIP provision, and refused the UIM provision payment.³⁵

Nearly two years after the accident, Hamburger filed a suit against State Farm in a Texas state court.³⁶ The complaint alleged that State Farm (1) breached the contract when the company failed to pay "extra-contractual damages" as required under the UIM clause and (2) acted in bad faith, a violation under the Deceptive Trade Practices Act (DTPA)³⁷ and under Article 21.21 of the Texas Insurance Code.³⁸ State Farm removed the case to the United States District Court for the Southern District of Texas based on diversity jurisdiction.³⁹ Hamburger asked for a trial by jury.⁴⁰

Because Hamburger had no expert witness to confirm that the accident caused the herniated disc, the trial court did not allow the jury to consider whether the insurer had to compensate Hamburger for his medical expenses or for the pain and suffering related to the herniated disc.⁴¹ Instead, the trial court granted State Farm's motion for judgment as a matter of law, concluding that the accident did not cause Hamburger's injuries.⁴² On the other hand, the

before becoming entitled to recover [UIM benefits].” *Id.* (quoting *Wellisch v. United Servs. Auto. Ass’n*, 75 S.W.3d 53, 57 (Tex. App.—San Antonio 2002, pet. denied)).

31. *Id.* at 878.

32. *Id.* at 878-79.

33. *Id.* at 878.

34. *Id.*

35. *Id.*

36. *Id.*

37. See TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 2003).

38. TEX. INS. CODE ANN. § 21.21(4)(10)(ii) (Vernon 2003); *Hamburger*, 361 F.3d at 879 (asserting that State Farm “failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer’s liability had become reasonably clear”).

39. *Hamburger*, 361 F.3d at 878.

40. See *id.* at 878-79.

41. *Id.* at 879.

Hamburger designated his expert witnesses on April 30, 2002, almost three months after the trial court's deadline, without submitting expert reports. On May 23, 2002, State Farm filed a motion to exclude Hamburger's expert witnesses for failure to timely designate the experts and produce expert reports. On June 12, 2002, the trial court granted State Farm's motion to exclude Hamburger's expert witnesses, and on August 23, 2002, the trial court denied Hamburger's motion to reconsider. Hamburger appeals the court decision to bar Dr. Lynn Fitzgerald's expert testimony that the accident caused Hamburger's herniated disc.

Id.

42. *Id.* “As an alternative ground for granting judgment as a matter of law that Hamburger was not entitled to recover medical expenses, the trial court found that Hamburger had presented no evidence

judge allowed the jury to decide whether Hamburger should receive compensation for past and future pain and suffering for injuries not associated with the herniated disc.⁴³

The jury awarded and the trial court entered a final judgment of \$50,000 against State Farm for Hamburger's pain and suffering, which was not related to his herniated disc.⁴⁴ Shortly thereafter, State Farm sought to offset State Farm's prior \$10,000 PIP payment and Old American's \$25,000 payment by moving to amend or alter the final judgment.⁴⁵ The trial court granted the motion and entered an amended final judgment of \$15,000 against State Farm.⁴⁶ Hamburger appealed the offsets to the jury verdict in the trial court's amended final judgment.⁴⁷

The issues before the Fifth Circuit were neither complicated nor novel. At the outset, the appellate court addressed whether the district court's summary judgment in favor of State Farm vis-à-vis the UIM extra-contractual claim or damages was erroneous.⁴⁸ Citing the Texas Supreme Court's decision in *Universe Life Insurance Co. v. Giles*,⁴⁹ the Fifth Circuit observed,

In order to impose liability on State Farm for [violating] the duty of good faith and fair dealing, the DTPA, and Article 21.21, Hamburger [had] to show that State Farm knew or should have known that it was reasonably clear that Hamburger's UIM claim was covered, but failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement.⁵⁰

After reviewing the evidence, the court of appeals found a "bona fide dispute" between Hamburger and State Farm regarding the UIM claim, rather than evidence of State Farm's engaging in bad-faith conduct.⁵¹ Therefore, the

that his medical expenses were reasonable." *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* "Hamburger [argued] that summary judgment on the extra-contractual claims was improper because (1) material facts were in dispute which precluded summary judgment, and (2) Hamburger was not afforded a full opportunity to conduct discovery." *Id.*

49. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 55 (Tex. 1997) (explaining the standard for an insurer's violation of its duty of good faith and fair dealing).

50. *Hamburger*, 361 F.3d at 880.

51. *Id.* at 881.

[I]n seeking payment of UIM benefits, Hamburger submitted to State Farm medical bills totaling \$18,960.90, and claimed additional damages for pain and suffering as to which he apparently submitted no additional information. State Farm responded: "The medical information that was submitted to us concerning Perry Hamburger does not appear to warrant an underinsured claim. This is based on Old American Insurance Company paying their policy limit of \$25,000.00 and State Farm paying the policy limit under Personal Injury Protection of \$10,000.00. We feel that \$35,000.00 is adequate compensation for Mr. Hamburger's claim." This letter reflects a bona fide dispute about State Farm's liability for UIM benefits.

Fifth Circuit found that the district court properly granted the motion for summary judgment in favor of State Farm.⁵²

Concerning the district court's decision to bar the testimony of Hamburger's expert witness, the court of appeals found no abuse of judicial discretion.⁵³ Quite simply, the Fifth Circuit correctly observed that Federal Rule of Civil Procedure 26(a)(2)(A) requires a party to timely identify his expert.⁵⁴ Hamburger failed to comply with that requirement.⁵⁵ In addition, the court of appeals found that the United States District Court for the Southern District of Texas did not abuse its discretion when it ruled that State Farm may offset both its \$10,000 PIP payment and Old American's \$25,000 settlement award from the jury's \$50,000 judgment in favor of Hamburger.⁵⁶

But the Fifth Circuit Court of Appeals reversed the district court's fourth ruling.⁵⁷ The accident did not cause Hamburger's herniated disc as a matter of law.⁵⁸ To reach that conclusion, the appellate court cited both federal and

Id.

52. *Id.*

Although Hamburger contends that "such an outlandishly low evaluation, on its face, shows that State Farm's denial of Mr. Hamburger's claim was merely a pretext" we disagree. Even if State Farm assumed during its evaluation that the accident caused all of Hamburger's claims, it cannot constitute bad faith *per se* for State Farm at that time to view \$16,039.10, which is the difference between the medical bills and the insurance benefits already paid, as sufficient compensation for Hamburger's subjective pain and suffering. Therefore, the trial court properly granted summary judgment for State Farm on Hamburger's extra-contractual claims.

Id.

53. *Id.* at 882.

54. *Id.*

Federal Rule of Civil Procedure 26(a)(2)(A) states that "a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence." [Also,] Federal Rule of Civil Procedure 26(a)(2)(B) provides that "this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness."

Id. (quoting FED. R. CIV. P. 26(a)(2)(A)-(B)).

55. *Id.* "Here, the trial court did not abuse its discretion in barring Dr. Fitzgerald as an expert witness because Hamburger failed to timely identify her as required by Rule 26(a)(2)(A)." *Id.*

56. *Id.*

State Farm contends that the joint pretrial order entered under Federal Rule of Civil Procedure 16(e) controls the subsequent course of the action. In the joint pre-trial order signed by Hamburger and State Farm, Hamburger agreed that "Defendant is entitled to offset any payments made pursuant to the underlying liability policy" and that "Defendant is entitled to offset any payments made under Plaintiff's PIP coverage unless Plaintiff's damages exceed the combined limits of his PIP and UIM coverage" . . . We will not reverse the trial court's exercise of its discretion based on Hamburger's unspoken assumption. Hamburger should not have been surprised by the possibility that if he did not prove that his medical expenses were reasonable and necessary, the jury would not be permitted to consider an award of medical expenses.

Id.

57. *Id.* at 886.

58. *Id.* at 879. "Because Hamburger had no expert testimony that the accident caused

Texas's law.⁵⁹ Citing its recent ruling in *Mathis v. Exxon Corp.*, the Fifth Circuit noted that a judgment as a matter of law is appropriate under federal law where "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue."⁶⁰

And citing the Texas Supreme Court's ruling in *Morgan v. Compugraphic Corp.*, the court of appeals observed,

Under [Texas's] law, "[l]ay testimony is adequate to prove causation in those cases in which general experience and common sense will enable a layman to determine, with reasonable probability, the causal relationship between the event and the condition. . . . Generally, lay testimony establishing a sequence of events which provides a strong, logically traceable connection between the event and the condition is sufficient proof of causation."⁶¹

In light of those principles, the Fifth Circuit declared that Hamburger was not required to establish a factual causation issue with expert testimony.⁶² Therefore, the Fifth Circuit reversed the trial court's judgment that Hamburger could not recover, as a matter of law, pain and suffering damages for the herniated disc.⁶³

B. Whole Life Insurance: Whether Under Louisiana's Law an Insurer Breaches a "Vanishing Premiums" Whole-Life Insurance Contract and an Implied Covenant of Good Faith and Fair Dealing by Failing to "Vanish" Class Action Members' Premium Payments After Seven Years

Although the facts and the type of insurance contract in *Shocklee v. Massachusetts Mutual Life Insurance Co.* differ from those appearing in *Hamburger*, the substantive questions in both cases are remarkably similar.⁶⁴ But the Fifth Circuit's analysis and interpretation of Louisiana's law in *Shocklee* are highly superficial, and the appellate court's holding is, at best, suspect.

Hamburger's herniated disc, the trial court granted State Farm's motion for judgment as a matter of law that the accident did not cause Hamburger's injuries." *Id.*

59. *Id.* at 884.

60. *Id.* (quoting *Mathis v. Exxon Corp.*, 302 F.3d 448, 453 (5th Cir. 2002)).

61. *Id.* (alteration in original) (quoting *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 733 (Tex. 1984)). "Therefore, in determining whether lay testimony is sufficient to prove causation, Texas courts look at the nature of the lay testimony and the nature of the injury." *Id.*

62. *Id.* at 886.

63. *Id.*

64. See *Shocklee v. Mass. Mut. Life. Ins. Co.*, 369 F.3d 437, 438-39 (5th Cir. Apr. 2004).

During the mid-1980s, a Massachusetts Mutual Life Insurance Company (MassMutual) agent persuaded Sanford and Marilyn Shocklee to purchase a \$25,000 whole-life insurance policy.⁶⁵ When marketing that product, the agent gave the Shocklees a dividend-payment schedule.⁶⁶ The schedule indicated that insureds like the Shocklees could use their accumulated dividends to pay the policy premiums after seven years.⁶⁷ Of course, there were two conditions: MassMutual's then-current dividend rates had to continue and the dividends had to be reinvested.⁶⁸ But more important, the soliciting agent, the schedule, the conditional binder or receipt,⁶⁹ and the "contract"⁷⁰ disclosed where and how MassMutual would reinvest those dividends.⁷¹

However, there were other disclosures.⁷² One stated that the policy premiums would be payable for life, and another stated that the "forecast dividend payments were 'neither guarantees nor estimates for the future.'"⁷³ Still, the Shocklees purchased the insurance and received a conditional-binding receipt immediately.⁷⁴ The Shocklees received a copy of the actual policy, which gave them ten days to review the policy and cancel it at will.⁷⁵ And they began making annual payments without canceling the policy.⁷⁶

For seven years, the Shocklees paid the scheduled premiums.⁷⁷ Presumably, MassMutual reinvested the policy dividends and sent annual reports to the Shocklees indicating the amount and history of the reinvestments.⁷⁸ In the early 1990s and during the eighth anniversary of the

65. *Id.*

66. *Id.* at 439.

67. *See id.*

68. *Id.*

69. Other names for this document include the following: a "binding receipt," a "temporary binder," and a "temporary receipt." "A 'binder' is used to bind insurance temporarily pending the issuance of the policy. No binder shall be valid beyond the issuance of the policy as to which it was given." *See* LA. REV. STAT. ANN. § 22:631 (West 2004); *Spain v. Travelers Ins. Co.*, 332 So. 2d 827, 833 (La. 1976) (embracing the view that insurers must issue a conditional receipt before delivery of the policy, and the receipt is not incorporated in the insurance contract).

70. *Shocklee*, 369 F.3d at 440.

In a recent case, the Eighth Circuit examined similar "vanishing premiums" insurance policies under Louisiana law. The policies at issue in [that case] are identical in all material respects to the policy at issue here. . . . The MassMutual policy provides that "[t]he policy and the application constitute the entire contract" and that the insurance company's "agents cannot alter or modify any of the terms of the policy . . . [nor] waive any of its provisions."

Id. (alteration in original) (quoting *In re Minn. Mut. Life Ins. Co. Sales Practices Litig.*, 346 F.3d 830, 837 (8th Cir. 2003)).

71. *See id.* at 439.

72. *Id.*

73. *Id.*

74. *See id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *See id.*

policy, MassMutual sent another premium bill to the Shocklees.⁷⁹ The Shocklees were shocked; but to be sure, they still made at least one additional premium payment.⁸⁰

In early 2000, the Shocklees filed a class-action lawsuit in the District Court for the Middle District of Louisiana.⁸¹ The complaint alleged that MassMutual breached the life-insurance contract by not vanishing their premium payments after seven years.⁸² The insured complainant also accused the insurer of breaching an implied covenant of good faith and fair dealing.⁸³ However, the record does not indicate whether the latter claim “sounded” in contract, tort, or under both sets of legal principles.⁸⁴

Initially, the district court denied MassMutual’s motion for summary judgment, finding that the whole-life insurance contract was ambiguous about “the source of the premium payments.”⁸⁵ However, after discovery, the district court considered the parties’ cross-motions for summary judgment; and, relying in part on statements in the Shocklees’ depositions, the district court awarded summary judgment in favor of MassMutual.⁸⁶ The Shocklees appealed, arguing that the MassMutual contract was ambiguous.⁸⁷

Curiously, the Fifth Circuit cited a host of settled contract principles in Louisiana.⁸⁸ But only two are relevant for this discussion.⁸⁹ First, under Louisiana’s law, “[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties’ intent.”⁹⁰ And second, Louisiana’s law “does not allow the parties to create an ambiguity where none exists and does not authorize courts to create new contractual obligations where the language of the written document clearly expresses the intent of the parties.”⁹¹

79. *See id.*

80. *See id.*

81. *See id.*

82. *Id.*

83. *Id.*

84. *Cf. Cleary v. Am. Airlines, Inc.*, 168 Cal. Rptr. 722, 729 (Cal. Ct. App. 1980) (holding that an implied covenant of good faith and fair dealing existed in every contract under California law sounding in both tort and contract), and *Lewis v. Marshall Bros. Lincoln-Mercury, Inc.*, 876 So. 2d 142, 145 (La. Ct. App. 2004) (holding that “[a]lthough a claim of redhibition may sound in both contract and tort, a plaintiff must allege sufficient facts in the petition to establish that damages occurred in a particular location so that venue might be proper in that parish in which the damage occurred.” (citation omitted)). *See also Shocklee*, 369 F.3d at 439-40 (reporting that the “parties agree that Louisiana law governs this action”).

85. *Shocklee*, 369 F.3d at 439 (emphasis added).

86. *Id.*

87. *See id.*

88. *See id.* at 440.

89. *See id.*

90. LA. CIV. CODE ANN. art. 2046 (West 1987).

91. *Omnitech Int’l, Inc. v. Clorox Co.*, 11 F.3d 1316, 1326 (5th Cir. 1994) (citing *Kennedy v. Sanco La., Inc.*, 573 So. 2d 505, 507 (La. Ct. App. 1990), *writ denied*, 578 So. 2d 138 (La. 1991)).

But these principles cause the writer to ask: What language and which contract did the Fifth Circuit have in mind—an ambiguous oral contract or an ambiguous written contract? Again, the soliciting agent gave some marketing information to the Shocklees.⁹² In one part, the document stated that the premiums would be “payable for life,” and in another, it stated that the forecasted dividends were “neither guarantees nor estimates for the future.”⁹³ Arguably, these two disclosures are contradictory, thereby creating some confusion for unsophisticated laypersons that really do not understand “vanishing premiums.”⁹⁴

Furthermore, the allegedly ambiguous language certainly did not appear in MassMutual’s “written contract.”⁹⁵ The Fifth Circuit correctly noted that MassMutual’s whole-life insurance “policy and the application [comprised] the entire contract.”⁹⁶ Yet, the Fifth Circuit cited the Eighth Circuit’s analysis and holding in a similar vanishing premiums case⁹⁷ and declared that “[c]ourts should not strain to find an ambiguity in an insurance policy when none exists.”⁹⁸ More disturbing, the court of appeals advanced the following statement without presenting a sound discussion or explaining the relevance of the statement: “The policy on its face, however, evinces no ambiguity [regarding the origin of the premium] payments. . . . [A]s with most

92. *Shocklee*, 369 F.3d at 439.

93. *Id.*

94. For many unsophisticated, easy-to-fleece or naïve applicants, the origin of the dividends under a whole-life insurance contract is not always clear. That explains why many jurisdictions insist that insurers adequately disclose information so that applicants sufficiently understand that market conditions influence the rate of return on dividends, which will affect whether premiums will indeed “vanish” after seven years. *See, e.g.*, *Von Hoffmann v. Prudential Ins. Co. of Am.*, 202 F. Supp. 2d 252, 254 (S.D.N.Y. 2002) (noting that the illustrations included a disclaimer stating that investment returns were not guaranteed and if investments failed to perform as predicted, additional premiums would be required beyond the vanishing date shown in the illustration). Moreover, even when insureds understand the origin of the dividends and the way that vanishing premiums works, problems remain. Often insureds do not receive the dividends when returns on investment have been good to stellar. Quite simply, insurers’ deceptive and fraudulent practices explain why insurers failed to pay dividends to “participating members” under whole-life insurance contracts. Of course, that forces owners of whole-life contracts to sue insurers to recoup unpaid dividends, and therefore, to ensure that premium payments vanish after seven years. *See, e.g.*, *Noonan v. Northwestern Mut. Life Ins. Co.* 687 N.W.2d 254, 256 (Wis. Ct. App. 2004) (holding that the policies required Northwestern to pay dividends based on the annual surplus of the company, after the insureds sued Northwestern for breaching the contract by paying insureds only interest from a short-term bond account and by unilaterally changing the way company distributes surplus profit to annuity policyholders). *See also Northwestern Mut. Life Ins. Co. v. Klempner*, 866 So. 2d 74, 74-75 (Fla. Dist. Ct. App. 2003) (reversing an order that granted class certification for some medical and non-medical policy holders that did not receive dividends from an annual divisible surplus after the insurer reclassified their policies as “non-contributing, ‘medical market class’”).

95. *Shocklee*, 369 F.3d at 441.

96. *Id.* at 440.

97. *Id.* at 440-41 (citing *In re Minn. Mut. Life Ins. Co. Sales Practices Litig.*, 346 F.3d 830, 836-37 (8th Cir. 2003) (“In a recent case, the Eighth Circuit examined similar ‘vanishing premiums’ insurance policies under Louisiana law. . . . The policies at issue in *Minnesota Mutual* are identical in all material respects to the policy at issue here. . . . The Eighth Circuit’s analysis is persuasive.” (citation omitted))).

98. *Id.* at 441.

individually-purchased life insurance policies, the insured is responsible for paying the premiums.”⁹⁹

Clearly, the Fifth Circuit’s analysis in *Shocklee* is highly superficial. A better analysis would have outlined the answers to these questions: (1) whether the MassMutual soliciting agent’s representations, the Shocklees’ first premium payment, and the temporary-conditional binder created a valid oral, temporary-insurance contract, and (2) if so, whether that oral contract was ambiguous. There is an abundance of authority in Louisiana,¹⁰⁰ in sister states,¹⁰¹ as well as in the Eight Circuit¹⁰² supporting the position that binders create oral, temporary-insurance contracts. Also, if the Fifth Circuit had found an oral contract, it would have had to harmonize another settled Louisiana principle with its strained conclusion in *Shocklee*: If ambiguity remains in an insurance contract after applying other general rules of construction, the ambiguous language must be construed in favor of the insured and against the insurer.¹⁰³

99. *Id.*

100. See *Borer v. Security Indus. Life Ins. Co.*, 245 So. 2d 5, 7 (La. Ct. App. 1971), *writ ref’d*, 247 So. 2d 394 (La. 1971) (embracing the proposition and declaring that it is essential to the existence of immediate coverage—respecting temporary binders and temporary insurance—that there is mutual intent among the parties to insure beginning on the date of premium payment or application); *Colomb v. U.S. Fidelity & Guar. Co.*, 539 So. 2d 940, 943-44 (La. Ct. App. 1989) (declaring that a liability insurer, whose policy did not unambiguously exclude coverage for the insured’s alleged negligent misrepresentations before entering into an oral contract, had duty to defend insured against negligence claim, even though there was some evidence suggesting that an “occurrence” happened before the policies went into effect).

101. See, e.g., *Miss. Farm Bureau Mut. Ins. Co. v. Todd*, 492 So. 2d 919, 929 (Miss. 1986) (embracing the proposition that “a binder is a contract for temporary insurance, until either a permanent policy can be written or its issuance approved or disapproved by the insurer”) (citations omitted); *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 98-99 (Tex. 1994) (holding that normally and by statute an agent has no authority to bind an insurer or create a temporary oral or written contract, but concluding that the company will be vicariously liable for any of the soliciting agent’s misconduct—misrepresentations and fraudulent activities—which are “within the actual or apparent scope of the agent’s authority”); see also *Jenkad Enters., Inc. v. Transp. Ins., Co.*, 18 S.W.3d 34, 37 (Mo. Ct. App. 2000) (reaffirming that a “binder is a contract of temporary insurance, either oral or written, [and, is] effective at the date of application for permanent insurance and terminating upon the issuance, delivery, and acceptance of the policy, or by a rejection of the application”).

102. See, e.g., *Hilt Truck Lines, Inc. v. Riggins*, 756 F.2d 676, 678 (8th Cir. 1985) (finding that under the Arkansas Insurance Code the binder and correspondence between an applicant and the insurance agent created a temporary contract of insurance, which “shall be deemed to include all the usual terms of the policy [for] which the binder was given [along] with such applicable indorsements as are designated in the binder”).

103. *Valentine v. Bonneville Ins. Co.*, 691 So. 2d 665, 668 (La. 1997).

C. Corporate-Owned Life Insurance: Whether Under Texas's Law a Corporate Employer, as the Self-Proclaimed Beneficiary, Has an Insurable Interest in the Continued Existence of an Insured Employee's Life Under a Corporate-Owned Life Insurance Contract

Under Texas's law, the owner of, the insured under, and the beneficiary named in a life-insurance contract are not identical. First, ownership allows a person to exercise absolute control over the contract, regardless of whether the owner or another party pays the premiums.¹⁰⁴ Therefore, an insured, a designated primary or secondary beneficiary, or another third party—for example, a parent, a child, or a spouse—may purchase and own a life-insurance contract that insures the life of another.¹⁰⁵ Second, if the insured owns the policy, the insured has complete authority to name the beneficiary.¹⁰⁶

On the other hand, if the insured is not the owner, the right to name the beneficiary resides exclusively with the owner, rather than with the insured.¹⁰⁷ But for sure, there are numerous instances where the owner of a life-insurance contract allows the insured to designate the primary or contingent beneficiary.¹⁰⁸ In addition, the owner of and the designated beneficiary under

104. See, e.g., *Little v. X-Pert Corp.*, 867 S.W.2d 15, 15-16 (Tex. 1993).

[F]our couples, James and Glee Little, David and Myrna Smith, Alfred and Patricia Ann Smith, and Harold and Ruth Lawley, formed X-Pert Corporation. Each couple owned 25 percent of the corporation's outstanding shares [A]ll eight shareholders and X-Pert executed a Buy-Sell Agreement [that] contained mutual covenants to buy and sell a shareholder's interest at death or if a shareholder wished to make an *inter vivos* sale of X-Pert stock. The covenants were intended to allow the surviving or remaining parties to the Buy-Sell Agreement to maintain ownership and control of the corporation. To carry out the covenants applicable to a shareholder's death, the shareholders agreed in the Buy-Sell Agreement to buy life insurance policies on James Little, David Smith, Alfred Smith, and Harold Lawley, with X-Pert named as legal beneficiary. X-Pert was to maintain the policies and pay all premiums.

Id.

105. See TEX. INS. CODE ANN. § 1103.054, which reads as follows:

An individual of legal age may: (1) apply for a policy insuring the individual's life; and (2) designate in writing in the application for the policy any individual, partnership, association, corporation, or other legal entity as: (A) a beneficiary of the policy; (B) an absolute or partial owner of the policy; or (C) both a beneficiary and an absolute or partial owner of the policy.

106. See, e.g., *McAllen State Bank v. Texas Bank & Trust Co.*, 423 S.W.2d 932, 934 (Tex. Civ. App.—Dallas 1968, writ granted) (finding that in the life insurance policy—under the heading of "Ownership" and under the sub-heading, "Control of Policy"—the insured was "the owner of this policy unless someone else [was] designated by endorsement [and that] [a]ll of the insured's rights belong[ed] to the owner"), *rev'd by* 433 S.W.2d 167 (Tex. 1968).

107. See, e.g., *Van Der Meulen v. Southwestern Life Ins. Co.*, 514 S.W.2d 469, 471 (Tex. Civ. App.—San Antonio 1974, writ *ref'd*) (observing that "[n]othing contained in [the] endorsement [to the contract] shall operate to prevent the Owner from exercising the right to name and change beneficiaries or the right to elect any method of settlement provided under the settlement provisions of this contract").

108. See, e.g., *Davis v. Tenn. Life Ins. Co.*, 562 S.W.2d 868, 869 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ *ref'd n.r.e.*) (reporting that "[the employee's] life was insured under Tennessee Life Insurance Company Group Policy . . . [that] the insurance premiums were paid entirely by Reading and Bates [Offshore Drilling Company] . . . [and that when] an employee first began work for Reading and

the contract may be identical.¹⁰⁹ The owner of and the insured under a life-insurance contract may also be the same person.¹¹⁰ However, as early as 1887, the Texas Supreme Court declared that a person must have an insurable interest in the insured's continued existence to qualify as a bona fide owner of a life-insurance contract.¹¹¹

In light of those settled principals, consider the facts, as well as the Fifth Circuit's findings and questionable ruling, in *Mayo v. Hartford Life Insurance Co.*¹¹² In 1993, Wal-Mart established a trust to serve as the legal holder of its corporate-owned life insurance (COLI) policies.¹¹³ Those contracts insured the lives of its 350,000 employees, who presumably were directors, general managers, supervisors, salespersons, as well as full- and part-time lower-level employees.¹¹⁴ Wal-Mart designated itself as the beneficiary.¹¹⁵

Bates he was required to sign a card designating a beneficiary for the insurance to which he was entitled").
109. See, e.g., *Little v. X-Pert Corp.*, 867 S.W.2d 15, 16 (Tex. 1993).

James Little and his wife sold all of their X-Pert stock to fellow shareholder Alfred Smith. Until that time, James Little had been an officer and director of X-Pert. James Little died approximately one month later. Pursuant to the Buy-Sell Agreement, a \$250,000 insurance policy had been purchased on his life from Jackson National Life Insurance Company, showing X-Pert as the owner and beneficiary.

Id. *Cormack v. Aspentech, Inc.*, No. 01-99-00444-CV, 2000 WL 330179, at *1 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (not designated for publication) (observing that the applicant "applied for \$500,000 term life insurance and [that in the] signed application, he named [a third party] as the owner and beneficiary. Six years later, he completed a signed application for a 'policy change' converting the coverage from term to whole life. The face amount was unchanged, and the owner and beneficiary were identified as 'Same as Original Policy.'").

110. See, e.g., *Barrientos v. Nava*, 94 S.W.3d 270, 281 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

When life insurance is owned by the insured, and he directs the insurance company to pay the insurance proceeds on his death outright to either a named person or the trustee of a trust, "the pay-out arrangement, though revocable by the insured, is an inter vivos donative document of transfer that is a substitute for a will."

Id. (quoting RESTATEMENT (SECOND) OF PROPERTY § 32.4 cmt. f (1990)).

111. *Price v. Supreme Lodge Knights of Honor*, 4 S.W. 633, 634 (Tex. 1887).

[P]olicies procured by persons having no interest in the life of the insured are void at common law, as against public policy. [The court also noted that such a] policy holder has nothing to lose for which he can claim indemnity; on the contrary, his interest is in the early death of the insured. When that occurs he ceases to pay premiums, and receives the amount of the policy. This creates a temptation to destroy human life, and the common law forbids the contract.

Id.

112. *Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400 (5th Cir. Jan. 2004).

113. *Id.* at 402.

114. *Id.*

Wal-Mart's COLI policies insured the lives of all employees, also called "associates," with service time sufficient for enrollment in the Wal-Mart Associates' Health and Welfare Plan, unless those associates elected not to participate in a special death benefit program that Wal-Mart introduced in conjunction with the COLI program. Fewer than one percent of the 350,000 eligible employees opted out of the program, which was discontinued by early 1998.

Id.

115. *Id.*

Even a conservative reading of the record reveals that legitimate economic or pecuniary reasons caused Wal-Mart to insure more than a third of a million employees. "Wal-Mart's COLI program was intended to be 'mortality neutral,' [under which the employees'] death benefits . . . would fund [other] employee[s'] benefit plans and death expenses, or [would] be repaid to the insurer as self-correcting 'cost of insurance' adjustments."¹¹⁶ More important,

Wal-Mart acted in pursuit of tax benefits related to the deductibility of premium payments, and was only one of many similarly situated companies which took this course of action. After Congress and the IRS eliminated the tax advantages of Wal-Mart's COLI program, Wal-Mart unwound the otherwise unprofitable program, surrendering the last of its policies by 2000.¹¹⁷

Douglas Sims was a Wal-Mart associate and was insured under a COLI policy until his death, although the special death-benefit program was discontinued before Sims' death.¹¹⁸ His estate discovered that Sims was insured under a COLI contract and filed a declaratory-judgment suit against Wal-Mart, alleging a violation of Texas's insurable-interest doctrine outlined above.¹¹⁹ The estate asked the United States District Court for the Southern District of Texas to declare Sims' rights under the COLI policy.¹²⁰ The estate also asked the district court to declare whether Wal-Mart had an insurable interest in the continued existence of Sims' life that would permit the company to become the owner of and the designated beneficiary in the life-insurance contract.¹²¹

Wal-Mart moved for summary judgment, which the district court denied.¹²² Sims' estate then filed a motion for partial summary judgment, arguing that Wal-Mart lacked an insurable interest in Sims' life.¹²³ Wal-Mart responded with a cross-motion for summary judgment, arguing that Wal-Mart

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 402-03 (The estate wanted "the imposition of a constructive trust on the policy benefits, and disgorgement of the money [that] Wal-Mart [allegedly] unjustly received at some point in 1999.>").

121. *Id.* at 403.

122. *Id.*

Wal-Mart [asked] for summary relief on the grounds that . . . Georgia law applie[d], and thus Sims ha[d] no claim and, in the alternative, [that] the Texas statute of limitations barr[ed] Sims' claim. After the district court denied [that] motion, Wal-Mart moved for reconsideration, renewing its choice of law argument and adding that recent developments in Texas law placed doubt on the public policy underlying the state's insurable interest doctrine.

Id.

123. *Id.*

had an insurable interest.¹²⁴ Curiously and surprisingly, the United States District Court for the Southern District of Texas did not dismiss the estate's suit altogether.¹²⁵ To be sure, under Texas's law, whether a policy owner, an insured, or a beneficiary has an insurable interest is a substantive question.¹²⁶ But procedurally, one's claiming that another has no insurable interest is an affirmative defense.¹²⁷ Moreover, only insurers—rather than insureds or their estates—have the right to raise that defense.¹²⁸ Nevertheless, the district court granted Sims' estate's motion for summary judgment; Wal-Mart appealed.¹²⁹

Initially, the Fifth Circuit had to resolve a choice-of-law question.¹³⁰ Wal-Mart argued that the district court erred when the court used Texas's rather than Georgia's substantive law to resolve the parties' dispute.¹³¹ The court of appeals, however, declared that when "making a [choice-of-law] determination, a federal court[']s exercising diversity jurisdiction must apply the [choice-of-law] rules of the forum state."¹³² And the appellate court held that Texas's law applied for several reasons: (1) "[t]he parties 'reside' in Texas (Wal-Mart by place of business) and the employment relationship was also wholly in Texas"; (2) "[t]he injury and the conduct causing it [occurred] either in Texas or Georgia (or both), [if] one considers the injury to be the misappropriation of money, the insuring of a non-insurable interest, or some

124. *Id.*

125. *Id.*

126. *Id.* at 403, 406.

127. *See, e.g.,* Colonial County Mut. Ins. Co. v. Valdez, 30 S.W.3d 514, 524 (Tex. App.—Corpus Christi 2000, no pet.) (finding that "[w]hen the vehicle was stolen and the insured made a claim under the policy, [the insurer refused it] on the previously undisclosed reason that Hector . . . no longer owned the car [and therefore] did not have an insurable interest. This defense was not disclosed to Hector when he bought the policy."); Henry v. Lincoln Income Life Ins. Co., 405 S.W.2d 167 (Tex. Civ. App.—Ft. Worth 1966, no writ) (finding that "the defense of no insurable interest [was not] available to [the insurer, since] [t]he contract with plaintiff made no provision requiring [an] insurable interest").

128. *See, e.g.,* Stillwagoner v. Travelers Ins. Co., 979 S.W.2d 354, 359 (Tex. App.—Tyler 1998, pet. ref'd).

Appellees argued before the trial court that "[i]t is well settled that *only* the insurer can raise the [beneficiary's] lack of insurable interest," citing 3 COUCH ON INSURANCE 3d, § 41.5 (1996), which states: "[T]he majority of courts which have considered the issue hold that only the insurer can raise the objection of want of insurable interest." On appeal, they concede that Texas followed the minority rule allowing any interested party other than the insurer to raise the issue. But now Appellees argue that the Texas rule is no longer operative since the legislature granted an insurable interest to a beneficiary named by the insured because the legislation "eliminated the issue of whether such a beneficiary had an insurable interest."

Id. (alteration in original). *See also* Tamez v. Certain Underwriters at Lloyd's, London, 999 S.W.2d 12, 14-16 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (observing that "[a] majority of state courts have held that only the insurer can raise the objection of lack of insurable interest," but holding that the administrators "have standing to challenge the existence of an insurable interest").

129. *Mayo*, 354 F.3d at 402.

130. *Id.* at 403-06.

131. *Id.* at 403.

132. *Id.*

other construction of the relevant events"; and, (3) Sims lived and worked at a Wal-Mart store in Texas.¹³³

Then the Fifth Circuit examined the three-pronged, insurable-interest doctrine outlined in *Drane v. Jefferson Standard Life Insurance Co.*¹³⁴ In *Drane*, the Texas Supreme Court declared that an insurable interest in the life of another exists if: (1) the owner of the life-insurance contract is "so closely related by blood or affinity that he wants the [insured] to continue to live, irrespective of monetary considerations," (2) the owner of the contract is "a creditor," or (3) the policy owner has "a reasonable expectation of pecuniary benefit or advantage from the continued life of [the insured]."¹³⁵

Wal-Mart argued that it had a reasonable expectation of pecuniary benefit in the continued lives of its employees sufficient to bring it within the last category described in *Drane*.¹³⁶ More specifically, Wal-Mart stressed that it had "an expectation of financial gain from the continued lives of its employees [in light of] the costs associated with the death of an employee, such as productivity losses, hiring and training a replacement, and payment of death benefits."¹³⁷ And as reported above, Wal-Mart's COLI program was designed in part to fund the benefit plans of its 350,000 employees.¹³⁸

Astonishingly, the Fifth Circuit refused to accept Wal-Mart's argument. First, the appellate court noted that Texas's lower courts embrace the view: "The mere existence of an employer/employee relationship is never sufficient to give the employer an insurable interest in the life of the employee."¹³⁹ For sure, that is Texas's law. But Wal-Mart never asserted an insurable interest based on an employer-employee relationship.¹⁴⁰ So, the Fifth Circuit's claiming otherwise is highly suspect. Second, Wal-Mart certainly argued, and the facts clearly established, that Wal-Mart had a pecuniary interest in the continued lives of its employees.¹⁴¹ But the Fifth Circuit dismissed that argument in an arguably cavalier manner without supporting evidence. The court of appeals stated:

133. *Id.* at 404-05 (concluding that "[t]he plurality of factors favor the application of Texas law, particularly given that courts evaluate such contracts for their quality, not their quantity—and that all of the factors must be considered in the light of [Restatement (Second) of Conflict of Laws] § 6[(2) (1971)]").

134. *Drane v. Jefferson Standard Life Ins. Co.*, 161 S.W.2d 1057 (Tex. 1942).

135. *Id.* at 1058-59.

136. *Mayo*, 354 F.3d at 406-07.

137. *Id.* at 407.

138. *Id.* at 402.

139. *Id.* at 406 (quoting *Stillwagoner v. Travelers Ins. Co.*, 979 S.W.2d 354, 361 (Tex. App.—Tyler 1998, pet. denied)).

140. *Id.* at 406-07.

141. *Id.*

[Wal-Mart also argues that] it possesses an expectation of financial gain from the continued lives of its employees by virtue of the costs associated with the death of an employee. . . . [But those] costs are associated with the loss of *any* employee . . . and, as [Texas's] precedent clearly indicates, employers lack an insurable interest in ordinary employees.¹⁴²

To support the latter assertion, the Fifth Circuit cited just two cases¹⁴³ — *Tamez v. Certain Underwriters at Lloyd's, London*¹⁴⁴ and *Stillwagoner v. Travelers Insurance Co.*¹⁴⁵ But the insurable-interest rulings in *Tamez* and *Stillwagoner* were not based on whether the employees were “ordinary,” professional, seasonal, permanent, or temporary employees.¹⁴⁶ To be precise, the court in *Tamez* held: “[A]n employer does not have a pecuniary interest in the continued life of its employee, *unless that employee is crucial to the operation of the business.*”¹⁴⁷ And in *Stillwagoner*, the court never mentioned or discussed the relevance of the employees’ classification.¹⁴⁸ To put it mildly, the Fifth Circuit wittingly or unwittingly mischaracterized Texas’s insurable-interest law in *Mayo*. Clearly, employers in Texas have an insurable interest in the continued lives of their employees, if they can satisfy the test stated in *Tamez*.¹⁴⁹ Arguably in *Mayo*, Wal-Mart satisfied the insurable-interest tests outlined in *Drane* and *Tamez*.

There is one final observation. In *Mayo*, Wal-Mart filed a motion requesting certification of the insurable-interest question to the Supreme Court of Texas.¹⁵⁰ But the Fifth Circuit denied that motion, asserting that its “familiarity with the [insurable-interest] doctrine . . . and the *unambiguous* line of Texas lower court decisions, make certification unnecessary.”¹⁵¹ Without doubt, the certification ruling was a major mistake. The Texas Supreme Court should address this issue more thoroughly, for insurable-interest decisions in Texas should not turn on whether a life-insurance

142. *Id.* at 407 (citing *Stillwagoner*, 979 S.W.2d at 362).

143. *Id.* at 407 n.4.

144. *Tamez v. Certain Underwriters at Lloyd's, London*, 999 S.W.2d 12, 18-19 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

145. *Stillwagoner*, 979 S.W.2d at 361-66.

146. *Tamez*, 999 S.W.2d at 18-21; *Stillwagoner*, 979 S.W.2d at 363-64.

147. *See Tamez*, 999 S.W.2d at 18 (emphasis added).

148. *See Stillwagoner*, 979 S.W.2d at 361-62 (“Even in the absence of evidence we may assume that [decendent’s] death forced some readjustments which normally accompany the death of an employee. But an insurable interest does not result from the cessation of ordinary service.”).

149. *See, e.g., Davis v. Tenn. Life Ins. Co.*, 562 S.W.2d 868, 871 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref’d n.r.e.) (relying on the facts in *Davis*, where an employer insured an “ordinary” employee under a life insurance policy that the employer owned. The employee designated his mother as the beneficiary of the policy. When the employee died, his wife sued for half of the proceeds of the policy, on the theory that the policy was community property. The mother prevailed in the suit.).

150. *Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400, 406 (5th Cir. Jan. 2004).

151. *Id.* at 406 (emphasis added) (ruling that “Wal-Mart’s motion to certify to the Texas Supreme Court is denied”).

contract is an accidental-death,¹⁵² a corporate-owned,¹⁵³ or a group-life policy.¹⁵⁴

D. Credit-Life Insurance: Whether Defending Parties Were Sufficiently Diverse to Permit a District Court to Remove State Common-Law Actions Against Insurers, Lenders, and Agents from a Mississippi State Court to a Federal District Court

Clearly, financial consumers confront very real abuses, fraudulent conduct, and deceptive practices when they attempt to secure automobile, home, and personal loans.¹⁵⁵ Very often, lenders force or encourage unsophisticated borrowers to purchase credit-life insurance as a condition for receiving a loan, which often has a high interest rate.¹⁵⁶ And to make matters worse from the borrowers' point of view, the lender selects the credit-life insurer.¹⁵⁷ Frequently, the insurer sells policies that require borrowers to pay an excessively high premium.¹⁵⁸

Ross v. CitiFinancial, Inc. illustrates one of the types of conflicts that can erupt from an arguably questionable relationship involving borrowers, lenders, insurance agents, and credit-life insurers.¹⁵⁹ Here are the brief facts. CitiFinancial and its predecessors (CitiFinancial) are lenders doing business in Mississippi, but they are Maryland, Tennessee, and Georgia corporations with their principal places of business located in those respective states.¹⁶⁰

152. See *Tamez*, 999 S.W.2d at 19 (ruling in favor of the employee's estate—on the merits—and holding that the employer who purchased an accidental-death policy on the employee's life and designated itself as the beneficiary had no insurable interest in employee's life); *Stillwagoner*, 979 S.W.2d at 361 (ruling in favor of the employee's estate on the merits, finding a wagering contract, and holding that the employer who purchased an accidental-death policy on a temporary employee's life and designated itself as the beneficiary had no insurable interest in employee's life).

153. See *Ball v. SBC Communications, Inc.*, No. 04-02-00702-CV, 2003 WL 21467219, at *6 (Tex. App.—San Antonio 2003, no pet. h.) (not designated for publication) (ruling in favor of the employer—on procedural grounds—who purchased a company-owned life insurance policy on an employee and claimed that it had insurable interest in employee's life). *But see*, *Torrez v. Winn-Dixie Stores, Inc.*, 118 S.W.3d 817, 821 (Tex. App.—Fort Worth 2003, pet. dism'd) (ruling against the employer—on procedural ground—who purchased a company-owned life insurance policy on an employee and claimed that it had insurable interest in employee's life).

154. See, e.g., *Davis*, 562 S.W.2d at 869 (finding that the employer was the owner of the group life policy, therefore by operation of law, the employer had an insurable interest in the continued existence of its employees' lives).

155. See generally *infra* Part IV.A and accompanying notes (discussing RICO implications of the actions of credit life insurers).

156. See generally *infra* Part IV.A and accompanying notes (discussing RICO implications of the actions of credit life insurers).

157. See generally *infra* Part IV.A and accompanying notes (discussing RICO implications of the actions of credit life insurers).

158. See generally *infra* Part IV.A and accompanying notes (discussing RICO implications of the actions of credit life insurers).

159. *Ross v. CitiFinancial*, 344 F.3d 458 (5th Cir. Aug. 2003).

160. *Howard v. CitiFinancial, Inc.*, 195 F. Supp. 2d 811, 816 (S.D. Miss. 2002).

Union Security Life Insurance (Union Security) and American Security Insurance (American Security) Companies are Delaware corporations.¹⁶¹ Their principal places of business are located in Georgia, but they sell a variety of insurance products in Mississippi, including credit-life insurance.¹⁶² CitiFinancial employed three agents who were licensed to sell insurance.¹⁶³ They were citizens of Mississippi, and they sold insurance in that state on behalf of their employer and CitiFinancial.¹⁶⁴

Denise Howard and Susie Ross resided in Mississippi.¹⁶⁵ Howard, Ross, and other similarly situated borrowers in Mississippi approached CitiFinancial to secure loans.¹⁶⁶ The lender granted the loans, but required the borrowers to purchase credit-life insurance from Union and American.¹⁶⁷ Finding this and other lending practices offensive, the borrowers filed a lawsuit in a Mississippi state court.¹⁶⁸ In addition to suing the two insurers—American Security and Union Security, the disgruntled borrowers also sued CitiFinancial and CitiFinancial's employees, the three who were licensed insurance agents and residents of Mississippi.¹⁶⁹

The plaintiffs listed a variety of violations and claims in the complaint.¹⁷⁰ According to the borrowers, the insurers and lender engaged in the following impermissible conduct: (1) The insurers sold insurance contracts, which generated premiums that were excessive when compared to market rates; (2) the insurance agents' undisclosed commissions inflated the insurance premiums; (3) the insurers did not offer an alternate and, presumably, less-expensive insurance contract; and (4) the insurers violated Mississippi's law by practicing in insurance packing, padding, flipping, and churning.¹⁷¹ The lenders allegedly increased the total amount of their loans by including the cost of insurance within the loan amounts, and they unnecessarily refinanced the loans, thereby generating even more premiums.¹⁷²

Given the discussion that follows, the following observations are warranted. First, a careful reading of the opinion did not clearly disclose plaintiffs' causes of action, those requiring plaintiffs to prove specific *prima*

161. *Id.*

162. *Id.*

163. *Id.* at 816 n.2 (noting that “[Tracy] Mitchell, [Darla] Farmer and [Valerie] Stevens are or were licensed insurance agents of CitiFinancial.”)

164. *Id.*

165. *Ross v. CitiFinancial, Inc.*, 344 F.3d 458, 460 (5th Cir. Aug. 2003).

166. *Id.*

167. *Howard*, 195 F. Supp. 2d at 816 (“Plaintiffs allege that, ‘[c]ontrary to law, [the lenders] required collateral protection insurance, credit life insurance, credit accident and health insurance, accidental death and dismemberment insurance, involuntary unemployment insurance, property insurance, and/or other insurance in connection with their loans. . . .”).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Ross v. CitiFinancial*, 344 F.3d 458, 461 (5th Cir. Aug. 2003).

facie cases. For example, plaintiffs accused the defendants of breaching implied covenants of good faith and fair dealing.¹⁷³ However, that is not a cause of action; instead, it is an allegation under Mississippi's law.¹⁷⁴ Therefore, to collect damages for a breach of covenant, a plaintiff must file a specific cause of action that sounds either in tort or in contract.¹⁷⁵ The plaintiffs in this case failed to do that.¹⁷⁶

Second, the borrowers sued the defendant for allegedly breaching a fiduciary duty.¹⁷⁷ But again, that is merely an allegation rather than a cause of action under Mississippi's law. Actually, to recover for a breach of a fiduciary duty, a plaintiff must file a specific cause of action that sounds in tort, rather than in contract.¹⁷⁸ The only unquestionable causes of action appearing in the complaint were common-law negligence, fraud, the tort of civil conspiracy, and an unconscionable violation of Mississippi's version of the Uniform Commercial Code.¹⁷⁹

CitiFinancial and the other defendants removed the lawsuit to the United States District Court for the Southern District of Mississippi under 28 U.S.C. § 1441,¹⁸⁰ claiming diversity jurisdiction under 28 U.S.C. § 1332.¹⁸¹ In doing so, the defendants claimed that the plaintiffs fraudulently joined CitiFinancial's insurance agents.¹⁸² The district court denied plaintiffs' remand motions and found that the court had subject matter jurisdiction under section 1332 because the plaintiffs had fraudulently joined the three insurance agents.¹⁸³ In addition, the district court found that Mississippi's general three-year statute of limitations¹⁸⁴ barred most of plaintiffs' causes of action.¹⁸⁵ The

173. *See id.*

174. *See id.* at 461-62.

175. *See* Union Nat'l Life Ins. Co. v. Crosby, 870 So. 2d 1175, 1182 (Miss. 2004) (holding that a breach of a duty of good faith and fair dealing arises from the existence of a contract between parties, but a suit for breaching the covenant sounds either in tort or in contract, or in both).

176. *Ross*, 344 F.3d at 461-67.

177. *Id.* at 461.

178. *See* Tyson v. Moore, 613 So. 2d 817, 823 (Miss.1992) (declaring that a claim of breach of fiduciary duty is "appropriately recognized as an action in tort, not contract").

179. *See* Howard v. CitiFinancial, 195 F. Supp. 2d 811, 816 (S.D. Miss. 2002).

180. Under 28 U.S.C. § 1441(a), "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a) (2000); *see also* Laughlin v. Prudential Ins. Co., 882 F.2d 187, 190 (5th Cir. 1989) (holding that the "removing party bears the burden of establishing federal jurisdiction").

181. 28 U.S.C. § 1332(a) states: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States. . . ." 28 U.S.C. § 1332(a) (2000); *Ross v. CitiFinancial*, 344 F.3d 458, 461 (5th Cir. Aug. 2003).

182. *Howard*, 195 F. Supp. 2d at 817 ("Defendants [argued] that [p]laintiffs . . . fraudulently joined the non-diverse [d]efendants to avoid federal jurisdiction and, therefore, the [court could] properly assert federal subject matter jurisdiction over this case.").

183. *Ross*, 344 F.3d at 461.

184. *Howard*, 195 F. Supp. 2d at 819. *See also* MISS. CODE ANN. § 15-1-49(1) (1990), stating: "(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years

lower court also found that plaintiffs could not prevail against CitiFinancial's insurance agents for the agents' alleged negligent and fraudulent misrepresentations, and they could not recover for the agents' alleged breach of a fiduciary duty.¹⁸⁶ Shortly thereafter, an interlocutory appeal followed.¹⁸⁷

Two procedural and two substantive questions appeared before the Fifth Circuit.¹⁸⁸ The first procedural question was whether the district court applied the correct standard to find that the plaintiffs fraudulently joined non-diverse defendants.¹⁸⁹ The court of appeals addressed this question fairly easily by reviewing settled principles.¹⁹⁰ At the outset, the Fifth Circuit observed that a fraudulent joinder could be established conclusively by (1) proving actual fraud in one's pleading of jurisdictional facts or by (2) proving plaintiff's inability to establish liability against a non-diverse defendant.¹⁹¹

In recent years, the Fifth Circuit has refined the second prong by stressing that a district court (1) must determine whether an arguably reasonable basis exists for concluding that state law would impose liability;¹⁹² (2) may "pierce the pleadings" by using summary judgment-type evidence to establish fraudulent joinder *vel non*;¹⁹³ (3) "must . . . take into account all unchallenged factual allegations, including those alleged in the complaint, in the light most favorable to the plaintiff";¹⁹⁴ and (4) must resolve all ambiguities of state law in favor of the non-moving party.¹⁹⁵ The Fifth Circuit found that the Southern District Court of Mississippi properly considered and applied these rules.¹⁹⁶ In particular, the district court "cited the 'reasonable basis' standard . . . and . . . never looked for a 'mere theoretical possibility of recovery.'"¹⁹⁷ Therefore, from the Fifth Circuit's point of view,

next after the cause of such action accrued, and not after.").

185. *Ross*, 344 F.3d at 461.

186. *Id.*

187. *See id.*

188. *Id.*

189. *Id.*

190. *See id.* at 461-63.

191. *See Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. Mar. 2003) (citing *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999)).

192. *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002) (This means that there must be a *reasonable* possibility of recovery, not merely a *theoretical one.*); *see also Badon v. RJR Nabisco, Inc.*, 236 F.3d 282, 286 n.4 (5th Cir. 2000) (citing the "reasonable basis" standard and rejecting the contention that a theoretical possibility of recovery is enough to support no fraudulent joinder); *Griggs v. State Farm Lloyds*, 181 F.3d 694, 701 (5th Cir. 1999) ("While the burden of demonstrating fraudulent joinder is a heavy one, we have never held that a particular plaintiff might possibly establish liability by the mere hypothetical possibility that such an action could exist.").

193. *See Travis*, 326 F.3d at 648-49 (citing *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir. 1990)).

194. *Id.* at 649.

195. *Id.*

196. *Ross v. CitiFinancial, Inc.*, 344 F.3d 458, 463 (5th Cir. 2003).

197. *Id.*

the district court properly found that the plaintiffs' borrowers fraudulently joined the CitiFinancial insurance agents as defendants.¹⁹⁸

The second procedural question before the court of appeals was whether Mississippi's statute of limitations requires an affirmative act to toll the statute for the various actions cited in the complaint.¹⁹⁹ Plaintiffs maintained that the district court erred by requiring them to prove an affirmative act of concealment.²⁰⁰ And they asserted that, in cases of fraud, no subsequent act of concealment is necessary.²⁰¹ Although the Mississippi Supreme Court has not ruled on this issue in the context of credit-insurance sales, the defendants argued that a subsequent affirmative act of fraudulent concealment is necessary to toll limitations where the underlying claim is for fraud.²⁰²

Mississippi's law is clear: (1) The statute of limitations period begins to run when the claims are discovered; (2) "Claims asserted three years after their accrual may be actionable *if* they were fraudulently concealed and [p]laintiffs could not discover them with reasonable diligence";²⁰³ and (3) To toll the limitations period, a plaintiff must prove that the defendant engaged in "*affirmative acts of concealment.*"²⁰⁴ And, even though the plaintiff tried with due diligence to discover the claim, the plaintiff was unsuccessful.²⁰⁵ After examining the facts in light of these rules, the Fifth Circuit declared that Mississippi's law required the plaintiffs' borrowers to prove an affirmative act of fraudulent concealment.²⁰⁶ More specifically, to toll the statute of limitations the borrowers had to prove that the insurance agents fraudulently concealed activities—which generated the claims—until after the agents consummated the sale of the credit-life insurance sales in order.²⁰⁷ The borrowers failed to establish the necessary proof.²⁰⁸ Therefore, the district court's ruling was proper.²⁰⁹

As mentioned earlier, appellants asked the Fifth Circuit to decide two substantive questions.²¹⁰ The first question was whether insureds might

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

If a person [who is liable] for any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

MISS. CODE ANN. § 15-1-67.

204. *Ross*, 344 F.3d at 463 (emphasis added).

205. *See Robinson v. Cobb*, 763 So. 2d 883, 887 (Miss. 2000).

206. *Ross*, 344 F.3d at 463.

207. *Id.* at 464.

208. *Id.* at 465.

209. *Id.* at 464.

210. *See supra* text accompanying note 188.

reasonably rely on insurance agents' oral representations—which were contrary to the terms in the written contract—to prove a fraudulent or a negligent misrepresentation.²¹¹ “The district court held that, under [Mississippi’s] law, a plaintiff has a duty to read a contract before signing it and cannot reasonably rely on oral misrepresentations regarding its terms.”²¹² Accordingly, the district court declared that the insured-borrowers did not state a valid claim for fraudulent or negligent misrepresentation.²¹³

But the complainants disagreed.²¹⁴ They insisted that Mississippi’s rule—a party must read a contract before signing it—does not apply if insurance agents’ fraudulent or false representations induced innocent applicants to purchase credit-life insurance contracts.²¹⁵ The plaintiffs argued that the Mississippi Supreme Court created two exceptions to the rule that the court will impute knowledge of written terms in a contract to the contract signatories: where there is fraud in factum²¹⁶ and where there is a petition for equitable relief.²¹⁷ Therefore, plaintiffs argued that at least one of those exceptions applied to this case.²¹⁸

Again the Fifth Circuit affirmed the district court’s ruling.²¹⁹ The court of appeals held that neither exception applied to this controversy because plaintiffs’ alleged injury was in effect fraud in the inducement,²²⁰ misrepresentations about the terms of the credit-life insurance contracts.²²¹ Mississippi’s law is clear: “[A party] is under an obligation to read a contract before signing it, and will not as a general rule be heard to complain of an oral misrepresentation the error of which would have been disclosed by reading the contract.”²²²

211. *Ross*, 344 F.3d at 464.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 465 (citing BLACK’S LAW DICTIONARY 661 (6th ed.1990) (defining fraud in factum as “[m]isrepresentation [about] the nature of a writing that a person signs with neither knowledge nor reasonable opportunity to obtain knowledge of its character or essential terms.”) (first alteration in original)).

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* (quoting BLACK’S LAW DICTIONARY 661 (6th ed.1990) in defining fraud in the inducement as “[f]raud connected with [the] underlying transaction and not with the nature of the contract or document signed” (alteration in original)).

221. *Id.* at 464-65.

222. *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co.*, 584 So. 2d 1254, 1257 (Miss. 1991) (alteration in original); *see also Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 726 (Miss. 2002) (holding that in “Mississippi, a person is charged with knowing the contents of any document that he executes”); *Cherry v. Anthony, Gibbs & Sage*, 501 So. 2d 416, 419 (Miss. 1987) (declaring that in the context of an insurance policy, knowledge of contract terms is “imputed to [the contracting party] as a matter of law” (alteration in original)).

The final substantive issue was whether a fiduciary relationship exists between borrowers—who purchase credit-life insurance contracts—and insurance agents, who are the lender’s employees, but who pitch those contracts for third-party insurers.²²³ The insured-borrowers alleged that the insurance agents breached their fiduciary duty to the borrowers by (1) failing to obtain adequate insurance at a reasonable and fair price, (2) failing to act in the best interests of insured borrowers, and (3) failing to disclose to the borrowers that the insurance agents would directly or indirectly receive remuneration for the insurance policies that the agents sold to the borrowers.²²⁴ On the other hand, the agents maintained that the borrowers could not reasonably prevail on a claim for breach of a fiduciary duty because the agents did not owe any fiduciary duty to the plaintiffs as a matter of Mississippi’s law.²²⁵

Quite bluntly, the Fifth Circuit performed a very superficial and arguably a results-oriented analysis to address this final question. In particular, the appellate court cited inferior Mississippi and federal courts’ rulings²²⁶ as well as non-insurance rulings²²⁷ to reach a highly strained conclusion. The appellate court declared that under Mississippi’s law, “‘there is no fiduciary relationship or duty between an insurance company and its insured in a first party insurance contract,’” except for when an insurance agent is procuring insurance for the applicant-insured.²²⁸ Consequently, the Fifth Circuit affirmed the district court’s ruling against the insured borrowers and remanded the case.²²⁹

223. *Ross*, 344 F.3d at 466.

224. *Howard v. CitiFinancial*, 195 F. Supp. 2d 811, 823 (S.D. Miss. 2002).

225. *Id.*

226. *See Langston v. Bigelow*, 820 So. 2d 752, 756 (Miss. Ct. App. 2002) (“[u]nder Mississippi law, there is no fiduciary relationship or duty between an insurance company and its insured in a first party insurance contract” (quoting *Gorman v. S.E. Fidelity Ins. Co.*, 621 F. Supp. 33, 38 (S.D. Miss. 1985))).

227. *See Ross*, 344 F.3d at 466 (citing *Am. Bankers Ins. Co. v. Alexander*, 818 So. 2d 1073 (Miss. 2001) (“fiduciary duty between bank, credit insurance company, and lendee arose where claim of ‘hidden scheme’ between bank and insurance company increasing insurance rates”); *Lowery v. Guar. Bank & Trust Co.*, 592 So. 2d 79 (Miss. 1991) (long history of dealings with bank aside from specific note gave rise to fiduciary duty between bank and lendee (insured)); *Gen. Motors Acceptance Corp. v. Baymon*, 732 So. 2d 262, 270 (Miss. 1999) (“The general rule is that there is no presumption of a fiduciary relationship between a debtor and creditor.” (citation omitted))).

228. *Ross*, 344 F.3d at 466.

Although [p]laintiffs point to affidavits in which some [p]laintiffs state they trusted and relied on [the insurance agents], none of this evidence shows circumstances *justifying* such reliance. Plaintiffs do not claim [that defendants] failed to procure insurance; moreover, they do not claim [that defendants] violated the written terms of the insurance contract or created a hidden scheme to defraud them.

Id. (citing *First United Bank of Poplarville v. Reid*, 612 So. 2d 1131, 1137 (Miss. 1992) (finding a fiduciary duty when a bank employee agreed to buy credit-life insurance for a loan applicant and concluding that the bank had a duty to get insurance because it became an insurance agent)).

229. *Id.* at 467.

Undeniably, a careful reading and analysis of Mississippi's insurance law reveals that the Fifth Circuit incorrectly decided the breach of fiduciary duty claim and the court's conclusion rests on an unintelligible reading of Mississippi's law. Therefore, the appellate court should have reversed the district court's ruling, remanded the case, and instructed the district court to apply and reconsider the facts in light of the following settled principle of law that appears in *Lowery v. Guaranty Bank & Trust Co.*, and in a host of Mississippi Supreme Court's decisions: "[An insurance] agent has a duty to use the degree of diligence and care which a reasonably prudent person would ordinarily exercise in the transaction of his own business, including the obligation of providing the proper information concerning the progress of the business entrusted."²³⁰

E. Marine-Cargo Insurance: Whether a District Court's Exercise of Personal Jurisdiction Over Co-Insurers, Venue Rulings, and Apportionment of Liability Among Co-Insurers Were Proper Under Louisiana's Law

At the outset, it is worth mentioning that this controversy has been before the Fifth Circuit twice—in *Adams v. Unione Mediterranea Di Sicurta (Adams I)*²³¹ and in *Adams v. Unione Mediterranea Di Sicurta (Adams II)*.²³² And, although the procedural questions in this case are very familiar and fairly easy to understand, the facts are not. They are more elaborate and less familiar, in

230. *Lowery v. Guar. Bank & Trust Co.*, 592 So. 2d 79, 83 (Miss. 1991); see *Sec. Ins. Agency, Inc. v. Cox*, 299 So. 2d 192, 194 (Miss. 1974); *Citizens' Bank v. Frazier*, 127 So. 716, 717-18 (Miss. 1930). *Frazier* . . . borrowed an additional sum of \$3,000 and secured it with a deed of trust on 41 additional bales of cotton, but insurance was not secured by the bank on the cotton. Upon granting the second loan the bank immediately requested its bookkeeper, who was a subagent for an insurance agency in Starkville, Mississippi to procure insurance for the additional loan. The subagent attempted to get into communication with the insurance agency by telephone but was unsuccessful . . . It is our view under the holding of *Citizens' Bank [v. Frazier]*, Security was agent for plaintiffs for the purpose of procuring insurance on the rental home. When the plaintiffs entrusted their insurance business to Security for the purpose of securing insurance on the rental house in addition to that in force on the home place and relied on Security to give them renewal notices, Security owed plaintiffs the duty to use that degree of diligence and care with reference thereto which a reasonably prudent man would exercise in the transaction of his own business.

Cox, 299 So. 2d at 194 (emphasis added).

[T]he only reasonable and just view that can be taken of this transaction is that the contract made between the parties, and its effect, was one by which the bank agreed to act for appellee in procuring the insurance, and to use that degree of diligence and care therein about which a reasonably prudent man would ordinarily exercise in the transaction of his own business of a like nature, and this includes, of course, the obligation, if the facts of the case raise such an obligation, of furnishing to the principal the proper and pertinent information concerning the progress of the business thus intrusted.

Citizens' Bank, 127 So. at 717-18.

231. *Adams v. Unione Mediterranea Di Sicurta (Adams I)*, 220 F.3d 659 (5th Cir. 2000).

232. *Adams v. Unione Mediterranea Di Sicurta (Adams II)*, 364 F.3d 646 (5th Cir. Apr. 2004).

part, because the controversy involves multiple foreign insurers as well as insureds residing in or doing business in Great Britain, Italy, Switzerland, and the United States, or both.²³³ Consequently, a more detailed outline of the facts appears below before discussing the Fifth Circuit's rather straightforward findings and conclusions.²³⁴

Steven Henry Adams is a London-based underwriter as well as a representative for other underwriters at Lloyd's of London (Underwriters).²³⁵ Unione Mediterranea Di Sicurta (UMS) is an Italian insurer that insures cargo on ships and other seaworthy vessels.²³⁶ Duferco SA (Duferco) is a Swiss company whose principle place of business is located in Lugano, Switzerland.²³⁷ Duferco manufactures and ships steel and steel products worldwide.²³⁸ Duferco agreed to ship 158 steel slabs to A.K. Steel Corporation of Middletown, Ohio.²³⁹ Canal Barge Company, Ltd. contracted to transport the steel.²⁴⁰

During the shipment, the Underwriters and UMS concurrently insured the steel cargo under separate marine-cargo insurance contracts.²⁴¹ The Underwriters insured the steel under an open cargo/shippers' interest insurance policy, which identified Canal Barge Company and Duferco as the named insureds.²⁴² UMS insured Duferco under a separate open-cargo policy,²⁴³ however, UMS also insured A.K. Steel under that policy.²⁴⁴ The policy limits outlined in Underwriters and UMS's insurance contracts were \$5

233. *Id.*

234. *See infra* notes 235-57 and accompanying text.

235. Much has been written about Lloyd's of London, its history and operations as well as about the various syndicates and names at Lloyd's that underwrite insurance risks around the world. To learn more, consider reading the following sources: Willy E. Rice, "Commercial Terrorism" *From the Transatlantic Slave Trade to the World Trade Center Disaster: Are Insurance Companies & Judges "Aiders and Abettors" of Terror?—A Critical Analysis of American and British Courts' Declaratory and Equitable Actions, 1654-2002*, 6 SCHOLAR 1, 49-52, 69-72 (2003) (reviewing the evolution of Lloyd's of London and its celebrated—although infamous—names, and chronicling their and other insurers participation in the terrors of the transatlantic slave trade); and, *Corfield v. Dallas Glen Hill L.P.*, 355 F.3d 853, 857-59 (5th Cir. 2003) (presenting a thorough review of the operations at Lloyd's of London).

236. *Adams I*, 220 F.3d at 664.

237. *Id.*

238. ORACLE, STEEL MAKER DUFERCO AUTOMATES GLOBAL FINANCES AND GAINS STRATEGIC VISIBILITY, <http://www.oracle.com/customers/profiles/PROFILE9190.HTML> (last visited Feb. 26, 2005) [hereinafter ORACLE]; *see* DUFERCO, at <http://www.duferco.com> (last visited Feb. 26, 2005) [hereinafter DUFERCO].

239. ORACLE, *supra* note 238.

240. *Id.*

241. *Id.*

242. *Adams I*, 220 F.3d at 664.

243. *Id.*

244. *Adams II*, 364 F.3d 646, 656 (5th Cir. Apr. 2004) (noting that "A.K. Steel was an additional insured under the UMS [policy]").

million and \$20 million per shipment, respectively.²⁴⁵ The value of the steel-slabs cargo was \$7,580,000.²⁴⁶

In October 1993, two of Canal Barge Company's barges—carrying the 158 slabs of steel—broke away from a flotilla of barges that carried a total of 1,290 slabs.²⁴⁷ The two barges sank in the Mississippi River while en route from New Orleans to Cincinnati.²⁴⁸ The loss occurred during the final leg of a long journey that originated in Italy.²⁴⁹ Duferco and the Underwriters ultimately agreed that \$986,352.41 was the value of the lost steel.²⁵⁰ Both UMS and Duferco tried to salvage the sunken cargo; those efforts were unsuccessful.²⁵¹ Shortly thereafter, Duferco filed a claim with UMS to cover the loss.²⁵² UMS denied Duferco's claim.²⁵³ Duferco then submitted a claim to the Underwriters in London and abandoned the sunken cargo altogether.²⁵⁴ At the same time, American Eagle Marine, Inc.—a professional salvage company—attempted to salvage the lost cargo, believing that all who had an interest in or a claim to the sunken slabs had abandoned the cargo in its entirety.²⁵⁵ American Eagle successfully salvaged eighty percent of the lost cargo—127 slabs—and sold them to A.K. Steel, the original buyer for \$525,424.32.²⁵⁶ American Eagle “made a net profit of \$190,975.68.”²⁵⁷

In *Adams I*, the Underwriters in London filed a lawsuit in the District Court for the Eastern District of Louisiana.²⁵⁸ They sued UMS—who denied Duferco's claim—for contribution; and they filed an action against American Eagle and A.K. Steel—the salvor and purchaser of the salvaged steel,

245. *Id.* at 649.

246. *Id.*

247. *Id.* at 648.

248. *Id.*

249. *Id.*

250. *Id.* at 649.

251. *Id.*

252. *Adams I*, 220 F. 3d 659, 664 (5th Cir. 2000).

253. *Id.* (“UMS denied the claim primarily because Duferco failed to warrant proper loading of the cargo. In the meantime, A.K. Steel (the original intended purchaser) confirmed that it did not own the cargo and assigned any and all of its rights to Duferco.”)

254. *Id.* “After the accident, Duferco made a claim with UMS. Duferco, through its agent, the Italian Claims Agency (“ICA”), awarded a salvage contract to American Eagle to raise the cargo.” *Id.* “In the letter, an ICA representative wrote [to American Eagle] that the cargo ‘had been abandoned.’” *Id.* (citation omitted)

255. *Id.* at 665.

256. *Id.*

American Eagle did not negotiate with potential buyers for the steel before commencing the salvage operation American Eagle first contacted A.K. Steel [and] Steel offered to purchase what it described as the “Duferco Steel, that had sunk in the Mississippi.” American Eagle was unaware that A.K. Steel was the original intended purchaser of the steel.
Id. (citation omitted). “In negotiations, American Eagle refused to warrant title to the steel as insisted by A.K. Steel.” *Id.* “American Eagle successfully salvaged 127 steel slabs, relinquishing them to A.K. Steel as they were placed aboard barges in the river.” *Id.*

257. *Adams II*, 364 F.3d 646, 649 (5th Cir. Apr. 2004).

258. *Id.*

respectively — for conversion.²⁵⁹ The district court declared that Underwriters could not recover any potential share of the losses in an action against UMS for contribution without first fully compensating Duferco for the loss.²⁶⁰ Therefore, the London underwriters paid Duferco \$986,352.41 for the loss and, through an assignment, obtained Duferco's rights against UMS and other possible tortfeasors.²⁶¹ Amazingly, after adamantly refusing to reimburse Duferco for the lost cargo, UMS sued A.K. Steel and American Eagle for its alleged share of the salvaged steel's market value.²⁶² But UMS also filed two pretrial motions, asserting that the United States District Court for the Eastern District of Louisiana should dismiss the case because (1) that court did not have personal jurisdiction over UMS and (2) the forum was improper.²⁶³ The district court denied UMS's motions.²⁶⁴ Instead, the district court granted Underwriters' motion for partial summary judgment and apportioned Duferco's loss between the two insurers, Underwriters and UMS.²⁶⁵

Later, the district court conducted a bench trial, in which it found that UMS had a contractual duty to reimburse Duferco for the lost steel.²⁶⁶ And because the London underwriters had paid Duferco and the latter had assigned all its rights to the former, UMS had to reimburse the Underwriters according to the pro-rata share—and up to the policy limits—identified in their respective marine-cargo insurance contracts.²⁶⁷ The court then awarded the Underwriters 80% of the approximately \$900,000 that they had paid to Duferco.²⁶⁸ The district court also found that American Eagle and A.K. Steel had converted the salvaged steel.²⁶⁹ Therefore, the court awarded the Underwriters 20% and UMS 80% of the \$190,975.68—the market value of the salvaged steel that A.K. Steel and American Eagle realized after paying salvaging expenses.²⁷⁰

In *Adams I*, UMS appealed the district court's adverse personal-jurisdiction, venue, and apportionment-of-liability rulings to the Court of

259. *Adams I*, 220 F.3d at 664.

Plaintiffs later discovered a successful salvage of 127 of the sunken steel slabs by American Eagle and A.K. Steel. Adams demanded that American Eagle and AK Steel return the cargo or pay its value. When the two companies refused to do either Plaintiffs amended their petition to assert a claim against A.K. Steel and American Eagle for the value of the converted steel.

Adams II, 364 F.3d at 649.

260. *Adams I*, 220 F.3d at 664.

261. *Adams II*, 364 F.3d at 649.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 649-50.

Appeals for the Fifth Circuit.²⁷¹ The Fifth Circuit addressed those issues and remanded for further proceedings only on those issues.²⁷² When remanded, the district court found adequate contacts existed with Louisiana to justify the exercise of jurisdiction and again entered a judgment.²⁷³ UMS appealed again.²⁷⁴

Again in *Adams II*, UMS challenged the district court's personal jurisdiction, venue, and apportionment-of-liability conclusions.²⁷⁵ In addition, Underwriters challenged the district court's order that gave UMS a pro-rata portion of the award against A.K. Steel and the court's refusal to award attorney's fees.²⁷⁶ And A.K. Steel appealed the district court's award to UMS, arguing that UMS had no contractual right to sue A.K. Steel—its additional insured under the marine—under a subrogation doctrine.²⁷⁷

As mentioned at the outset, this case does not introduce any novel or unfamiliar questions of law. The Fifth Circuit's holdings comported very closely to settled principles of law. To illustrate, in *Adams I*, the district court found both specific and personal jurisdiction to hear this controversy.²⁷⁸ That court also suggested that Federal Rule of Civil Procedure 4(k)(2)²⁷⁹ might confer the court's jurisdiction over the Italian insurer, UMS.²⁸⁰ Put simply, under Rule 4(k)(2) a federal district court may exercise jurisdiction over a person, if (1) that person does not concede to jurisdiction in another state,²⁸¹

271. *Id.* at 650 (To be sure, other parties appealed on other grounds. Underwriters cross appealed arguing that UMS was not entitled to an award from A.K. Steel, because UMS refused to pay anything to cover Duferco's losses and UMS refused to reimburse Underwriters a portion of the litigation costs for suing A.K. Steel and American Eagle. A.K. Steel appealed the district court's judgment against it. But, the Fifth Circuit only addressed the personal-jurisdiction, venue, and apportionment-of-liability questions in *Adams I*).

272. *Adams I*, 220 F.3d at 664.

Regarding the dispute between the insurers, we conclude that UMS did not waive its personal jurisdiction defense, and we reverse and remand for the district court to determine jurisdiction.

We do not decide the other issues UMS and the [Underwriters] raise on appeal against each other. As to the conversion dispute, we affirm on all grounds except one.

Id.

273. *Adams II*, 364 F.3d at 650.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *See Adams v. Unione Mediterranea Di Sicurta*, 234 F. Supp. 2d 612, 620-25 (E.D. La. 2002).

279. FED. R. CIV. P. 4(k)(2) states:

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

Id.

280. *Adams*, 234 F. Supp. 2d at 625-26.

281. *See, e.g., ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001) ("If . . . the defendant contends that he cannot be sued in the forum state and refuses to identify any other where suit is possible, then the federal court is entitled to use Rule 4(k)(2).").

and (2) that party has sufficient ties to the United States, as a whole, to satisfy constitutional-due-process concerns.²⁸²

The Fifth Circuit held that the district court indeed had proper jurisdiction over UMS, because the Italian insurer did not identify other venues in the United States where personal jurisdiction would attach.²⁸³ The appellate court also found that UMS had insured and paid numerous claims to companies in the United States.²⁸⁴ Furthermore, the Italian insurer had underwritten hundreds of shipments to the United States.²⁸⁵ Additionally, "UMS used and paid a number of individuals in the United States as claims adjusters, surveyors, investigators and other representatives to enable it to conduct business in this country."²⁸⁶

Therefore, in light of those findings, the Fifth Circuit declared:

Given the volume of activity, we have no difficulty concluding that UMS has continuous and systematic contacts with the United States as a whole. It was foreseeable that suit in U.S. courts would result from these business contacts. [UMS] was well aware of the shipments to the United States and in fact enabled the prosecution of claims in the United States by providing claims agents and surveyors here. Thus, subjecting UMS to [a] suit here does not offend notions of fair play and substantial justice.²⁸⁷

UMS also asked the Fifth Circuit to determine whether the District Court for the Eastern District of Louisiana was the proper venue to decide the controversy.²⁸⁸ The district court ruled that venue was proper and denied UMS's motion to dismiss.²⁸⁹ On the other hand, the Italian insurer argued "that the district court should have enforced the forum-selection clause contained in the insurance contract between UMS and Duferco."²⁹⁰ To be sure, under that clause,²⁹¹ the proper forum would have been a court of competent jurisdiction in Italy.

The Fifth Circuit supported the district court's ruling because the lower court found that the Underwriters' suit against UMS "was a contribution

282. See, e.g., *World Tanker Carriers Corp. v. MV Ya Mawlaya*, 99 F.3d 717, 723 (5th Cir. 1996).

283. *Adams II*, 364 F.3d 646, 651 (5th Cir. Apr. 2004).

284. *Id.*

285. *Id.* ("Specifically records produced by UMS and Duferco show that UMS insured approximately 260 shipments to the United States between 1989 and 1995 for Duferco alone; 138 of these Duferco shipments to the United States made between 1991 and 1994 were valued at over \$130 million.")

286. *Id.* at 651 n.4 ("These facts have not been contested by UMS.")

287. *Id.* at 651-52 (citations omitted).

288. *Id.* at 652.

289. *Id.*

290. *Id.*

291. *Id.* That clause reads: "*Competent Court*—Article 16. The competent Court, at the choice of the Plaintiff party, is exclusively that of the Legal Authority of the place at which the Insurer or the Agency to which the Policy has been allocated or at which the contract has been concluded, has its management."

action and not a subrogation action.”²⁹² As such, the London underwriters did not stand in Duferco’s shoes, and they could not be bound by the forum selection clause in an agreement to which the Underwriters were not a party.²⁹³ UMS still insisted, “under American, English, or Italian law an insurer who sues a co-insurer for contribution is bound by provisions in the co-insurer’s insurance policy.”²⁹⁴ In the end, the Fifth Circuit dismissed the Italian insurer’s argument and held that “[t]he district court correctly refused to enforce UMS’s forum selection clause.”²⁹⁵

The final question involved a substantive matter—whether the district court correctly apportioned the liability among the various parties.²⁹⁶ There were three disputes, which the Fifth Circuit quickly addressed.²⁹⁷ And given that the apportionment disputes were essentially a collection of mini actions in equity rather than in law, the court of appeals decided each without creating new law or citing many settled principles.²⁹⁸ First, UMS challenged “the district court’s summary judgment apportioning payment of the loss between” the London underwriters and UMS according to their respective policy limits.²⁹⁹ The district court’s order apportioned Duferco’s loss on a 4:1 ratio based on UMS’s policy limit of \$20 million and the Underwriters’ \$5 million limit.³⁰⁰ But UMS argued “that the loss should have been apportioned based upon the value of the insured lost cargo,” and each insurer should have shared the loss equally.³⁰¹ After all, the value of the lost cargo was the same, and the loss fell within each insurer’s policy limit.³⁰²

292. *Id.*

If [the Underwriters’] suit was based on [their] subrogation rights, [the Underwriters] would be bound by the forum selection clause. [The Underwriters] seek contribution from UMS as a co-insurer. The subrogation agreement obtained from Duferco does not transform the nature of their claims against UMS into subrogation claims; rather the subrogation agreement folds into the contribution claim.

Id.

293. *See id.* (concluding that under settled law the London underwriters were not parties to the UMS-Duferco contract, therefore they were not bound by the forum selection clause in the UMS policy) (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (“It goes without saying that a contract cannot bind a nonparty.”); *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 460 (6th Cir. 1999) (“Under the general principles of contract law, it is axiomatic that courts cannot bind a non-party to a contract, because that party never agreed to the terms set forth therein.”)).

294. *Id.* The court noted that “UMS cites cases where courts have dismissed contribution actions where the defendant co-insurer had no coverage, or where plaintiffs did not comply with notice requirements in the policy. . . . UMS further quotes an English marine insurance treatise to support its arguments. . . . UMS reliance on [those] authorities is misplaced.” *Id.* at 652-53.

295. *Id.* at 653.

296. *See id.* at 654.

297. *See id.* at 654-56.

298. *See id.*

299. *Id.* at 654.

300. *Id.*

301. *Id.*

302. *Id.*

The Fifth Circuit disagreed, finding that the district court's decision to apportion the loss was based upon the lower court's interpretation of the Duferco-UMS's contract³⁰³ and Italian Code,³⁰⁴ rather than on American substantive law.³⁰⁵

Second, the Underwriters challenged the district court's decision to split the \$190,975.68 tort award against A.K. Steel on a pro-rata basis between the two insurers—the Underwriters receiving 20% and UMS receiving 80%.³⁰⁶ The London underwriters argued that the Italian insurer should not receive any money from A.K. Steel.³⁰⁷ As reported earlier, UMS reimbursed the Underwriters for paying UMS's share to cover Duferco's expenses after losing the steel slabs.³⁰⁸ The district court disagreed.³⁰⁹ Certainly, UMS did not make payments to help compensate Duferco for the lost steel,³¹⁰ but the lower court found that the Italian insurer was a subrogee under the UMS-Duferco insurance contract.³¹¹ Therefore, from the district court's perspective, UMS could assert a subrogation claim against A.K. Steel.³¹² Of the \$190,975.68, the district court awarded approximately \$151,000 to UMS.³¹³ The London underwriters appealed.³¹⁴

On review, the Fifth Circuit vacated the district court's award in favor of the Italian insurer.³¹⁵ Put simply, after examining the doctrine of equitable subrogation,³¹⁶ the court of appeals found that UMS was not a subrogee;³¹⁷ therefore, the district court should have awarded the entire \$190,975.68 to the

303. The "other insurance" clause in the Duferco-UMS insurance contract dictated the mode of apportionment and stated: "Article 9. When for one and the same risk, several insurances with several insurers have been taken out separately—even by various contracting parties—Article 1910 of the Civil Code [of Italy] will apply." *Id.*

304. "Article 1910 of the Italian Civil Code provides: '*Insurance with more than one insurer. . . . An insurer who has made payment has a right to recourse against the other insurers for a proportional contribution based on the indemnities owed in accordance with their respective contracts. If one of the insurers is insolvent, his share shall be divided among the others.*'" *Id.*

305. *Id.* at 655.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *See id.* at 647.

315. *Id.* at 655.

316. *Id.* The court stated that "under the doctrine of equitable subrogation . . . where an insured is entitled to receive recovery for the loss from . . . the insurer and the tortfeasor, it is only after the insured has been fully compensated for all of the loss that the insurer acquires the right to subrogation." *Id.* (quoting 16 LEE R. RUSS, COUCH ON INSURANCE § 223:134, at 147-48 (3d ed. 2000)). The court further stated: "an insurer [will not] be subrogated to the rights of the insured unless it had paid the loss in full." *Id.* at 654 (quoting 6A JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE, § 4121, at 395 (1972)).

317. *Id.* at 655.

Underwriters.³¹⁸ The Fifth Circuit then remanded the case and ordered the district court to give UMS an opportunity to satisfy the Underwriters' judgment against UMS.³¹⁹ If UMS paid its fair share of Duferco's loss, it would be entitled to an equitable credit for its share of the tort recovery from A.K. Steel.³²⁰ Finally, A.K. Steel of Ohio argued that the Italian insurer should not recover A.K. Steel's allegedly fair share of the profits from the salvaged steel.³²¹ From A.K. Steel's viewpoint, it was also insured under the Duferco-UMS marine-cargo insurance contract; therefore, it should have received the approximately \$191,000—UMS's alleged share of the profit from the salvaged steel.³²² The Fifth Circuit disagreed.³²³

The court of appeals accepted A.K. Steel's argument: An insurer generally cannot subrogate against its insureds.³²⁴ The Fifth Circuit ruled: Courts do not bar all insurer-initiated suits against an insured.³²⁵ The Italian underwriter sued A.K. Steel for conversion—for exercising illegal control over, and profiting from, the salvaged steel.³²⁶ UMS demanded that A.K. Steel reimburse the company.³²⁷ But to repeat, UMS did not pay anything to make Duferco whole.³²⁸

To resolve the dispute, the Fifth Circuit held that A.K. Steel ultimately had suffered no loss in the entire ordeal.³²⁹ In fact, A.K. Steel became unjustly enriched from its salvaging activities.³³⁰ Therefore, the appellate court declared UMS could receive reimbursements from A.K. Steel even though the company was an insured under UMS's policy.³³¹

318. *Id.*

319. *See id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 656 (reaffirming that "an insurer may not sue its own insured to recover under the insurance policy" and that the doctrine of equitable subrogation will not allow an insurer to recover against its insured or from an additional assured any part of the insurer's payment for a risk covered under a property insurance contract) (citing *Peavey Co. v. M/V ANPA*, 971 F.2d 1168, 1177 (5th Cir. 1992)).

325. *Id.*

An insurer may recover damages from an insured for losses outside the policy. In particular an insurer may bring a reimbursement action against its insured for recovered property or an insurers overpayment for losses, even where a subrogation action is forbidden. . . . "An insurer may recover payments it has made for lost property if the property is subsequently found."

Id. (quoting 6 LEE R. RUSS, *COUCH ON INSURANCE*, § 226:4, at 15-16 (3d ed. 2000)).

326. *See id.*

327. *Id.*

328. *Id.* at 649.

329. *Id.* at 656.

330. *Id.*

331. *Id.*

*F. Property Insurance: Whether Under Federal Law
"Complete Diversity" of Citizenship Requires a Court to
Consider the Citizenship of Every Underwriter Subscribing to a
Lloyd's of London Insurance Contract When the Lead Underwriter
Only Sues on Its Own Behalf*

Although *Corfield v. Dallas Glen Hills LP* is a case of first impression for the Fifth Circuit, the procedural question in the case is quite familiar and uncomplicated.³³² On the other hand, the underlying facts are fairly intricate because they involve a breach-of-contract controversy between a limited partnership and certain underwriters at Lloyd's of London.³³³ The original complaint listed several parties doing business at Lloyd's of London as defendants.³³⁴ Therefore, before discussing the Fifth Circuit's decision, the author outlines the structure and operations at Lloyd's of London and discuss who is liable when a party sells and breaches a Lloyd's property insurance contract.

At the outset, it is important to establish that Lloyd's of London, the Corporation of Lloyd's, and the Society of Lloyd's are labels for the same entity.³³⁵ Lloyd's is more than three hundred years old.³³⁶ Contrary to popular belief, Lloyd's of London is not an insurance company.³³⁷ It neither underwrites various risks nor sells contracts of insurance.³³⁸ Instead, Lloyd's provides office space and administrative assistance for its members.³³⁹ Lloyd's also provides a market for its members to insure or underwrite certain percentages of risks and to sell or assign those percentages to other members.³⁴⁰

332. *Corfield v. Dallas Glen Hills LP*, 355 F.3d 853 (5th Cir. Dec. 2003).

333. *See id.* at 855-56.

334. *Id.* at 855.

335. *See, e.g., Society of Lloyd's v. Turner*, 303 F.3d 325, 326-27 (5th Cir. 2002).

Through a succession of Parliamentary Acts (the Lloyd's Acts 1871-1982), the United Kingdom Parliament has authorized Lloyd's to regulate an English insurance market located in London, England The Corporation of Lloyd's, which is also known as the Society of Lloyd's, provides the building and personnel necessary to the market's administrative operations. The Corporation is run by the Council of Lloyd's, which promulgates "Byelaws," regulates the market, and generally controls Lloyd's administrative functions.

Id.

336. *See Haynsworth v. The Corporation*, 121 F.3d 956, 958 (5th Cir. 1997) (reporting that "Lloyd's is a 300-year-old market in which individual and corporate underwriters known as 'Names' underwrite insurance").

337. *See Smith v. Lloyd's of London*, 568 F.2d 1115, 1117 n.3 (5th Cir. 1978) (citing ANTONY BROWN, LLOYD'S OF LONDON (1974); John M. Sylvester & Roberta D. Anderson, *Is It Still Possible To Litigate Against Lloyd's in Federal Court?*, 34 TORT & INS. L.J. 1065, 1068 (1999)).

338. *See Lowsley-Williams v. North River Ins. Co.*, 884 F. Supp. 166, 167 (D.N.J. 1995) (Stipulations, ¶¶ 3-4).

339. *Lowsley-Williams*, 884 F. Supp. at 167 (Stipulation, ¶ 1); *Society of Lloyd's*, 303 F.3d at 326-27.

340. *See Certain Interested Underwriters at Lloyd's, London v. Layne*, 26 F.3d 39, 41 (6th Cir.

At Lloyd's, there are two general classes of members—"names" and "syndicates."³⁴¹ Names are individuals and corporations who finance the insurance market and ultimately insure risks.³⁴² Also, names are investors and underwriters.³⁴³ They invest in or underwrite a percentage of the risk under an insurance contract, hoping to realize a wholesome return on their investments.³⁴⁴ Most names do not actively participate in the insurance market on a daily basis.³⁴⁵ Instead, groups of names called syndicates³⁴⁶ are responsible for forming insurance contracts³⁴⁷ and underwriting various risks at Lloyd's.³⁴⁸

The syndicates insure all types of tangible and intangible interests worldwide.³⁴⁹ They also sell reinsurance contracts—Treaty of Reinsurance³⁵⁰

1994) (citing Clifford Chance, *Doing Business in the United Kingdom*, §§ 46.02, 46-6 to 46-8 (Barbara Ford et al. eds., 1990); Eileen M. Dacey, *The Structures of the Lloyd's Market, in Lloyd's, the ILU, and the London Insurance Market 1990*, at 33, 49-50 (PLI Commercial Law & Practice Course Handbook Series No. 555, 1990)).

341. See *infra* text accompanying notes 342-56.

342. See *Lowsley-Williams*, 884 F. Supp. at 167-68 ("Persons desiring to be [n]ames must pay an entrance fee, keep certain deposits at Lloyd's, and meet several specific requirements, including the possession of a certain degree of wealth, in order to become [n]ames.") (Stipulations, ¶¶ 10 & 66); *Sylvester & Anderson*, *supra* note 337.

343. *Lowsley-Williams*, 884 F. Supp. at 167 (Stipulations, ¶¶ 7-8).

344. See *id.* at 168.

The maximum amount that each [n]ame may underwrite is determined in relation to the [n]ame's wealth, in addition to other factors. Since [n]ames assume unlimited liability, [n]ames are liable to the full extent of their personal wealth for any risks undertaken. For any given contract, each [n]ame is liable only for the percentage of the risk which that [n]ame has agreed to underwrite and for no other portion of the risk assumed by any other [n]ame.

Id. (Stipulations, ¶¶ 11-13). See also Willy E. Rice, "Commercial Terrorism" *From the Transatlantic Slave Trade to the World Trade Center Disaster: Are Insurance Companies & Judges "Aiders and Abettors" of Terror?—A Critical Analysis of American and British Courts' Declaratory and Equitable Actions, 1654-2002*, 6 SCHOLAR 1, 49-52 (2003) (outlining the historical structure and operations at Lloyd's).

345. See *Layne*, 26 F.3d at 42.

346. *Lowsley-Williams*, 884 F. Supp. at 168. "In order to increase the efficiency of underwriting risks and to combine the resources of numerous underwriters, names form groups called syndicates." *Id.* (Stipulation, ¶ 16).

347. See *Chem. Leaman Tank Lines v. Aetna Cas. & Sur. Co.*, 177 F.3d 210, 221 (3d Cir. 1999) (reporting that during a given operating year, a group of names will form a syndicate which will in turn subscribe to policies on behalf of all names in the syndicate).

348. *Layne*, 26 F.3d at 41-42.

349. See generally *Chem. Leaman Tank Liner*, 177 F.3d at 214-15 (insuring against contamination of ground water for cleanup costs in New Jersey); *Layne*, 26 F.3d at 41 (insuring a tavern against fire loss in Tennessee); *Lowsley-Williams*, 884 F. Supp. at 167 (insuring rights and duties under reinsurance contracts in New Jersey).

350. *N. River Ins. Co. v. Philadelphia Reinsurance Corp.*, 63 F.3d 160, 162 (2d Cir. 1995). The foreign reinsurers are Underwriters and Underwriting Syndicates at Lloyd's of London, and foreign companies subscribing to reinsurance. . . . London reinsurers [reinsure primary insurers] under so-called 'treaty programs.' . . . A reinsurance treaty is an ongoing contractual relationship between two insurance companies in which the primary insurer agrees in advance to cede, and the reinsurer to accept, specified business that is the subject of the contract. Under a treaty, a reinsurer agrees to indemnify a primary insurer with respect to a portion of the primary insurer's liability in a designated line of business. . . . [T]ypical[ly], the reinsurance

—to other insurers worldwide.³⁵¹ Under a typical contract, multiple syndicates collectively underwrite one hundred percent of the coverage.³⁵² On the other hand, syndicates themselves have no independent legal identity.³⁵³ Consequently, a syndicate bears no liability for the risk under a Lloyd's policy.³⁵⁴ Rather, the individual names comprising the syndicates are jointly and severally liable³⁵⁵ under the contract.³⁵⁶

Against that background, consider the facts in *Corfield*.³⁵⁷ Dallas Glen Hills L.P. (DGH) is a limited partnership.³⁵⁸ One partner definitely resided in Texas.³⁵⁹ But there was dispute about whether the other partners resided in Delaware and in New York.³⁶⁰ Liberty Corporate Capital, Ltd. (Liberty) is a

treaty involve[s] the participation of many reinsurers, each accepting a percentage of the total liability under a single treaty.

Id. See also *In re Ins. Antitrust Litig.*, 938 F.2d 919, 923 (9th Cir. 1991). "Reinsurance is arranged by specialized brokers and underwriters. Much reinsurance is done by syndicates doing business through Lloyd's of London." *Id.*

351. See generally *Haynsworth v. The Corporation*, 121 F.3d 956, 958-59 (5th Cir. 1997) (notwithstanding, the jurisdiction where the contract operates to insure each agreement must contain a clause designating English law as the law governing disputes arising under the agreement).

352. *Corfield v. Dallas Glen Hills LP*, 355 F.3d 853, 858 (5th Cir. Dec. 2003); see *Layne*, 26 F.3d at 42 ("These syndicates . . . are comprised of some 30,000 member-investors, sometimes called 'underwriters' or 'names,' who hope to share in any profit the syndicate might make.") (quoting *Daly v. Lime St. Underwriting Agencies Ltd.*, 2 FTLR 277, 279 (Q.B.1987)); *Sylvester & Anderson*, *supra* note 337, at 1068.

353. *Sylvester & Anderson*, *supra* note 337, at 1068; see also *Corfield*, 355 F.3d at 858 ("[A] [s]yndicate is a creature of administrative convenience through which individual investors can subscribe to a Lloyd's policy.").

354. See *Lowsley-Williams*, 884 F. Supp. at 167-68. "[P]olicyholders have no contractual relationship with Lloyd's. . . . [In addition,] there is no contractual relationship among members of a syndicate, between syndicates, or between [a] policyholder and a syndicate. Syndicates do not assume liability or underwrite risks; [n]ames do." *Id.* (Stipulations, ¶¶ 5 & 19-21). See also *Corfield*, 355 F.3d at 858.

Lloyd's requires [n]ames to pay a membership fee, [to] keep certain deposits at Lloyd's, and [to] possess a certain degree of financial wealth. Each [n]ame is exposed to unlimited personal liability for his proportionate share of the loss on a particular policy that the [n]ame . . . subscribed to as an underwriter. Typically hundreds of [n]ames will subscribe to a single policy, and the liability among the [n]ames is several, not joint.

Id. (citing *Chemical Leaman Tank Lines*, 177 F.3d at 221; *Squibb & Sons, Inc. v. Lloyd's & Cos.*, 241 F.3d 154, 161-62 (2d Cir. 2001)).

355. See *Society of Lloyd's v. Turner*, 303 F.3d 325, 327 (5th Cir. 2002). The Council of Lloyd's controls Lloyd's administrative functions. *Id.* The Council also develops regulations or "byelaws" for the syndicates and names. *Id.* One regulation requires names to become members of Lloyd's before they can participate in the insurance market. *Id.* Also, names "must pass a means test to ensure . . . [they can] meet their underwriting obligations." *Id.* But more important, they must appear in person—before a representative of the Council in London—and swear that they accept exposure to "unlimited personal liability" for the privilege to underwrite insurance in the Lloyd's market. *Id.*

356. *Corfield*, 355 F.3d at 859. "[Although] an insured receives a Lloyd's 'policy' of insurance, [the insured] has in fact received . . . numerous contractual commitments from each [n]ame who has agreed to subscribe to the risk. The [n]ames are jointly and severally obligated to the insured for the percentage of the risk each has agreed to assume." *Id.*

357. See discussion *infra* notes 358-66 and accompanying text.

358. *Corfield*, 355 F.3d at 856.

359. *Id.*

360. *Id.* at 856-57. An amended complaint alleged "that all of DGH's partners were . . . citizens of Texas" and a second amended complaint "alleged that all of DGH's partners were either citizens of

member at Lloyd's of London.³⁶¹ In fact, Liberty is a large syndicate of names that insure against perils associated with and causing property losses.³⁶² Liberty insured DGH under a Lloyd's commercial-property insurance contract.³⁶³ The policy limit was \$500,000.³⁶⁴ Liberty insured 32.79% of the risk; therefore, Liberty had complete authority to accept or deny claims as well as the power to prosecute or defend lawsuits.³⁶⁵ During the policy period, DGH experienced a loss and filed a property-loss claim with Liberty.³⁶⁶

Liberty Syndicate 190 (Syndicate 190) is a wholly-owned subsidiary of Liberty Corporate Capital, Ltd.³⁶⁷ Acting through Syndicate 190, Liberty instructed an adjuster to inspect DGH's property and submit a report.³⁶⁸ Liberty rejected DGH's claim after evaluating the adjuster's finding.³⁶⁹ Liberty determined that the policy did not cover the property loss.³⁷⁰ Thomas Corfield (Corfield) is a British subject and an "active" underwriter for Syndicate 190.³⁷¹ Corfield underwrites insurance himself; he also represents certain other underwriters at Lloyd's, those insuring DGH under the property insurance contract.³⁷² Like many insurers who anticipate an insured's lawsuit after rejecting a claim, Corfield filed a declaratory-judgment action—under the Federal Declaratory Judgment Act³⁷³—in the United States District Court for the Northern District of Texas.³⁷⁴ Corfield commenced the action on his behalf and on behalf of other underwriters who assumed portions of the risk under DGH's policy.³⁷⁵

In the complaint, Corfield asked the district court to declare whether Liberty had a duty to pay for DGH's property losses.³⁷⁶ To be sure, if the court had found no coverage and, therefore, declared that Liberty had no contractual duty to pay, Liberty would have effectively shielded itself from a bad-faith or a breach-of-contract lawsuit or both.³⁷⁷ Corfield alleged that

361. *Id.* at 856.

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.* at 855 n.1.

366. *Id.* at 855.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. The Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a) reads in pertinent part:

In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a) (2000).

374. *Corfield*, 355 F.3d at 853.

375. *Id.* at 856.

376. *Id.*

377. *See id.* at 853.

jurisdiction was based upon diversity of citizenship.³⁷⁸ However, Corfield's complaint failed to identify DGH's citizenship, only stating that DGH was a Texas limited partnership.³⁷⁹ Moreover, the district court questioned whether Corfield properly pleaded his own citizenship, given that he brought an action both on his own behalf and as the representative of the other underwriters.³⁸⁰ Repeatedly, the district court ordered Corfield to identify the DGH partnership's citizenship and each of the partner's citizenship.³⁸¹

In response to the district court's order, Liberty replaced Corfield as the named plaintiff and filed a final complaint for declaratory relief in which Liberty alleged that it was suing *only on its own behalf as the lead underwriter on the policy*.³⁸² Liberty dropped the allegations that it was suing as a representative on behalf of the other underwriters.³⁸³ Liberty also alleged that all of DGH's partners were citizens of Texas, Delaware, or New York.³⁸⁴

Nevertheless, to find diversity the district court decided to determine the citizenship of each underwriter who subscribed to the policy to achieve complete diversity.³⁸⁵ Furthermore, entertaining DGH's argument that at least one of the Lloyd's underwriters was a citizen of Texas, the district court decided that the parties were not completely diverse.³⁸⁶ DGH cited Federal Rule of Civil Procedure 12(b)(1)³⁸⁷ and moved to dismiss the case for lack of

378. *Id.* at 855. 28 U.S.C. § 1332(a)(2), (3) (2000) provides in pertinent part:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum [of] or value of \$75,000, exclusive of interest or costs, and is between— . . . (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties. . . .

28 U.S.C. § 1332(a)(2), (3) (2000).

379. *Corfield*, 355 F.3d at 856.

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.* at 856-57.

385. *Id.* at 857. The federal diversity statute, 28 U.S.C. § 1332(a)(2), provides in relevant part: "The district courts shall have original jurisdiction over all civil actions where the matter in controversy exceeds . . . \$75,000 . . . and is between citizens of a State and citizens or subjects of a foreign state[.]" See also *Whalen v. Carter*, 954 F.2d 1087, 1094 (5th Cir. 1992) (concluding that the diversity statute requires "complete diversity" of citizenship and that a district court cannot exercise diversity jurisdiction if one of the plaintiffs shares the same state citizenship as any one of the defendants) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806); *Mas v. Perry*, 489 F.2d 1396, 1398-99 (5th Cir. 1974)).

386. *Corfield*, 355 F.3d at 856.

DGH argued that for diversity purposes the district court must consider the citizenship of every underwriter subscribing to a Lloyd's policy when determining if complete diversity is satisfied.

DGH also asserted that at least one underwriter on the Policy was a citizen of Texas as was at least one of DGH's partners. Thus, DGH argued that complete diversity was lacking.

Id.

387. FED. R. CIV. P. 12(b)(1) reads in pertinent part: "Every defense . . . to a claim for relief in any pleading . . . be asserted in the responsive pleading thereto if one is required, except that the following defense . . . may at the option of the pleader be made by motion: lack of jurisdiction over the subject matter[.]" *Id.*

subject matter jurisdiction.³⁸⁸ The district court granted DGH's motion.³⁸⁹ Liberty timely appealed.³⁹⁰

Liberty asked the Fifth Circuit to determine a fairly narrow question: whether complete diversity requires a district court to consider the citizenship of every underwriter who subscribed to a Lloyd's of London policy when the lead underwriter sues only on its own behalf.³⁹¹ As mentioned earlier, this was a question of first impression for the Fifth Circuit.³⁹² But several other federal circuits have addressed the procedural question appearing in *Corfield*, reaching conflicting results. For example, the Second Circuit held that a district court must view all names in a syndicate as dispensable parties when considering diversity of citizenship.³⁹³ The Second Circuit found that all names under a contract are contractually bound and Lloyd's rules require all names to abide by any judgment rendered against the lead underwriter.³⁹⁴

The Seventh Circuit also ruled that lower courts must treat the syndicates at Lloyd's as entities and the citizenship of every subscribing name must be considered when determining a syndicate's citizenship.³⁹⁵ Conversely, the Third Circuit held that the citizenship of the lone underwriter is the only citizenship relevant for diversity purposes.³⁹⁶ Similarly, the Sixth Circuit declared that only the single underwriter's citizenship is relevant when determining whether complete diversity exists.³⁹⁷

After reviewing the decisions outlined above, the Fifth Circuit adopted the Second Circuit's analysis and conclusion to decide the diversity question in *Corfield*.³⁹⁸ Therefore, the Fifth Circuit reversed and remanded, declaring the following:

[T]he district court had subject matter jurisdiction over this claim because DGH is alleged[ly] a citizen of Texas, Delaware, and New York, and Liberty is alleged[ly] a citizen of the United Kingdom. Liberty's 32.79 percent of risk is approximately \$163,950 . . . [,] an amount well in excess of the

388. *Corfield*, 355 F.3d at 856.

389. *Id.* at 857.

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.* at 859-63.

394. *See* E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., No. 82 CIV. 7327JSM, 1999 WL 350857, at *5 (S.D.N.Y.), *aff'd*, 241 F.3d 154 (2d Cir. 2001).

395. *See* Ind. Gas Co. v. Home Ins. Co., 141 F.3d 314, 317 (7th Cir. 1998).

396. *See* Chem. Leaman Tank Liner, Inc. v. Aetna Cas. & Sur. Co., 177 F.3d 210, 223 (3d Cir. 1999).

397. *See* Certain Interested Underwriters at Lloyd's, London v. Layne, 26 F.3d 39, 43 (6th Cir. 1994).

398. *Corfield*, 355 F.3d at 863.

In the current posture of the instant case, Liberty is suing only in its individual capacity as lead underwriter on the Policy. Thus, Liberty's case is presented to us in the exact procedural posture suggested by the Second Circuit in *Squibb I* and ultimately approved by the Second Circuit in *Squibb II*. We find the Second Circuit's approach to be based upon sound reasoning.

Id.

jurisdictional amount. The other subscribing [n]ames are not parties before the [c]ourt and their citizenship need not be considered when determining whether the parties are completely diverse. Thus, the district court erred in dismissing the action for lack of subject matter jurisdiction.³⁹⁹

III. FIRST-PARTY INSURANCE CONTRACTS: STATE STATUTORY CLAIMS & DECISIONS

A. Health Insurance Plans: Whether ERISA Preempts a Louisiana Declaratory Judgment Trial Where an Insured HMO Member Asks a Court to Declare that the Employer's Equitable-Subrogation Claims Are Unfounded

Like the petitioners in *Adams* and *Corfield*, the litigants in *Arana v. Ochsner Health Plan (Arana I)* asked the Fifth Circuit to decide whether a federal district court had subject matter jurisdiction to decide a controversy.⁴⁰⁰ But in *Arana I*, the parties to the suit styled the procedural conflict as one involving a federal-preemption rather than a diversity question.⁴⁰¹ Furthermore, after the court of appeals resolved the procedural debate in *Arana I*, the parties asked the Fifth Circuit to determine a substantive question in *Arana II*.⁴⁰² And once more, in the latter case, the court of appeals had to decide a critically important and timely equitable-subrogation question that arguably has some implications for the entire managed-care industry in this country.⁴⁰³

Consider the brief facts in *Arana I*.⁴⁰⁴ Julio C. Arana's mother worked for LeCler Printing Company.⁴⁰⁵ Ochsner Health Plan, Inc. (OHP) provided health benefits for LeCler's employees under a managed-health and benefits plan.⁴⁰⁶ OHP covered Arana under his mother's health plan.⁴⁰⁷ During the coverage period, Arana was seriously injured when a 1996 Ford Crown Victoria struck the 1995 Nissan Pathfinder that Arana was driving.⁴⁰⁸ Following the accident, OHP paid nearly \$180,000 in health benefits to treat

399. *Id.*

400. *Arana v. Ochsner Health Plan (Arana I)*, 338 F.3d 433, 436 (5th Cir. July 2003).

401. *Id.* at 438.

402. *Arana v. Ochsner Health Plan (Arana II)*, 352 F.3d 973 (5th Cir. Dec. 2003).

403. *Arana I*, 338 F.3d at 437 n.6.

Participating in this case as *amici curiae* are Louisiana Managed Health Care Association, Inc., et al.; Benefit Recovery, Inc.; Elaine L. Chao, Secretary of the United States Department of Labor; and Professors Edward H. Cooper and Dana M. Muir of the University of Michigan Law School. Professors Cooper and Muir filed their brief at the request of the court, and we are grateful for their participation.

Id.

404. *Id.*

405. *Arana II*, 352 F.3d at 975.

406. *Id.*

407. *See id.*

408. *Id.*

Arana's accident-related injuries.⁴⁰⁹ When the accident occurred, several other insurers—State Farm, Allstate, the Fireman's Fund, and United Fire—covered collectively the Crown Victoria, the Pathfinder, and uninsured motorists.⁴¹⁰ Each of those insurers paid substantial benefits to Arana under the terms of their respective policies.⁴¹¹ State Farm and Allstate paid \$150,000.⁴¹² And collectively, Fireman's Fund and United Fire paid \$962,500 to settle Arana's claims against the tortfeasor.⁴¹³

After discovering that Arana received more than one million dollars from the insurers, OHP wrote to Arana's mother and United Fire notifying both that OHP had a contractual right to recover the health benefits it had paid on Arana's behalf.⁴¹⁴ Shortly thereafter, Arana filed a declaratory-judgment action in a Louisiana state court arguing that Louisiana's law barred OHP's equitable-subrogation claim.⁴¹⁵ OHP removed Arana's lawsuit to the District Court for the Eastern District of Louisiana on the grounds that the Employee Retirement Income Security Act (ERISA)⁴¹⁶ completely preempted Arana's state-declaratory-judgment action.⁴¹⁷

The district court found that it had subject matter jurisdiction because Arana stated a claim "to recover benefits" under ERISA § 502(a)(1)(B).⁴¹⁸ From the district court's perspective, Arana's assertion that his action could proceed only under Louisiana's state law was unconvincing.⁴¹⁹ The lower court found that OHP was attempting to reduce the amount of benefits it had paid under a health plan, an ERISA-related claim. The district court did award partial summary judgment to Arana on the merits of his other claims.⁴²⁰

409. *Id.*

410. *Id.*

411. *See id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. *Arana I*, 338 F.3d at 435-36.

Arana raised two claims: (1) a request for a declaratory judgment "requiring OHP to release its notice of lien and to withdraw and release OHP's subrogation, reimbursement and assignment claims" because LA. REV. STAT. ANN. § 22:663 bars OHP from asserting these rights; and (2) a request for statutory penalties and attorney's fees under LA. REV. STAT. § 22:657 for OHP's allegedly wrongful attempt to assert a lien against his tort settlements and obtain reimbursement from him. Arana brought the case as a class action, but no class has been certified.

Id.

416. 29 U.S.C. §§ 1001-1461 (2000).

417. *Arana II*, 352 F.3d at 975.

418. Employee Retirement Income Security Act (ERISA) § 502(a)(1)(B), which reads in pertinent part:

(a) A civil action may be brought—

(1) by a participant or beneficiary—

...

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . .

29 U.S.C. § 1132 (2000).

419. *Arana II*, 352 F.3d at 979.

420. *Arana I*, 338 F.3d at 436 n.5.

Arana appealed the district court's adverse ruling to a Fifth-Circuit panel, arguing that federal courts did not have subject matter jurisdiction over this action.⁴²¹ More specifically, he asserted that ERISA did not completely preempt his state-declaratory-judgment action.⁴²² The panel agreed.⁴²³ OHP then petitioned the Fifth Circuit for rehearing en banc to determine whether jurisdiction was proper.⁴²⁴ The full court of appeals agreed to decide the controversy.⁴²⁵

In *Arana I*, right away the Fifth Circuit cited a settled principle of federal law, the "well-pleaded complaint rule": Under the federal removal statute, a federal district court may remove a state-court civil action to federal court if the claim arises under federal law or there is diversity jurisdiction, providing that the defendant is not a citizen of the state where the action commences.⁴²⁶ But there is an exception to this settled rule: "Congress may so completely [preempt] a particular area [of law so] that any civil complaint [involving such claims would be] necessarily federal in character."⁴²⁷ Consequently, those civil claims would be preempted, too.⁴²⁸

The Fifth Circuit observed that federal law is clear regarding another matter: State law claims are completely preempted if the petitioner attempts to secure relief within the scope of ERISA § 502(a)(1)(B).⁴²⁹ Therefore, the Fifth Circuit ruled in *Arana I* that the district court had federal subject matter jurisdiction.⁴³⁰ The court of appeals held that Arana's state-court suit stated a claim to recover benefits or to enforce rights, which were completely

421. *Id.* at 436.

422. *Id.*

423. *Id.* at 436-37.

The panel held that Arana's first claim [was] not a claim 'to recover benefits' within the scope of ERISA § 502(a)(1)(B) because OHP has already paid Arana all of the health benefits due and Arana [was] not seeking additional benefits. The panel also rejected OHP's argument that Arana's first claim [was] one "to enforce his rights under the terms of the plan" under § 502(a)(1)(B) because Arana [was] not seeking to enforce the plan's terms but . . . to declare a portion of the plan illegal under Louisiana law if enforced. Finally, the panel determined that Arana's second claim, which [sought] penalties and attorney's fees, [was] not within the scope of ERISA § 502(a) because, [although] LA. REV. STAT. § 22:657 may conflict with ERISA, a mere conflict with federal law is insufficient for jurisdiction.

Id.

424. *Id.* at 437.

425. *See id.*

426. *Id.*; 28 U.S.C. § 1441(b) (2000), which reads:

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

See also Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6 (2003) (declaring that "[as] a general rule, absent diversity jurisdiction, a case will complaint does not affirmatively allege a federal claim").

427. *Arana I*, 338 F.3d at 437 (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987)).

428. *See Taylor*, 482 U.S. at 63-64.

429. *See id.* at 62-66.

430. *Arana I*, 338 F.3d at 440.

preempted under ERISA § 502(a)(1)(B).⁴³¹ The en banc court returned the case to a Fifth-Circuit panel to address the merits of Arana's substantive claims.⁴³²

In *Arana II*, the only issue before the panel was the viability of Arana's declaratory-judgment action under Louisiana's law.⁴³³ Once more, Arana cited Louisiana Revised Statute Section 22:663.⁴³⁴ He asserted that the statute prohibited OHP from becoming a subrogee.⁴³⁵ Therefore, OHP could not seize any of the money that the four liability insurers gave Arana to settle Arana's third-party claims against the respective insureds.⁴³⁶

Section 22:663 states in relevant part:

No group policy of accident, health or hospitalization insurance . . . shall be issued by any insurer doing business in this state which . . . excludes or reduces the payment of benefits to or on behalf of an insured [if those] benefits have been paid under any other individually underwritten contract or plan of insurance for the same claim determination period. Any group policy provision in violation of this section shall be invalid.⁴³⁷

To defend itself, OHP argued that the statute did not apply because OHP was not an insurer.⁴³⁸ The Fifth-Circuit panel agreed.⁴³⁹

First, the panel in *Arana II* observed that OHP was a health maintenance organization (HMO), one that provided insurance.⁴⁴⁰ But, the panel found that—barring some narrow exceptions—HMO's like OHP were not insurers⁴⁴¹ under Louisiana's statutory law.⁴⁴² Second, the Fifth-Circuit panel stated that

431. *Id.*

432. *Id.*

433. *Arana II*, 352 F.3d at 976.

434. See LA. REV. STAT. ANN. § 22:663 (West 1995 & Supp. 2003).

435. *Arana II*, 352 F.3d at 978-79. LA. CIV. CODE ANN. art. 1825 "defines subrogation as 'the substitution of one person to the rights of another.' Subrogation generally takes place after insurance proceeds have been paid out and the insurance company, substituting itself in place of the insured, seeks reimbursement from a third-party." *Id.* (quoting LA. CIV. CODE ANN. art. 1825).

436. See *Arana II*, 352 F.3d at 979.

437. LA. REV. STAT. ANN. § 22:663 (West 1995 & Supp. 2003) (emphasis added).

438. See *Arana II*, 352 F.3d at 976.

439. *Id.* at 976-77.

440. See *id.*

441. *Id.* "OHP is a health maintenance organization, however, not an insurer, and Louisiana law has carefully identified the Insurance Code provisions that apply to HMOs. Thus, '[a] health maintenance organization is an insurer but *only* for the purposes enumerated in R.S. 22:2002(7).'" *Id.*; see also *Tucker v. Ochsner Health Plan*, 674 So. 2d 1052, 1055 (La. Ct. App. 1996) (holding that an HMO is not an insurance company for purposes of a statute granting special venue provisions for insurance claims); *Crawford v. Blue Cross & Blue Shield*, 814 So. 2d 574, 580 (La. Ct. App. 2001) (declining to follow *Tucker* on the grounds that Blue Cross was an insurer rather than an HMO).

442. *Arana II*, 352 F.3d at 979. Section 22:2002(7) of the Insurance Code states that "[a] health maintenance organization [is] an insurer for the purposes of R.S. 22:213.6 and 213.7, Part XVI, comprised of R.S. 22:731 through 774, Part XXI-A, comprised of R.S. 22:1001 through 1015, and Part XXVI-B, comprised of R.S. 22:1241 through 1247.1, of Chapter 1 of this title," and states that "[a] health maintenance organization *shall not* be considered an insurer for *any other purpose*." LA. REV. STAT. ANN. § 22:2002(7) (emphasis added).

if “the Louisiana legislature [wishes] to prohibit subrogation[,] it is free to do so, but the plain language of § 22:663 does not allow [the Fifth Circuit] to expand the reach of the statute.”⁴⁴³ Therefore, the appellate court reversed the district court’s ruling and declared: “OHP is not an ‘insurer’ [under] § 22:663, and § 22:663 does not in any event prevent subrogation. Arana has no claim under Louisiana law.”⁴⁴⁴

B. Property Insurance: Whether an Allegedly Ambiguous Clause in a Property Insurance Contract Was Reimbursement or a Subrogation Provision that Allowed Recovery Under a “Plan Priority” or a “Make Whole” Theory

New Orleans Assets, L.L.C. v. Woodward presents another controversy involving the doctrine of equitable subrogation in Louisiana.⁴⁴⁵ But unlike the insurer in *Arana II*, the insurer in *Woodward* presented a fairly novel, interesting, and, arguably, daring question, “[one] that the Louisiana Supreme Court has not addressed squarely.”⁴⁴⁶ However, the facts surrounding the controversy are fairly common occurrences.⁴⁴⁷ *New Orleans Assets, L.L.C. (NOA)* owns an office building that houses the Federal Bureau of Investigation’s regional headquarters.⁴⁴⁸ After the building was completed, NOA spent nine-million dollars to remove widespread mildew and mold from the exterior walls.⁴⁴⁹ NOA sued the various designers and builders alleging that faulty design and construction caused the mold and mildew.⁴⁵⁰

Reliance Insurance Company insured NOA’s building under a property insurance contract.⁴⁵¹ While Reliance insured NOA’s loss, the latter could not cover insurance proceeds because Reliance became insolvent.⁴⁵² But, NOA later settled its claim with several of the designers and builders, but the settlement did not cover all of NOA’s loss.⁴⁵³ The parties could not determine precisely the total cost of NOA’s loss, but they agreed the settlement and the remaining unpaid loss greatly exceeded \$149,900.⁴⁵⁴

For certain, that number is significant for two reasons.⁴⁵⁵ First, Louisiana created the Louisiana Insurance Guaranty Association (LIGA).⁴⁵⁶ LIGA’s primary responsibility is to assist insureds and pay insureds’ claims when

443. *Arana II*, 352 F.3d at 979.

444. *Id.*

445. *See New Orleans Assets, L.L.C. v. Woodward*, 363 F.3d 372 (5th Cir. Mar. 2004).

446. *Id.* at 376.

447. *Id.* at 373-74.

448. *Id.* at 373.

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.*

453. *Id.* at 374.

454. *Id.*

455. *See* LA. REV. STAT. ANN. § 22.1376 (West 1995).

456. *Id.*

insurance companies become insolvent.⁴⁵⁷ As a result, LIGA became the successor to Reliance, NOA's original property insurer.⁴⁵⁸ Second, Louisiana's insolvency statute is clear about another matter: Regardless of an insured's loss, the maximum amount that LIGA must pay is \$149,900 per claim.⁴⁵⁹ Therefore, NOA could only recover \$149,900 from LIGA, which was considerably smaller than NOA's property loss.⁴⁶⁰

Yet, after NOA filed a property-loss claim with the successor insurer, LIGA refused to pay even \$149,900.⁴⁶¹ Therefore, NOA commenced a breach-of-contract action against LIGA in the United States District Court for the Eastern District of Louisiana.⁴⁶² During the proceeding, LIGA learned of the settlement between NOA and the tortfeasors who negligently designed and constructed NOA's building.⁴⁶³ LIGA filed a motion for summary judgment citing language in the original contract between NOA and Reliance.⁴⁶⁴

To justify its petition for summary relief, LIGA argued that NOA had a contractual duty to reimburse LIGA first after NOA received settlement dollars.⁴⁶⁵ LIGA stressed that its statutory liability to NOA, if any, was capped at \$149,900; NOA received more than that amount in the settlement.⁴⁶⁶ Therefore, LIGA argued that there was no contractual obligation to pay NOA anything.⁴⁶⁷ In fact, LIGA advanced an arguably novel and imaginative theory of recovery for itself.⁴⁶⁸ The state-created guaranty association stressed that

the Reliance contract also governed its present relationship with NOA; therefore, under the terms of that agreement, NOA had a contractual duty to reimburse LIGA for all payments received in the settlement.⁴⁶⁹ Incredibly, LIGA advanced that theory even though NOA was not fully compensated for or recovered completely from its property loss.⁴⁷⁰ More astonishing, the district court agreed with LIGA's argument and granted summary judgment in their favor.⁴⁷¹ NOA appealed.⁴⁷²

457. *Id.*

458. *Woodward*, 363 F.3d at 373. "LIGA was 'deemed the insurer' and had 'all rights, duties, and obligations of the insolvent insurer.'" *Id.* (quoting LA. REV. STAT. ANN. § 22:1382(A)(2) (West Supp. 2004)). "In effect, when Reliance went bankrupt, LIGA stepped into the shoes of Reliance and became NOA's property insurer." *Id.* (citing LA. REV. STAT. ANN. § 22:1382(A)(2)).

459. See LA. REV. STAT. ANN. § 22:1382(A)(1)(a)(iii). Actually, LIGA's maximum exposure under this provision is \$150,000 per claim minus a \$100 deductible. *Id.*; *Woodward*, 363 F.3d at 374 n.1.

460. *Woodward*, 363 F.3d at 374 n.1.

461. See *id.*

462. *Id.*

463. See *id.*

464. *Id.*

465. *Id.*

466. *Id.*

467. See *id.*

468. *Id.*

469. *Id.*

470. *Id.*

471. *Id.*

472. *Id.*

The question before the Fifth Circuit was very narrow: whether a disputed clause under the property-insurance contract was a subrogation or a reimbursement clause.⁴⁷³ In particular, the following provision appeared in the contract: “If you [the insured] waive your rights against another party in writing after [a] loss or damage, we [the insurer] can recover from you any amount you received for that waiver.”⁴⁷⁴ According to LIGA, that language created a reimbursement rather than a partial-subrogation clause; therefore, the guaranty association asserted that NOA had a duty to reimburse LIGA for funds that LIGA never paid on NOA’s behalf, even though the settlement did not make NOA whole.⁴⁷⁵

Quite often, an insured party—like NOA—receives benefits from its insurer, as well as from third-party tortfeasors, to compensate for an assortment of property losses and bodily injuries.⁴⁷⁶ The facts outlined in *Arana II* illustrate this practice very well.⁴⁷⁷ Therefore, anticipating such an outcome, smart insurers typically insert distinguishable subrogation and reimbursement clauses in the insurance contracts.

Louisiana’s equitable subrogation doctrine permits an insurer to step into the insured’s shoes to assert rights against and to seek reimbursement from the insured’s third-party tortfeasor.⁴⁷⁸ But as we learned in *Arana II*, there is a proviso: The insurer may acquire those rights only after the insurer pays funds to make its insured nearly whole again after the insured experiences a loss.⁴⁷⁹ On the other hand, Louisiana’s doctrine of reimbursement allows the insurer to commence an equitable action against the insured only to recover funds that the insurer paid to or on behalf of the insured.⁴⁸⁰

After considering these two doctrines, the Fifth Circuit acknowledged the following: “[Since the disputed clause in the Reliance contract] provides for both subrogation rights and reimbursement, we treat it as a subrogation clause. . . . [And because] the make whole doctrine applies to subrogation agreements, the make whole doctrine applies to this case.”⁴⁸¹ Therefore, the court of

473. *See id.*

474. *Id.* at 375 n.5.

475. *Id.* at 376.

476. *See, e.g., Arana II*, 352 F.3d 973 (5th Cir. Dec. 2003).

477. *See supra* notes 402-13 and accompanying text.

478. *See Barreca v. Cobb*, 668 So. 2d 1129, 1131 (La. 1996) (declaring that under the “subrogation [doctrine], the insurer stands in the shoes of the insured and acquires the right to assert the actions and rights of the [insured]”) (citation omitted).

479. *See Arana II*, 352 F.3d at 978-79.

480. *See Barreca*, 668 So. 2d at 1131. “While subrogation and reimbursement are similar in effect, they are different principles. With subrogation, the insurer stands in the shoes of the insured . . . , whereas with reimbursement, the insurer has a direct right of repayment against the insured. . . .” *Id.* (citing *Copeland v. Slidell Mem’l Hosp.*, 657 So. 2d 1292, 1298-1299 (La. 1995)). Thus, the agreement appearing in this case, although entitled “subrogation recovery agreement” does not conventionally subrogate Copeland to the Wallaces’ rights against the tortfeasor, it only affords Copeland the right of repayment from the insured. *Id.*

481. *New Orleans Assets, L.L.C. v. Woodward*, 363 F.3d 372, 376 (5th Cir. Mar. 2004).

When, as in this case, an insured party recovers only part of its loss from a tortfeasor, two different rules might establish the priority between an insurer and the insured to the recovery:

appeals reversed the district court's grant of summary relief in favor of LIGA and remanded the case for further proceedings.⁴⁸²

Arguably, the Fifth Circuit's holding in *Woodward* was correct, but the manner in which the appellate court reached that result is a bit disturbing. As reported at the outset, the Fifth Circuit acknowledged that the Louisiana Supreme Court has not addressed the disputed question in this case.⁴⁸³ Nevertheless, the appellate court refused to certify the case to the Supreme Court of Louisiana,⁴⁸⁴ preferring instead to "make an *Erie* guess."⁴⁸⁵

Louisiana adopted five doctrines to interpret disputed language in insurance contracts—traditional principles of contract construction,⁴⁸⁶ the doctrine of plain meaning,⁴⁸⁷ the ambiguity doctrine,⁴⁸⁸ the doctrine of reasonable expectation,⁴⁸⁹ and the adhesion doctrine.⁴⁹⁰ The Fifth Circuit did not carefully consider any of the previous doctrines to resolve the dispute in *Woodward*.⁴⁹¹ Even after LIGA reminded the court of appeals that the Louisiana Supreme Court employs at least one of these doctrines to interpret insurance contracts, the Fifth Circuit dismissed LIGA's concern cavalierly.⁴⁹² In a very brief footnote, the Fifth Circuit stated: "Viewing the clause as a whole, and mindful of the examples set in *Barreca* and *Smith*, both of which allude to reimbursement but provide for subrogation, we construe the contract as providing for subrogation."⁴⁹³

(1) *Plan Priority*, under which priority is given to the plan for full recovery "off the top," [or]

(2) *Make Whole*, under which priority is given to the beneficiary to keep everything he recovers from third parties until he is made entirely whole.

Id. at 374 (quoting *Sunbeam-Oster Co. Group Benefits Plan for Salaried & Non-Bargaining Hourly Employees v. Whitehurst*, 102 F.3d 1368, 1373-74 (5th Cir. 1996)).

482. *Id.* at 377.

483. *Id.* at 376.

484. *Id.* at 377 n.10. "Because we render a decision in this case, we deny as moot NOA's alternative motion to certify this issue to the Louisiana Supreme Court." *Id.*

485. *Id.* at 376; see *Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992). "[I]t is the duty of the federal court to determine as best it can, what the highest court of the state would decide." *Id.* (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 89 (1938)).

486. See *Ledbetter v. Concord Gen. Corp.*, 665 So. 2d 1166, 1169 (La. 1996) (holding that "[a]n insurance policy is an agreement between the parties and should be interpreted by using ordinary contract principles").

487. See *La. Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.*, 630 So. 2d 759, 763 (La. 1994) (holding that the parties' "intent is to be determined in accordance with the general, ordinary, plain and popular meaning of the words used in the policy").

488. See *Succession of Fannaly v. Lafayette Ins. Co.*, 805 So. 2d 1134, 1138 (La. 2002) (repeating that the "ambiguous contractual provision is construed against the insurer who furnished the contract's text and in favor of the insured").

489. See *La. Ins. Guar. Ass'n*, 630 So. 2d at 764 (holding that a court should construe an insurance contract "to fulfill the reasonable expectations of the parties in the light of the customs and usages of the industry") (quoting *Trinity Indust., Inc. v. Ins. Co. of N. Am.*, 916 F.2d 267, 269 (5th Cir. 1990)).

490. See *Duncan v. Kan. City S. Ry. Co.*, 747 So. 2d 656, 674 (La. Ct. App. 1999) (observing that "[i]t is well settled that . . . insurance policies are generally contracts of adhesion").

491. See *New Orleans Assets, L.L.C. v. Woodward*, 363 F.3d 373, 377 n.9 (5th Cir. Mar. 2004).

492. *Id.* ("LIGA points out, and we fully recognize, that the ordinary meaning of the text governs the meaning of contracts." (citing *Succession of Fannaly v. Lafayette Ins. Co.*, 805 So. 2d 1134, 1137 (La. 2002))).

493. *Id.*; *Smith v. Manville Forest Prods. Corp.*, 521 So. 2d 772, 776 (La. Ct. App. 1988).

But very likely, the Louisiana Supreme Court could invest more time and perform a more thorough analysis to reach a sound and just interpretation of the disputed language in the Reliance contract. To reach that end, the supreme court would have followed the methodology that it so carefully outlined in *Succession of Fannaly*.⁴⁹⁴ In that case, the Louisiana Supreme Court stated:

An insurance policy is [a] . . . contract subject to the general rules of contract interpretation. . . . The extent of coverage under an insurance contract is dependent on the *common intent* of the insured and insurer. Thus, when interpreting an insurance contract, *courts must attempt to discern the common intent of the insured and insurer*. In ascertaining the common intent of the insured and insurer, courts begin their analysis with a review of the words in the insurance contract. *Words in an insurance contract must be ascribed their generally prevailing meaning*, unless the words have acquired a technical meaning, in which case the words must be ascribed their technical meaning. Moreover, *an insurance contract is construed as a whole* and each provision in the contract must be interpreted in light of the other provisions. One provision of the contract should not be construed separately at the expense of disregarding other provisions. When the words of an insurance contract are clear and explicit and lead to no absurd consequences, courts must enforce the contract as written.⁴⁹⁵

To be sure, the Fifth Circuit's analysis in *Woodward* certainly did not cite or consider the principles outlined in *Succession of Fannaly* as it should have.

C. Health Insurance Plans: Whether Under Texas's Law the District Court Properly Certified a Large Class of Self-Funded ERISA Health Plans for Arbitration After a Reinsurer Allegedly Breached Several Health-Related Reinsurance Contracts

Pedcor Management v. Nations Personnel of Texas presents a major disagreement over a class certification.⁴⁹⁶ But unlike the former two cases, the conflict in *Pedcor* concerns whether plaintiffs have a right to certify a class for an arbitration hearing rather than for a trial by jury.⁴⁹⁷ Interestingly, the aggrieved *Pedcor* complainants are large numbers of American health-insurance plans and the defendants are foreign reinsurers.⁴⁹⁸ But more important, the holding in *Pedcor* is likely to have an impact and even greater relevance beyond the Fifth Circuit.⁴⁹⁹

494. *Succession of Fannaly*, 805 So. 2d at 1138.

495. *Id.* at 1136-37 (emphasis added) (citations omitted).

496. *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Personnel, Inc.*, 343 F.3d 355 (5th Cir. Aug. 2003).

497. *Id.* at 359.

498. *Id.* at 357.

499. *See id.* at 362-63 n.36.

In *Pedcor*, four usually allied parties find themselves involved in a somewhat unusual fracas. North American Indemnity (NAI) is a Belgian-incorporated reinsurance company, which sells reinsurance throughout the United States.⁵⁰⁰ A reinsurance contract is also called a Treaty of Reinsurance.⁵⁰¹ At least 408 employers—who established self-funded plans (Plans) under the Employee Retirement Income Security Act (ERISA)—purchased reinsurance from NAI.⁵⁰² American Heartland Health Administrators (AHHA) is the third-party administrator of the Plans.⁵⁰³ And *Pedcor* Management Company, Inc. Employee Welfare Benefit Plan (*Pedcor*) is one of the plans that purchased reinsurance from NAI.⁵⁰⁴

The dispute in *Pedcor* arose when NAI allegedly breached its reinsurance contracts by refusing to pay various claims.⁵⁰⁵ Initially, NAI sued AHHA—the Plans' third-party administrator—for negligently underwriting the Plans.⁵⁰⁶ NAI filed the suit in the United States District Court for the Southern District of Texas.⁵⁰⁷ Later, *Pedcor* and several other individual Plans intervened successfully as plaintiffs against NAI.⁵⁰⁸ The district court denied NAI's motion to dismiss its original suit against AHHA without prejudice and entered a take-nothing judgment.⁵⁰⁹ Soon thereafter, the district court held a hearing with *Pedcor* and the other intervening Plans.⁵¹⁰ The purpose of the hearing was to discuss the possibility of certifying a class of plans to commence an arbitration hearing against NAI.⁵¹¹

500. *Id.* at 357.

501. *See, e.g.*, *N. River Ins. Co. v. Philadelphia Reinsurance Corp.*, 63 F.3d 160, 162 (2d Cir. 1995).

The foreign reinsurers are Underwriters and Underwriting Syndicates at Lloyd's of London, and foreign companies subscribing to reinsurance London reinsurers [reinsure primary insurers] under so-called "treaty programs" A reinsurance treaty is an ongoing contractual relationship between two insurance companies in which the primary insurer agrees in advance to cede, and the reinsurer to accept, specified business that is the subject of the contract. Under a treaty, a reinsurer agrees to indemnify a primary insurer with respect to a portion of the primary insurer's liability in a designated line of business [Typically,] the reinsurance treaty involve[s] the participation of many reinsurers, each accepting a percentage of the total liability under a single treaty.

Id.; *see also In re Ins. Antitrust Litig.*, 938 F.2d 919, 923 (9th Cir. 1991) ("Reinsurance is arranged by specialized brokers and underwriters. Much reinsurance is done by syndicates doing business through Lloyd's of London.").

502. *Pedcor*, 343 F.3d at 357.

503. *Id.*

504. *Id.*

505. *Id.*

506. *Id.*

507. *Id.*

508. *Id.*

509. *Id.*

510. *Id.*

511. *Id.*

Pedcor's counsel participated in the hearing, but after much consideration, the counsel filed written suggestions advising against class certification.⁵¹² Nevertheless, the district court certified a class "to consist of all employer plans that bought reinsurance from North American Indemnity,"⁵¹³ but who failed to receive reimbursements from the Belgium reinsurer. The district court also stated that it would compel arbitration soon after certifying the class.⁵¹⁴ Pedcor timely appealed the certification order.⁵¹⁵

Before the Fifth Circuit, Pedcor challenged the district court's class-certification decision and the lower court's order compelling an arbitration of the disputed claims between the Plans and NAI.⁵¹⁶ At the very start, the Fifth Circuit examined the arbitration clauses appearing in the various reinsurance contracts.⁵¹⁷ The court of appeals found that each arbitration clause contained the following relevant language: (1) Any dispute under the reinsurance agreement must go to arbitration; (2) As a general matter each party must choose one arbitrator, and the two chosen arbitrators must select a third arbitrator to form a panel; and (3) "[A]rbitration shall be governed by the laws of the State of Texas."⁵¹⁸

But the Fifth Circuit found no express provision in the reinsurance contract clauses regarding consolidating claims or certifying a class of plans for arbitration.⁵¹⁹ Therefore, to help determine whether the district court applied the correct legal standards or abused its discretion, the court of appeals examined the Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*, which appeared after the district court's certification order and the parties' first appellate brief.⁵²⁰

In *Green Tree*, the Supreme Court reviewed a state court's decision that ordered class arbitration under South Carolina's law.⁵²¹ And like the contract in *Pedcor*, the arbitration agreement in that case did not clearly allow or prevent class arbitration.⁵²² After concluding that the agreement did not expressly forbid class arbitration, a plurality of the Court held: "Under the terms of the parties' contracts, the question—whether the agreement forbids class arbitration—is for the arbitrator to decide."⁵²³

512. *Id.* ("Pedcor's counsel . . . had been granted leave to appear as amicus curiae in the proceedings. . .").

513. *Id.*

514. *Id.* at 357 n.2.

515. *Id.*

516. *Id.* at 358.

517. *See id.* at 358-63.

518. *Id.* at 357.

519. *See id.* at 360.

520. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

521. *See id.*

522. *Id.* (citing *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 359 (S.C. 2002)).

523. *Id.* at 451.

It did not take the Fifth Circuit long to settle this dispute. The appellate court only wanted to know if the arbitration clauses in *Green Tree* and the present case were sufficiently similar.⁵²⁴ Finding that the clauses were similar, the Fifth Circuit declared that “arbitrators should decide whether class arbitration is available or forbidden,” vacated the district court’s certification order, and remanded to the district court.⁵²⁵

IV. FIRST-PARTY INSURANCE CONTRACTS: FEDERAL STATUTORY CLAIMS & DECISIONS

A. *Credit-Life Insurance: Whether an Insured Had Standing to Commence a Putative, Class-Action Suit Against Credit Life Insurers Under the Federal Civil RICO Statute*

Although the procedural question in *Brown v. Protective Life Insurance Co.* is fairly common, material background information is extremely scanty.⁵²⁶ Nevertheless, a careful reading of what appears in the opinion suggests that Marylena Brown approached Crescent Bank & Trust and applied for a loan.⁵²⁷ Whether Brown applied for a consumer, business, or property loan is unclear.⁵²⁸ But as a condition for awarding the loan, Crescent required Brown to purchase credit-life insurance from Protective Life Insurance Company.⁵²⁹ This would make sense, for this is a common practice in the banking industry.⁵³⁰

It appears that Brown received the loan because she paid \$1,876.70 to cover the insurance premium.⁵³¹ But, whether the lender or the insurer received that money is also unclear.⁵³² Apparently, it did not matter who received the premium payment, for Brown sued Protective Life, Crescent Bank & Trust, and another unidentifiable party—Banner of New Orleans

524. *Pedcor*, 343 F.3d at 359. “The clarity of *Green Tree*’s holding—that arbitrators are supposed to decide whether an arbitration agreement forbids or allows class arbitration—leaves us to decide only whether the instant case is sufficiently analogous to *Green Tree* to come within its rule.” *Id.*

525. *Id.* at 363.

526. *Brown v. Protective Life Ins. Co.*, 353 F.3d 405 (5th Cir. Dec. 2003).

527. *See id.*

528. *See id.*

529. *Id.* at 407.

530. *See, e.g., Bryant v. Heritage Life Ins. Co.*, 613 So. 2d 1044, 1044-45 (La. Ct. App. 1993). [Husband-and-wife applicants] borrowed \$80,000.00 from the [b]ank, securing the loan with a home mortgage. The [applicants] allege[] that they advised . . . an employee acting as agent for the [b]ank, that they wanted credit disability insurance in an amount sufficient to cover the full amount of the loan [if the husband became] disabled. [The applicants alleged that the bank obtained the] policies of credit disability insurance from Heritage Life Insurance Company . . . and Gulfco Life Insurance Company . . . with the Bank named as beneficiary under the policies. The [applicants] allegedly paid \$3,000.00 [to the bank as] premiums for the insurance. . . .

Id.

531. *Brown*, 353 F.3d at 408.

532. *See id.*

Inc.⁵³³ More specifically, she filed a class-action suit in the District Court for the Eastern District of Louisiana, on behalf of herself and a proposed class of similarly situated consumers.⁵³⁴

In her complaint, Brown accused the defendants of violating RICO.⁵³⁵ In particular, she accused the defendants of violating section 1962(c), which “prohibits ‘any person employed by or associated with any enterprise’ from participating in or conducting the affairs of that enterprise through a pattern of racketeering activity.”⁵³⁶ Once more, an explanation of the alleged corruption does not appear in the decision; we only know that the violation was “related to Protective Life’s sale of [credit-life] insurance.”⁵³⁷ But this is a common complaint among consumers who have been forced to purchase credit-life insurance;⁵³⁸ it has been litigated before in other jurisdictions.⁵³⁹

533. *See id.*

534. *Id.* at 407.

535. *Id.* at 406. 18 U.S.C. § 1964(a) states in pertinent part:

The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, . . . from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

18 U.S.C. § 1964(a) (2000).

536. *Brown*, 353 F.3d at 407 (quoting 18 U.S.C. § 1962(c) (2000)).

537. *Id.* at 406.

538. *See, e.g.*, Karen Slater, *Insurers Allege Abuse of Credit-Life Policies*, WALL ST. J., Jan. 1, 1988, 1988 WL-WSJ 473496.

Sellers of a type of life insurance often criticized by consumer activists as too expensive charge that they are being ripped off—by consumers. The product is credit-life insurance, which pays the balance outstanding on a loan if the borrower dies. Insurers say a growing number of terminally ill people borrow large sums shortly before death to get the associated insurance. Lenders and auto dealers [receive] big commissions [from] insurers to sell credit-life coverage to consumers who take out personal and auto loans. . . . [I]nsurers say [there have] been abuses of the coverage. “Deathbed draws” of credit life are “conceptually a fraud,” although perfectly legal, says [the] regulatory counsel at CUNA Mutual Insurance Society, the largest writer of credit-life policies. Credit-life insurers aren’t getting much sympathy from consumer activists.

Id.

539. *See, e.g.*, *Printis v. Bankers Life Ins. Co.*, 583 S.E.2d 22, 22-23 (Ga. 2003).

Felicia Printis purchased a car, a service agreement, and optional credit life and disability insurance for the 60-month term of her financing contract. After receiving credit for her trade-in and . . . down payment, Printis owed \$20,711.45. [The seller told Printis] that the finance charge . . . would be \$2,117.95, making the total [loan] amount . . . \$22,829.40. . . . Bankers Life Insurance Company [provided the credit life insurance to insure the \$22,829.40 loan]. [Subsequently], Printis filed a complaint. . . . [She asserted that her indebtedness was really \$20,711.45 plus accrued interest, rather than \$22,829.40. Therefore, she paid too much for the credit life insurance]. She sought a refund [for] the difference . . . (\$47.65). [In her complaint, Printis] claimed that the insurer . . . committed a RICO violation (mail fraud and wire fraud) by “conspiring with its agents and auto dealers to sell this illegal, unnecessary, and excessive insurance coverage at [a] greater expense to the consumer. . . .”

Id.

Brown also alleged that Protective Life engaged in a pattern of racketeering in violation of 18 U.S.C. § 2314.⁵⁴⁰ This federal statute prohibits the interstate transportation of stolen property.⁵⁴¹ To establish an offense under the statute, the government must prove that (1) the defendant engaged in the interstate transportation of goods, merchandise, wares, money, or securities; (2) the value of the transported items was \$5,000 or more; and (3) the defendant knew that such items had been stolen, converted, or taken by fraud.⁵⁴²

The district court dismissed Brown's class-action suit, ruling that she did not have standing to bring the RICO action under Federal Rule of Civil Procedure 12(b)(6).⁵⁴³ Brown appealed in a timely fashion, and the Fifth Circuit agreed to decide a single procedural question: whether Brown had standing to commence a putative, class-action suit against the credit-life insurers under the federal civil RICO statute.⁵⁴⁴

To address Brown's procedural question, the Fifth Circuit observed that a RICO plaintiff has standing to bring an action and recover only to the extent that a RICO violation has injured the aggrieved party's business or property.⁵⁴⁵ The appellate court also stated that a person who represents a class of members must allege and show that she has been injured.⁵⁴⁶ It is not enough to establish that unidentified members of the class have suffered.⁵⁴⁷ The Fifth Circuit also declared that, as the only named RICO plaintiff, Brown had to allege that she was injured by predicate acts.⁵⁴⁸ Those acts were "(1) the interstate transportation of (2) goods, merchandise, wares, money, or securities valued at \$5,000 or more (3) with the knowledge that such items have been stolen, converted or taken by fraud."⁵⁴⁹

540. See *Brown*, 353 F.3d at 406. 18 U.S.C. § 2314 reads in relevant part:

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 2314 (2000).

541. 18 U.S.C. § 2314.

542. See *United States v. Onyiego*, 286 F.3d 249, 253 (5th Cir. 2002) (citing *Dowling v. United States*, 473 U.S. 207, 214 (1985)).

543. FED. R. CIV. P. 12(b) states in pertinent part:

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . failure to state a claim upon which relief can be granted. . . .

FED. R. CIV. P. 12(b).

544. *Brown*, 353 F.3d at 407.

545. *Id.*; see *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

546. *Accord Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 659 (3d Cir. 1998) (abrogated on other grounds). "To link their own injuries to the alleged RICO enterprise, plaintiffs must allege what happened to them. . . . Until the putative class is certified, the action is one between the [named plaintiffs] and the defendants." *Id.*

547. See *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

548. *Brown*, 353 F.3d at 407.

549. *Id.* (quoting *United States v. Onyiego*, 286 F.3d 249, 253 (5th Cir. 2002)).

In light of those various federal principles, the Fifth Circuit ultimately concluded that Brown did not meet the standing requirements to commence a RICO class-action suit.⁵⁵⁰ Put simply, she could not prove a personal loss greater than \$1,876.70, which was the total amount that she paid as a premium for credit-life insurance.⁵⁵¹ Certainly, Brown amended her complaint and cited predicate acts, which arguably proved a loss greater than \$5,000.⁵⁵² But that number was based on the allegations of unnamed plaintiffs, those claiming that Protective Life had deceived them.⁵⁵³ Therefore, the Fifth Circuit affirmed the district court's dismissal of Brown's RICO claim, because Brown was the only named plaintiff and she could not prove the requisite financial loss to her business or property.⁵⁵⁴

B. Industrial Life Insurance: Whether Insured African-Americans Sufficiently Satisfied the "Class Definition" Requirements to Commence a Class-Action, Racial-Discrimination Suit Against Industrial Life Insurers Under the Civil Rights Act of 1866—42 U.S.C. §§ 1981 and 1982

In re Monumental Life Insurance Company also presents a class-certification controversy involving allegations of racial discrimination for more than a half century.⁵⁵⁵ Monumental Life Insurance Company (Monumental), American National Insurance Company (American), and Western and Southern Insurance Company (Western) include over 280 companies that issued "industrial life policies over a fifty- to sixty-five-year period."⁵⁵⁶ During that period, African-Americans, like other ethnic groups,

550. *Id.* at 408.

551. *Id.*

552. *Id.*

553. *Id.*

554. *Id.*

Assuming *arguendo* that Brown raised the issue of proceeds in response to Protective Life's motion to dismiss, the proceeds are insufficient to state a RICO cause of action because the insurance proceeds, which were returned to Brown, did not harm Brown's business or property. Only the \$1,876.60 that Brown paid for the loan—the premium—harmed Brown's business or property. Whether, and by how much, the insurance premiums and proceeds from Protective Life's credit life insurance plans harmed other, unnamed individuals is irrelevant to the question of whether Brown has RICO standing. Brown can only allege injury by Protective Life in the amount of her \$1,876.70.

Id.

555. *In re Monumental Life Ins. Co.*, 365 F.3d 408, 411 (5th Cir. Apr. 2004) (reporting that the court withdrew the original—343 F.3d 331 (5th Cir. 2003)—"for the limited purpose of making minor adjustments in the analyses contained in parts III.A, III.B, and V," and stating that "the greater portion of the opinion remains intact").

556. *In re Monumental Life*, 365 F.3d at 412 n.3 ("Over the years, defendants have acquired other insurance companies and thereby assumed blocks of in-force insurance policies issued by them. Monumental currently administers policies issued by 200 different companies, while Western . . . administers policies issued by approximately 80 companies. [American] has assumed an indeterminate number of in-force policies.").

purchased many of those contracts from Monumental, American, and Western.⁵⁵⁷

After investigating these insurers' current and historical patterns and practices of pricing and marketing industrial-life contracts, a class of African-Americans commenced a class-action suit against the insurers in the District Court for the Eastern District of Louisiana.⁵⁵⁸ The complaint alleged that the insurers violated The Civil Rights Act of 1866 and 42 U.S.C. §§ 1981, 1982.⁵⁵⁹ More explicitly, the complainants accused the insurers of discriminating against African-Americans for decades during the sale and administration of low-value life insurance policies.⁵⁶⁰

Allegedly, the impermissible discrimination occurred in two forms—"dual rate" and "dual plan" discrimination.⁵⁶¹ Under the first scheme, the insurers supposedly sold identical industrial-life contracts to African-American and Anglo-Americans, while requiring African-Americans to pay a higher premium—dual rate.⁵⁶² Under the second practice, the insurers purportedly insured African-Americans under "specially-designed substandard" industrial policies, while insuring Anglo-Americans under comparable plans that offered more superior and substantial benefits—dual plans.⁵⁶³

The complainants moved for class certification under Federal Rule of Civil Procedure 23(b)(2)⁵⁶⁴ and asked the court to award notice⁵⁶⁵ and opt-out

557. *See id.* at 412.

558. *See id.* at 412-13.

559. 42 U.S.C. §§ 1981(a), 1982 (2000); *In re Monumental Life*, 365 F.3d at 412. 42 U.S.C. § 1981(a) states:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id. 42 U.S.C. § 1982 states: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." *Id.*

560. *In re Monumental Life*, 365 F.3d at 412 ("[Typically,] industrial life policies . . . have face amounts of \$2000 or less and require small weekly or monthly premiums.").

561. *Id.*

562. *Id.*

563. *Id.* "These practices are memorialized in the insurer's rate books and records, which explicitly distinguish dual rate and dual plan policies by race." *Id.* "As an example, a 1962 [American] rate book shows that, for a twenty-year-old [African-American], a \$500 '20 Pay Life' industrial policy charged a weekly premium of \$0.41, while a twenty-year-old [Anglo-American] paid only \$0.32." *Id.* at 412 n.4.

564. *Id.* at 412; FED. R. CIV. P. 23(b) states:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally

rights⁵⁶⁶ to class members.⁵⁶⁷ Also, the aggrieved insureds sought (1) an injunction to prevent the insurers from collecting allegedly discriminatory premiums, (2) a reformation of the insurance contracts to equalize benefits, and (3) restitution for past premium overcharges or benefit underpayments.⁵⁶⁸

To be sure, Monumental, American, and Western denied the accusations.⁵⁶⁹ They also argued that class certification was improper because the plaintiffs' class definition did not and could not readily identify the class members.⁵⁷⁰ More important, the insurers stressed that a precise class definition was truly essential under Rule 23(b)(3) because the complainants asked the district court to grant notice and opt-out rights.⁵⁷¹

The district court denied plaintiffs' request for certification, finding that their claims for monetary relief was predominate over their injunctive relief claims, making a Rule 23(b)(2) certification inappropriate.⁵⁷² The court also

applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . .

FED. R. CIV. P. 23(b)(1)-(2).

565. See *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 994 (5th Cir. Unit B 1981) (concluding that the notice requirements under Rule 23(b)(2)—for class members who ask for monetary relief—will not always be equivalent to those required under Rule 23(b)(3)).

566. *In re Monumental Life*, 365 F.3d at 416-17.

As "fundamental requisites of the constitutional guarantees of procedural due process," . . . notice and opt-out are mandatory for damage classes certified under rule 23(b)(3). Though rule 23 does not explicitly extend these safeguards to rule 23(b)(2) classes, due process requires the provision of notice where a rule 23(b)(2) class seeks monetary damages.

Id. (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974)). But see *Penson*, 634 F.2d at 994 (concluding that there is no absolute right of an opt-out in a Rule 23(b)(2) class-action suit even where the members ask for and receive monetary relief). See also *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) (contemplating the use of opt-out rights for a Rule 23(b)(2) class); *Eubanks v. Billington*, 110 F.3d 87, 94 (D.C. Cir. 1997) (holding that the language of Rule 23 is sufficiently flexible to afford district courts the discretion to grant opt-out rights for Rule 23(b)(2) classes).

567. *In re Monumental Life*, 365 F.3d at 413.

568. *Id.* at 412-13.

569. *Id.* at 412 & n.2 ("[The insurers defended their respective] practice on the basis that (1) the race-distinct pricing was justified; (2) [regulators approved] the practice . . . (3) the racially discriminatory policies were no more profitable than were those sold to whites; and (4) some of the discriminatory policies were remediated.").

570. *Id.* at 413. But see *id.* at 414.

Plaintiffs' filings in the district court clarified any ambiguities by stating that "the class is limited to industrial policies sold at a substandard (i.e., higher) rate for African-Americans and a lower rate for Caucasians, or as a substandard plan (i.e., a more costly plan) for African-Americans and a corresponding less expensive plan for Caucasians." Plaintiffs define industrial life insurance policies as "(1) policies labeled as 'industrial' or (2) those policies with a face amount of less than \$2,000.00 and weekly or monthly home premium collection."

Id.

571. *Id.* at 413.

A precise class definition is necessary to identify properly "those entitled to relief, those bound by the judgment, and those entitled to notice." Some courts have stated that a precise class definition is not as critical where certification of a class for injunctive or declaratory relief is sought under rule 23(b)(2). Where notice and opt-out rights are requested, however, a precise class definition becomes just as important as in the rule 23(b)(3) context.

Id. (quoting 5 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.21[6], at 23-62.2 (3d ed. 2003); *DeBremæcker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (citations omitted)).

572. *In re Monumental*, 365 F.3d at 413.

found the majority of class members would not benefit from injunctive relief.⁵⁷³ Furthermore, given the number of companies and policies involved, individualized hearings were necessary to determine damages.⁵⁷⁴ The defendants sought, and the Fifth Circuit granted, an interlocutory review under Federal Rule of Civil Procedure 23(f).⁵⁷⁵

Writing for the Fifth Circuit's majority, Justice Jerry Smith characterized plaintiffs' action as "[an] ultimate negative value [class-action] lawsuit."⁵⁷⁶ Put simply, an action is a negative-value suit if a court determines that it is economically infeasible for class members to litigate individually.⁵⁷⁷ And in *Monumental*, the court of appeals found the majority of class members were "poor and uneducated."⁵⁷⁸ Still, the appellate court stressed that "[a]ll classes must satisfy the four baseline requirements of [Federal Rule of Civil Procedure] 23(a): numerosity, commonality, typicality, and adequacy of representation."⁵⁷⁹

To settle the dispute in this case, the Fifth Circuit relied heavily and predominantly on its observations and decision in *Allison v. Citgo Petroleum Corp.*⁵⁸⁰ First, as noted above, complainants wanted a class certification as well as injunctive relief, restitution, and damages.⁵⁸¹ The district court concluded that "this is a case in which individuality overrides any bland group-think, and money [is] the prime goal . . . not injunctive relief."⁵⁸² To justify its decision to deny any relief to the African-American complainants, the United States District Court for the Eastern District Louisiana cited *Allison* and stated: "Rule 23(b)(2) certification is improper . . . where the class's request for injunctive relief merely serves as a bootstrap for a claim of monetary damages."⁵⁸³

573. *Id.* at 411.

574. *Id.* at 413.

575. *Id.* FED. R. CIV. P. 23(f) reads:

A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

FED. R. CIV. P. 23(f).

576. *In re Monumental Life*, 365 F.3d at 411.

577. *See Phillips Petroleum v. Shutts*, 472 U.S. 797, 809 (1985); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996).

578. *In re Monumental Life*, 365 F.3d at 420 ("Doubtless most class members, the majority of whom are poor and uneducated, remain unaware of defendants' discriminatory practices.").

579. *Id.* at 414-15 ("Assuming these requirements are satisfied, a rule 23(b)(2) class may be certified if 'the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.'") (quoting FED. R. CIV. P. 23(b)(2)).

580. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998).

581. *Id.*

582. *In re Monumental Life*, 365 F.3d at 415 (quoting FED. R. CIV. P. 23(b)(2)).

583. *Id.*

But the Fifth Circuit declared that the district court either misread or misinterpreted the class-certification ruling in *Allison*.⁵⁸⁴ First, to help correct any misconceptions of and an appreciation for that ruling, the court of appeals made several observations. The Fifth Circuit admitted that Rule 23(b)(2) places greater emphasis on awarding injunctive and declaratory relief because the rule anticipates the formation of a fairly “homogenous and cohesive [class] with few conflicting interests among its members.”⁵⁸⁵ But, the court of appeals correctly observed that once a request for damages enters the picture, class cohesiveness generally disappears.⁵⁸⁶ Consequently, a trier of fact then must address the merits of individual claims.⁵⁸⁷ That requires separate hearings, which effectively negates an efficient and less expensive lawsuit.⁵⁸⁸

Therefore, to remove any remaining doubt about its central holding in *Allison*, the Fifth Circuit stated that for monetary relief to be a viable remedy under Rule 23(b)(2), it must benefit the class *as a whole*.⁵⁸⁹ In addition, the class must establish that injunctive or declaratory relief forms the basis of the class-action suit and that a request for monetary relief is incidental.⁵⁹⁰ Therefore, in light of *Allison*'s principles, the Fifth Circuit reversed and remanded the case.⁵⁹¹

*C. Property Insurance: Whether the McCarran-Ferguson Act
Preempts a Class-Action Suit Against an Insurer—Under the Civil
Rights Act of 1866 and the Fair Housing Act of 1968—for Allegedly
Using Discriminatory Credit Scoring to Sell More Expensive
Property Insurance to Non-Caucasians*

The six non-Caucasian complainants in *Dehoyos v. Allstate Corp.*⁵⁹² are insureds under various automobile and homeowners' insurance contracts.⁵⁹³ Their insurers are Allstate Insurance Company, Allstate Texas Lloyd's, and various other subsidiaries of Allstate Corporation (Allstate), all of which sell

584. *Id.* (“*Allison* did not hold, as the district court believed, that monetary relief predominates where it is the ‘prime goal’ or a mere bootstrap to injunctive relief. Instead, ‘determining whether one form of relief actually predominates in some quantifiable sense is a wasteful and impossible task that should be avoided.’” (quoting *Allison*, 151 F.3d at 412 (citing 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1775, at 470 (2d ed.1986))).

585. *In re Monumental Life*, 365 F.3d at 415 (quoting *Allison*, 151 F.3d at 413) (“Class certification centers on the defendants’ alleged unlawful conduct, not on individual injury.”).

586. *Id.*

587. *Id.*

588. *Id.* at 415-16.

589. *Allison*, 151 F.3d at 415.

590. *Id.*

591. *In re Monumental Life*, 365 F.3d at 421.

592. *Dehoyos v. Allstate Corp.*, 345 F.3d 290 (5th Cir. Sept. 2003).

593. *Id.* “This nationwide class action [challenges the] insurers’ use of credit scoring in the pricing of automobile and home owners’ policies[.]” *Id.* at 300.

insurance in Texas and Florida.⁵⁹⁴ Like the African-American plaintiffs in *Monumental*, the racial minorities in *Dehoyos* filed a class-action suit, alleging that Allstate violated sections 1981⁵⁹⁵ and 1982⁵⁹⁶ of the Civil Rights Act of 1866.⁵⁹⁷ The complainants also alleged that Allstate violated the Fair Housing Act of 1968 (FHA).⁵⁹⁸ The lawsuit commenced in the United States District Court for the Western District of Texas.⁵⁹⁹

Specifically, the *Dehoyos* complainants accused Allstate of employing an impermissible discriminatory “‘credit-scoring system’ to target non-Caucasian[s] . . . for the sale of more expensive insurance policies.”⁶⁰⁰ They also claimed that the credit-scoring system actually selects non-Caucasian applicants for more expensive policies when compared to the premiums that Caucasians pay for identical coverage.⁶⁰¹ Allstate filed a Rule 12(b)(6)⁶⁰² motion to dismiss, arguing that the McCarran-Ferguson Act (MFA)⁶⁰³ preempts the application of the federal antidiscrimination statutes to the present controversy.⁶⁰⁴ The district court denied the motion, finding that the McCarran-Ferguson Act did not preclude the application of the civil-rights statutes.⁶⁰⁵ But, the lower court granted a leave for an interlocutory appeal.⁶⁰⁶

The sole issue before the Fifth Circuit was whether the MFA precludes a nationwide lawsuit to challenge Allstate’s credit-scoring and pricing schemes under sections 1981 and 1982 of the Civil Rights Act of 1866 and the Fair Housing Act of 1968 (FHA).⁶⁰⁷ Under the MFA, “No Act of Congress shall be construed to *invalidate, impair, or supersede any law enacted by any*

594. *See id.* at 293.

595. *Id.* 42 U.S.C. § 1981(a) (2000) states:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (2000).

596. 42 U.S.C. § 1981(a) (2000). Section 1982 states: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” 42 U.S.C. § 1982 (2000).

597. *Dehoyos*, 345 F.3d at 293.

598. *Id.*; *see* 42 U.S.C. § 3601 (2000). More specifically, 42 U.S.C. § 3604(b) states: “[I]t shall be unlawful . . . [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.” 42 U.S.C. § 3604(b) (2000).

599. *Dehoyos*, 345 F.3d at 293.

600. *Id.*

601. *Id.* at 300.

602. FED. R. CIV. P. 12(b)(6) states in pertinent part: “Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . failure to state a claim upon which relief can be granted. . . .” FED. R. CIV. P. 12(b)(6).

603. 15 U.S.C. §§ 1011-1015 (1999).

604. *Dehoyos*, 345 F.3d at 293.

605. *Id.*

606. *Id.*

607. *Id.* at 294.

State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.”⁶⁰⁸

In *Humana Inc. v. Forsyth*, the Supreme Court outlined the methodology that courts must apply when deciding preemption questions under the MFA.⁶⁰⁹ First, the Court expressly rejected the assumption that the MFA approved a state-supremacy “field preemption” approach to the application of federal law to the insurance industry.⁶¹⁰ Instead, the Court emphasized that courts must employ a “conflict preemption” analysis to determine whether federal law impairs states’ authority and ability to regulate the business of insurance.⁶¹¹ The Supreme Court stated that the following formulation captures the meaning of impairment under 15 U.S.C. § 1012(b): “[1] When federal law does not directly conflict with state regulation, and [2] when application of the federal law would not frustrate any declared state policy or interfere with a State’s administrative regime, the McCarran-Ferguson Act does not preclude its application.”⁶¹²

But, to actually decide whether the MFA prevents federal laws from impairing state agencies’ ability to regulate the business of insurance, the Court ordered federal courts to consider and satisfy three criteria:

- (1) the federal law in question must not be specifically directed at insurance regulation; (2) there must exist a particular state law, or declared regulatory policy enacted for the purpose of regulating insurance; and (3) application of the federal law to the controversy in question must invalidate, impair or supercede that state law.⁶¹³

Applying *Humana*’s preemption standard, the Court of Appeals for the Fifth Circuit declared that the MFA did not preempt the application of the federal

608. 15 U.S.C. § 1012(b) (2000) (emphasis added); see *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995). “The McCarran-Ferguson Act is a form of inverse preemption, so principles defining when state remedies conflict (and so are preempted by) federal law are pertinent in deciding when federal rules ‘invalidate, impair, or supersede’ state rules.” *Cisneros*, 52 F.3d at 1363.

609. *Humana Inc. v. Forsyth*, 525 U.S. 299, 309-10 (1999).

610. *Id.* at 309.

The Court rejects the *Humana* petitioners’ suggestion that the word “impair,” in the McCarran-Ferguson Act context, signals Congress’ intent to cede the field of insurance regulation to the States, saving only instances in which Congress expressly orders otherwise. If Congress had meant generally to preempt the field for the States, Congress could have said either that “no federal statute [that does not say so explicitly] shall be construed to *apply* to the business of insurance” or that federal legislation generally . . . would be “applicable to the business of insurance [only] to the extent that such business is not regulated by state law.”

Id. at 300 (alteration in original) (citations omitted).

611. *Dehoyos*, 345 F.3d at 294 (citing *Humana*, 525 U.S. at 300).

612. *Id.* at 295 n.3 (citing *Humana*, 525 U.S. at 307, 310).

613. *Id.* at 294-95 (citing *Humana*, 525 U.S. at 307, 310); *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 708 (5th Cir. 2002) (declaring that the test under McCarran-Ferguson is not whether a state has enacted statutes regulating the business of insurance, but whether such state statutes will be invalidated, impaired, or superseded by the application of federal law, and concluding that MFA preemption would not be found merely because a state has a mechanism in place for regulating insurance contracts).

civil-rights statutes.⁶¹⁴ The appellate court found that the federal antidiscrimination laws did not interfere with Florida's and Texas's insurance statutes and regulations or with those states' ability to regulate the business of insurance.⁶¹⁵

But Justice Edith Jones dissented and argued that

[T]his nationwide class action challenging insurers' use of credit scoring in the pricing of automobile and home owners' policies [cannot] proceed intact under the McCarran-Ferguson Act. The allegations of intentional race discrimination under 42 U.S.C. §§ 1981 and 1982 do not appear to be preempted, but they are a diversion. Plaintiffs' principal attack is under the Fair Housing Act against the alleged disparate impact of a facially-neutral component of insurance pricing decisions.⁶¹⁶

The majority in *Dehoyos* cavalierly dismissed Justice Jones's "diversion" argument in a two-sentence footnote.⁶¹⁷

From this commentator's perspective, the majority's refusal to address the dissenting justice's concern was highly unwarranted. For sure, Justice Jones raised a valid issue, even though the outcome in the case would have remained the same. But here we will address that issue. Associate Justice Jones wrote the following: "[t]he majority, in my view, fails to recognize that a [disparate- impact] claim goes to the heart of the risk adjustment that underlies the insurance business. . . . 'Risk discrimination is not race discrimination.' Every insurer sets its prices according to the risk embodied in covering particular categories of customers."⁶¹⁸ More specifically, Justice Jones stated:

what I take issue with here is the claim founded upon the allegedly disparate impact of credit history, a facially neutral risk classification factor, utilized within a complex state regulatory scheme. The circumstances under which

614. *Dehoyos*, 345 F.3d at 299.

615. *Id.* at 298-99.

Appellants argue that the application of the [civil-rights] statutes at issue here would frustrate Texas and Florida state insurance policy by frustrating the ability of those states to regulate insurance pricing policies. . . . Obviously this assertion is not nearly enough to withstand [a] *Humana* scrutiny. Appellants cannot demonstrate that the federal law in question frustrates a policy associated with the regulation of insurance pricing without identifying an actual policy.

Id.

616. *Id.* at 300 n.1 (Jones, J., dissenting). "In this court, §§ 1981 and 1982 have been confined to cases involving intentional racial discrimination, not [disparate-impact] claims." *Id.* (Jones, J., dissenting) (citing *Arguello v. Conoco, Inc.*, 207 F.3d 803, 809 n.9 (5th Cir. 2000); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1385 (5th Cir. 1986)).

617. *Id.* at 294 n.1 ("The dissent invites us to label Appellees' claims under §§ 1981 and 1982 a diversion and to comment on the merits of those claims. We decline to go beyond the preliminary questions presented by this interlocutory appeal.")

618. *Dehoyos*, 345 F.3d at 300-01 (Jones, J., dissenting) (citing *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 290 (7th Cir. 1992)).

[Congress enacted] the McCarran-Ferguson Act . . . further underscore the majority's error in holding that [disparate-impact] claims under the Fair Housing Act are not preempted.⁶¹⁹

But it appears that the dissenting justice overlooked, dismissed, or minimized the fundamental question: whether allowing disgruntled insureds to commence private causes of action against insurers—for allegedly practicing disparate-impact, racial discrimination under federal or under “substantially equivalent”⁶²⁰ state fair-housing laws—seriously invalidates, impairs, or supercedes *a state's ability* to regulate the business of insurance.⁶²¹ Without doubt, the answer to this question is a resounding no.

Even Florida's and Texas's insurance codes prohibit insurance companies from practicing disparate-impact discrimination on the basis of race or ethnicity.⁶²² In those states, allegedly aggrieved racial minorities may commence private causes of action against insurers to secure various remedies in a court of law.⁶²³ Clearly, those suits have not impaired Texas's and

619. *Id.* at 303 (Jones, J., dissenting).

620. See Willy E. Rice, *Judicial Enforcement of Fair Housing Laws: An Analysis of Some Unexamined Problems that the Fair Housing Amendments Act of 1983 Would Eliminate*, 27 *How. L. J.* 227, 235 (1983) (reporting that “[a]s of 1979, [the Department of Housing and Urban Development] recognized only twenty-two states that provided rights and remedies ‘substantially equivalent’ to those provided under Title VIII [of the Fair Housing Act of 1968]”); *United Farm Bureau Mut. Ins. Co. v. Metro. Human Relations Comm'n*, 24 F.3d 1008, 1011 n.3 (9th Cir. 1993).

Metro is a “certified” agency, which means that HUD has determined that the Fort Wayne General Ordinance under which Metro operates is “substantially equivalent” to the federal Fair Housing Act. . . . For an agency to be certified, the Secretary of HUD must determine that the substantive rights protected by the local agency, the procedures followed by the local agency, the remedies available to the local agency, and the availability of judicial review of local agency actions, are “substantially equivalent” to those created by the federal Fair Housing Act.

Metro. Human Relations Comm'n, 24 F.3d at 1011 n.3; 42 U.S.C. § 3610(f)(3)(A) (1988).

621. See *Dehoyos*, 345 F.3d at 300-03 (Jones, J., dissenting).

622. See FLA. STAT. ch. 627.917(1) (2003).

The commission shall establish and promulgate a uniform statewide reporting system to classify risks for the purpose of evaluating rates and premiums and for the purpose of evaluating competition and the availability of motor vehicle insurance in the voluntary market. The system shall divide risks into classifications based upon variations in hazards or expenses of claims. The classification system may include any difference among risks that can be demonstrated to have a probable effect upon losses or expenses, but in no event shall the system adopted by the commission discriminate among risks based upon race, creed, color, or national origin. The classification system shall divide the state into geographical areas based upon hazards or expenses of claims.

Id.; FLA. STAT. ANN. § 760.25(1) (West 2004).

“It is unlawful for any . . . insurance company . . . the business of which consists in whole or in part of the making of commercial real estate loans to deny . . . other financial assistance . . . to discriminate against him or her in the fixing of the amount, interest rate, duration, or other term or condition of such loan or other financial assistance, because of the race, color, national origin, sex, handicap, familial status, or religion of such person. . . . activists.

Id.

623. See, e.g., *Crown Life Ins. Co. v. Garcia*, 424 So. 2d 893, 895 (Fla. Dist. Ct. App. 1982) (permitting a private action against the insurer for practicing disparate-impact discrimination on the basis of disability); *Cortez v. Progressive County Mut. Ins. Co.*, 61 S.W.3d 68, 71 (Tex. App.—Austin 2001, pet. granted) (permitting a private action against the insurer for practicing disparate-impact discrimination

Florida's insurance commissioners' abilities to regulate the business of insurance.⁶²⁴ Furthermore, the majority in *Dehoyos* correctly and appropriately observed "[e]very circuit that has considered the question has determined that federal anti-discrimination laws may be applied in an insurance context, even where the state insurance agencies have mechanisms in place to regulate discriminatory practices."⁶²⁵

V. THIRD-PARTY INSURANCE CONTRACTS: STATE COMMON-LAW CLAIMS & DECISIONS

A. Third-Party Liability Claims: Injury to Persons

1. Injury to Persons: Whether Under Louisiana's Equitable-Subrogation Law a Lessee's Excess Liability Insurer May Recover Funds from a Lessor-Owner that the Insurer Paid to Settle a Third-Party Personal Claim Originating on the Lessor's Commercial Property

Westchester Fire Ins. v. Haspel-Kansas Investment (Haspel) presents another equitable-subrogation conflict originating in Louisiana.⁶²⁶ But unlike the subrogation controversies appearing in *Arana II* and *Woodward*, the disagreement in *Haspel* involves a third-party liability insurance contract.⁶²⁷ Also, in the present case, a third-party victim rather than the insured sustained

on the basis of race).

624. See *Cortez*, 61 S.W.3d at 71; *Garcia*, 424 S.W.2d at 895.

625. *Dehoyos*, 345 F.3d at 295 ("Specifically, the Eleventh, Seventh, Fourth, Sixth, and Ninth Circuits . . . have determined that the [McCarran-Ferguson Act] does not prevent the application of federal anti-discrimination laws to the insurance industry."); see *Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1222-23 (11th Cir. 2001) (concluding that the insurer's argument fails "[a]bsent more convincing evidence that racial discrimination in the insurance context is an integral part of Alabama's regulatory scheme [and refusing to] conclude that Alabama intended to condone racial discrimination in its scheme of insurance regulation"); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995) (concluding "that the presence of additional remedies in the Fair Housing Act does not cause the Act to invalidate, impair or supersede Ohio insurance law [and holding] that the McCarran-Ferguson Act does not preclude HUD's interpretation of the Fair Housing Act"); *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1491-92 (9th Cir. 1995) (following *American Family* and holding that federal regulation that provides additional remedies to those provided under state insurance plan does not violate the McCarran-Ferguson Act); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 27 (7th Cir. 1992) (finding that the McCarran-Ferguson Act's reverse preemption rule did not bar a disparate-impact discrimination action against an insurer under the Fair Housing Act of 1968); *Mackey v. Nationwide Ins.*, 724 F.2d 419, 421 (4th Cir. 1984) (concluding that applying the Fair Housing Act in insurance context would not impair or supersede any state law, although North Carolina forbids discriminatory rates in the insurance business).

626. *Westchester Fire Ins. v. Haspel-Kansas Inv.*, 342 F.3d 416 (5th Cir. Aug. 2003).

627. Compare *id.* at 421-22, with *Arana v. Ochsner Health Plan*, 332 F.3d 973, 976 (5th Cir. June 2003) (involving a dispute over whether the first-party carrier had a contractual right to subrogate), and *New Orleans Assets, L.L.C. v. Woodward*, 363 F.3d 372, 374 (5th Cir. Mar. 2004) (involving action to recover unpaid damages from a first-party insurer).

personal injuries and compensation for those injuries.⁶²⁸ More important, the reported facts about the underlying third-party case in *Haspel* are fairly extensive and quite dramatic.⁶²⁹ But material facts about the conflict between the major adversaries are absent, which makes the Fifth Circuit's analysis extremely superficial and its conclusion highly suspect.⁶³⁰

Here is a synopsis of the underlying facts. Haspel-Kansas Investments owns a small shopping center in New Orleans.⁶³¹ K&B Drug Stores (K&B) leases space from Haspel-Kansas.⁶³² Significantly, K&B was the only store in the shopping center that operated twenty-four hours a day.⁶³³ In addition, the patrons of three nearby nightclubs parked in the shopping center's parking lot.⁶³⁴ This created a problem for K&B.⁶³⁵ Therefore, a K&B representative wrote letters to Haspel-Kansas, reporting various problems associated with the nightclubs' patrons' parking and congregating in the parking lot.⁶³⁶

In fact, K&B repeatedly asked Haspel-Kansas to correct the problems and provide better security.⁶³⁷ Haspel-Kansas refused.⁶³⁸ K&B then hired off-duty New Orleans police officers to provide security inside and outside of the store.⁶³⁹ On one fateful evening, an assailant shot and severely injured Jermol Stinson in the shopping center's parking lot, in the vicinity of K&B Drug Store.⁶⁴⁰ The culprit shot Stinson in the neck and Stinson became paralyzed.⁶⁴¹ When the shooting occurred, a uniformed police officer—working as security for K&B—was in the very vicinity of the assailant.⁶⁴² Initially, Stinson filed a third-party negligence suit against K&B in a Louisiana court.⁶⁴³ Right away, K&B filed an action against Haspel-Kansas, demanding that the landlord contribute to the defense of, and make reimbursements for, any out-of-pocket expenses associated with the third-party lawsuit.⁶⁴⁴ Later, Stinson added Haspel-Kansas as a defendant.⁶⁴⁵

Ultimately, K&B and Haspel-Kansas agreed to mount a joint defense against Stinson's lawsuit (Demand Agreement).⁶⁴⁶ As consideration for that

628. *Westchester Fire Ins.*, 342 F.3d at 418.

629. *Id.*

630. *See id.*

631. *Id.*

632. *Id.*

633. *Id.*

634. *Id.*

635. *Id.*

636. *Id.* ("The problems cited ranged from vandalism and car theft, to reports of gunfire in the vicinity of the store.")

637. *Id.*

638. *Id.*

639. *Id.*

640. *Id.*

641. *Id.*

642. *Id.*

643. *Id.*

644. *Id.*

645. *Id.*

646. *Id.*

agreement, K&B dismissed its earlier demand for contribution from Haspel-Kansas.⁶⁴⁷ Under the Demand Agreement, the parties agreed that K&B would not relinquish its right to sue for indemnity or contribution in a later suit if Stinson prevailed.⁶⁴⁸ Unexpectedly, Stinson dismissed his claims against Haspel-Kansas with prejudice and settled his claims against K&B for two million dollars.⁶⁴⁹ Travelers Insurance Company and Westchester Fire Insurance Company insured K&B under a primary and an excess liability insurance contract, respectively.⁶⁵⁰ Westchester, K&B's excess insurer, paid one-million dollars of that settlement.⁶⁵¹

In a separate proceeding, Westchester Fire Insurance Company sued Haspel-Kansas in the United States District Court for the Eastern District of Louisiana.⁶⁵² The complaint listed several theories of recovery. First, Westchester filed an equitable action for contribution.⁶⁵³ Westchester asserted that Haspel-Kansas was a joint tortfeasor when the Stinson incident occurred.⁶⁵⁴ Yet, the landlord did not contribute anything to help settle the lawsuit.⁶⁵⁵ Therefore, Westchester claimed that Haspel-Kansas had a duty to reimburse Westchester.⁶⁵⁶ After all, Westchester was K&B's subrogee under the excess-insurance contract, and the insurer had paid half of the settlement costs. Sadly, the reported facts do not disclose the amount of the requested reimbursement.⁶⁵⁷

Second, citing the doctrine of equitable subrogation again, as well as clauses in the lease agreement between K&B and Haspel-Kansas, Westchester sued the latter for a breach of warranty and for indemnity.⁶⁵⁸ Once more, the facts neither disclose nor discuss the type of warranty under the lease agreement.⁶⁵⁹ But it appears that Westchester accused Haspel-Kansas of breaching an express or an implied warranty to provide a secure and safe parking lot for its tenants.⁶⁶⁰ The indemnity clause in the lease agreement stated in pertinent part:

647. *Id.*

648. *Id.*

649. *Id.*

650. *Id.*

651. *Id.* Significantly, the opinion does not state whether K&B or K&B's primary insurer—Travelers—paid the additional \$1,000,000 to settle Stinson's third-party suit. *Id.*

652. *Id.*

653. *Id.*; see also *Honeycutt v. Whitten*, 95 So. 216 (La. 1923) (noting "that under the equitable doctrine of contribution among joint and [solitary] obligors a legal situation [arises] in which one of the [obligors] might, as a result of [a] conventional agreement, acquire[s] a claim against the other"); *Mecker v. Klemm*, 11 La. Ann. 104 (1856) (declaring that "liability for contribution to a general average loss . . . rests upon the broad and equitable doctrine that no one shall enrich himself at another's expense").

654. *Westchester Fire Ins.*, 342 F.3d at 418.

655. *Id.*

656. *Id.*

657. See *id.*

658. *Id.*

659. See *id.*

660. *Id.* at 421.

Lessor agrees to hold [Lessee] harmless . . . from any responsibility for injury to person . . . resulting from any occurrence in, on, or about the Shopping Center outside of the leased premises, including without limitation the sidewalks and parking areas, not due to the negligence of the [Lessee].⁶⁶¹

Following a bench trial, the district court entered a judgment in favor of the commercial landlord and dismissed the excess insurer's claims with prejudice.⁶⁶² The district court found that Westchester's action for contribution was baseless because neither party was liable for Stinson's damages.⁶⁶³ More specifically, the district court determined that Haspel-Kansas's conduct was not the cause-in-fact of Stinson's injuries.⁶⁶⁴ Additionally, the lower court ruled that Westchester could not collect under the indemnity clause in the lease agreement because the excess insurer voluntarily settled Stinson's negligence suit.⁶⁶⁵ Westchester timely appealed the district court's ruling.⁶⁶⁶

To repeat, *Haspel* presented the Fifth Circuit with yet another conflict involving the doctrine of equitable subrogation in Louisiana.⁶⁶⁷ But unlike *Arana II* and *Woodward*, the substantive question before the court of appeals in *Haspel* was not whether the excess insurer was a bona fide subrogee.⁶⁶⁸ Under the facts in this case, Westchester clearly had the right to "stand in its insured's shoes" and exercise any right against Haspel-Kansas that K&B could exercise. Instead, the broad question in *Haspel* was whether the excess insurer—as a subrogee—could prevail against its insured's landlord under the equitable doctrine of contribution.⁶⁶⁹

To help answer that question, the Fifth Circuit had to decide whether Haspel-Kansas—a joint-tortfeasor—committed an action that harmed Stinson for purpose of causation.⁶⁷⁰ Assuming that the landlord committed simple negligence, the court of appeals had to decide whether Haspel-Kansas's action or inaction was the cause-in-fact of the third party's injuries.⁶⁷¹ Examining Louisiana's law⁶⁷² and the testimony of the parties' expert witnesses during

661. *Id.*

662. *Id.* at 418.

663. *Id.* at 419.

664. *Id.* at 418.

665. *Id.* at 421.

666. *Id.* at 417.

667. *See id.*

668. *Id.*

669. *Id.* at 418.

670. *Id.*

671. *Id.* at 419.

672. *Id.* To impose liability for negligence under LA. CIV. CODE ANN. art. 2315, Louisiana courts perform a duty-risk analysis and require a plaintiff must prove that: (1) the defendant had a duty to conform his or her conduct to a specific standard of care; (2) the defendant failed to conform his or her conduct to the appropriate standard of care; (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries; (4) the defendant's substandard conduct was the legal cause of the plaintiff's injuries (the scope of protection element); and (5) defendant's breach produce actual damages. *Id.*

the bench trial,⁶⁷³ the Fifth Circuit embraced the district court's findings and conclusion.⁶⁷⁴ In particular, the appellate court held that even assuming K&B or Haspel-Kansas was negligent on that fateful night in New Orleans, neither one's conduct was the cause-in-fact of Stinson's injuries.⁶⁷⁵ Therefore, the Fifth Circuit declared that Westchester's claim for contribution from Haspel-Kansas was unfounded because neither party was liable for Stinson's damages.⁶⁷⁶

Embracing the district court's findings, the court of appeals also declared that Haspel-Kansas did not have to reimburse Westchester as the subrogee under K&B's lease agreement.⁶⁷⁷ According to the Fifth Circuit, K&B voluntarily chose to settle Stinson's negligence claim to avoid an uncertain outcome in a personal-injury jury trial; therefore, "K&B [could not] benefit from the indemnity clause."⁶⁷⁸ Finally, the court of appeals stressed that forcing the landlord to reimburse its tenant under the facts in this case "would lead to a perverse result[. A]n indemnitee would have the incentive to settle *even frivolous claims* in order to avoid the costs and risks associated with litigation, and then demand indemnity for the pay-out."⁶⁷⁹

To be very blunt, in *Haspel*, the analyses are exceedingly superficial and they ignore settled principles of law and public policy in Louisiana. But more important, the holding is unsound at best and perverse at worse. First, under its "cause-in-fact" analysis, the Fifth Circuit held that neither K&B nor Haspel-Kansas negligently caused Stinson's injuries.⁶⁸⁰ Therefore, neither party had to pay damages, although K&B and its excess insurer settled the case.⁶⁸¹ But under the appellate court's duty-to-indemnify analysis, it declared "[u]nder the indemnity provision, K&B is entitled to indemnity for any responsibility not due to its negligence. Although K&B did not admit liability as part of the settlement, it did unilaterally decide to settle a negligence suit, thereby creating K&B's 'responsibility' under the indemnity provision."⁶⁸²

673. *Id.* at 419-20.

During the bench trial both parties presented expert testimony regarding the effectiveness of additional parking lot security. . . . The district court found that the evidence showed that the shooting of Stinson was "an unplanned, irrational attack directed at [Stinson] personally in apparent retaliation for some perceived affront or exchange of words, or simply a most unfortunate encounter with [Stinson] as he was leaving the parking lot." The district court agreed with Haspel-Kansas that none of [its expert's recommended] security measures . . . would have deterred [the] shooting.

Id. (alteration in original) (citations omitted).

674. *Id.* at 421.

675. *Id.*

676. *Id.* at 420.

677. *Id.* at 422.

678. *Id.*

679. *Id.* (emphasis added).

680. *Id.* at 421.

681. *Id.*

682. *Id.*

Without doubt, this is nonsense and judge-made law. The appellate court cites no Louisiana cases or opinions to support this conclusion.⁶⁸³ Furthermore, an alleged tortfeasor's decision to unilaterally settle a third-party personal injury suit *out of court* is not *prima facie* evidence of the alleged tortfeasor's negligence or "responsibility." Even the Fifth Circuit correctly observed that Louisiana's law is exceedingly clear: The burden is on the plaintiff—in this case, Stinson—to *prove in court* that an alleged tortfeasor was negligent or responsible.⁶⁸⁴

Besides, the appellate court's negligence/responsibility and cause-in-fact analyses are truly diversionary, presumably to achieve a strained result. The conflict in *Haspel* centers on two alleged tortfeasors—a landlord and tenant—and the tenant's insurer-subrogee,⁶⁸⁵ the conflict involves the doctrine of contribution, which sounds in equity. The conflict does not involve a third-party victim's claim against two alleged tortfeasors and a subrogee, and it certainly does not involve a cause of action for negligence, which sounds in tort.⁶⁸⁶

Again, K&B and Westchester settled the claim, although the district court found that Haspel-Kansas was not negligent.⁶⁸⁷ Yet, the court of appeals declared that K&B and its insurer-subrogee must bear the entire burden under a theory of equitable contribution,⁶⁸⁸ even though undisputed evidence revealed that K&B tried repeatedly to get its landlord—Haspel-Kansas—to institute effective measures to reduce incidences like the Stinson affair.⁶⁸⁹ To repeat, the Fifth Circuit ruled against K&B and Westchester because K&B unilaterally decided to settle the third-party claim.⁶⁹⁰

But from this commentator's perspective, that justification is highly suspect. In fact, the Fifth Circuit could have reached the same conclusion more convincingly simply by citing the Louisiana Supreme Court's observation in *Taylor v. United States Fidelity & Guaranty Insurance Co.*: "Louisiana courts have long recognized that when a plaintiff settles with and releases one of several joint tortfeasors, he thereby deprives the remaining obligors of the right to contribution against the released obligor."⁶⁹¹

However, the settled principle appearing in *Taylor* does not apply to the present case.⁶⁹² Under the Demand Agreement between K&B and Haspel-

683. *Id.* at 421-22.

684. *Id.* at 419.

685. *Id.* at 418.

686. *Id.*

687. *Id.* at 421.

688. *Id.* at 422.

689. *Id.* at 418. "Prior to the shooting, a representative of K&B wrote letters to Haspel-Kansas to inform the landlord of problems. . . . K&B repeatedly requested assistance from Haspel-Kansas [to solve] the security problems. Haspel-Kansas [informed] K&B that [Haspel-Kansas was not] obligated to provide security for the parking lot." *Id.*

690. *See id.*

691. *Taylor v. United States Fid. & Guar. Ins. Co.*, 630 So. 2d 237, 239 (La. 1993).

692. *Westchester Fire Ins.*, 342 F.3d at 418.

Kansas, the parties agreed to commence a joint defense in the underlying third-party lawsuit.⁶⁹³ Once more, as consideration for that agreement, K&B agreed to dismiss its earlier demand for contribution from Haspel-Kansas. But there was a proviso under the demand agreement: If Stinson prevailed, the parties agreed that K&B could exert its legal right and sue Haspel-Kansas for indemnity or contribution in a later suit.⁶⁹⁴

Of course, Stinson prevailed by settling the case with K&B, after dismissing his claims with prejudice against Haspel-Kansas.⁶⁹⁵ In Louisiana, as in all jurisdictions, valid contracts are enforceable if the parties' intent is clear⁶⁹⁶ and sufficient consideration supports the agreement.⁶⁹⁷ Arguably, the legal counsel for a sophisticated client-partnership like Haspel-Kansas Investment understood *Taylor's* equitable-contribution doctrine and knew that a court would not force the commercial landlord to reimburse K&B or its insurer (Westchester) if the latter voluntarily settled the Stinson claim. Yet, Haspel-Kansas gave that right away under the Demand Agreement.⁶⁹⁸ Curiously, the Fifth Circuit wittingly or unwittingly failed to discuss this issue.

Finally, the Fifth Circuit stated that allowing one or several alleged tortfeasors—for instance, K&B and its insurer, Westchester—to take the initiative and settle a third-party personal-injury suit is unwarranted. Even worse, permitting a motivated party to secure a settlement is a perversion. From the court of appeals' perspective, the practice would cause the motivated tortfeasor to settle "frivolous claims in order to avoid the costs and risks associated with litigation."⁶⁹⁹ Of course, the Fifth Circuit does not define "frivolous."

More important, avoiding defense costs and minimizing various risks associated with a jury trial are extremely legitimate, intelligible, and economic reasons to encourage fair settlements between insureds and alleged victims and contribution among alleged joint tortfeasors. Furthermore, defendants and their insurers are better situated to determine whether such claims are frivolous or legitimate. To conclude, it would be helpful if the Fifth Circuit embraces and remembers the learned advice of one appellate court in Louisiana: "[C]ourts should encourage, not deter, [practices that may] settle

693. *Id.*

694. *Id.*

695. *See id.*

696. *See, e.g.,* First Nat'l Bank of Commerce v. City of New Orleans, 555 So. 2d 1345, 1348 (La. 1990) (reaffirming that courts will enforce contracts according to the true intent of the parties when the intent is clear and leads to no absurd consequences and provided that the agreement is not contrary to good morals or public policy).

697. *Cf. Becker & Assocs., Inc. v. Lou-Ark Equip. Rentals Co.*, 331 So. 2d 474, 476 (La. 1976) (citing Article 2462 of the LA. CIV. CODE ANN., which, in pertinent part, provides: "One may purchase the right, or option to accept or reject, within a stipulated time, an offer or promise to sell, after the purchase of such option, for any consideration therein stipulated. . . .").

698. *Westchester Fire Ins.*, 342 F.3d at 418.

699. *Id.*

any aspect of an action[.] [a view that comports] with the well established principle that compromise and settlement should be promoted and encouraged wherever possible."⁷⁰⁰

2. Injury to Persons: Whether Mississippi's "Volunteer Doctrine" Prevents an Insured's Excess Insurer from Receiving Contributions from a Primary Carrier After the Former Settled a Third-Party Suit, and Whether the Primary Insurer Is Liable for a Bad-Faith Refusal to Defend Its Insured Against a Third-Party Lawsuit

Although the facts in the underlying lawsuit are different, the adversaries and one of the substantive questions in *Genesis Insurance Co. v. Wausau Insurance Cos.*⁷⁰¹ are remarkably similar to those appearing in *Haspel*.⁷⁰² In *Genesis*, we find two insurers—a primary and an excess carrier—squabbling over whether the excess carrier should recover funds from the primary insurer under Mississippi's equitable doctrine of contribution.⁷⁰³ Yet, the Fifth Circuit's analysis in *Genesis* differs significantly from the appellate court's ruling in *Haspel*. Additionally, we find a different outcome even though Mississippi's and Louisiana's doctrines of contribution are remarkably similar.

To be fair, the court of appeals attempted to conduct a more intelligible and thorough analysis in *Genesis* than it did in *Haspel*. More astonishing and welcoming, the Fifth Circuit even addressed some of the major concerns that this commentator raised about its lackluster analysis in *Haspel*.⁷⁰⁴ Still, as discussed and explained below, the court of appeals's analysis of the remaining substantive question in *Genesis* is less than stellar.

Here are the relevant facts. The President Casino (President) is located in Biloxi, Mississippi.⁷⁰⁵ The casino owns shuttle buses to transport its guests

700. See *Ree Corp. v. Shaffer*, 246 So. 2d 313, 323 (La. Ct. App. 1971); *Rodriguez v. La. Tank, Inc.*, 657 So. 2d 1363, 1368 (La. Ct. App. 1995).

It is well settled that the law favors compromise and voluntary settlement of disputes out of court with the attendant saving of time and expense to both the litigants and the court. These same reasons compel favorable consideration of compromises of pending litigation. It is common knowledge that the institution of law suits frequently leads to compromise of the underlying dispute thus terminating the litigation. A compromise need not necessarily settle all differences between parties. Disputants frequently settle some of their differences and mutually consent to litigate remaining issues on which they cannot agree. To declare that all partial settlements that result in dismissal of a suit with prejudice necessarily preclude a subsequent action to pursue remaining rights, which are specifically reserved, would tend to discourage compromise.

Rodriguez, 657 So. 2d at 1368.

701. *Genesis Ins. Co. v. Wausau Ins. Cos.*, 343 F.3d 733, 734 (5th Cir. Aug. 2003).

702. Compare *id.* (dealing with an excess carrier trying to recover funds from the primary carrier), with *Westchester Fire Ins.*, 342 F.3d at 418 (dealing with a claim brought to recover portion of settlement paid as indemnity).

703. *Genesis*, 343 F.3d at 734.

704. *Id.* at 739-20 (discussing a business' choice to settle or defend itself in litigation).

705. *Id.* at 734.

and employs persons to drive the buses.⁷⁰⁶ Edith Baker was a guest at the President.⁷⁰⁷ After entering a crosswalk in front of the casino's entrance, a President employee drove one of the shuttle buses into Baker.⁷⁰⁸ The impact threw Baker at least fifteen feet.⁷⁰⁹ She "suffered a variety of injuries, including a fractured skull, broken ribs, . . . the permanent loss of smell and taste . . . [and] damage to her jaw."⁷¹⁰

At the time of the accident, Wausau Insurance Companies(Wausau)—the primary insurer—insured President under a business-automobile contract. The casino immediately reported the accident to Wausau, who sent an adjuster to investigate the mishap and submit a report.⁷¹¹ Five months later, the adjuster completed his investigation.⁷¹² By that time, the third-party victim had retained an attorney.⁷¹³ Neither Baker nor Wausau offered to settle the case.⁷¹⁴

Therefore, the case lingered until three days before the third anniversary of the accident.⁷¹⁵ At that time, Baker filed a personal-injury suit in a Mississippi circuit court.⁷¹⁶ The complaint alleged that President and its employee negligently operated the shuttle bus.⁷¹⁷ Later, the circuit court approved Baker's motion to amend her complaint to include a premises-liability claim.⁷¹⁸ According to Baker, President created a hazard by negligently placing a crosswalk in an inappropriate location and by failing to place warning signs and indicators near the crosswalk.⁷¹⁹

Wausau hired an attorney to defend President,⁷²⁰ but Wausau sent a reservation-of-rights letter⁷²¹ to President, stressing that Wausau was reserving

706. *Id.*

707. *Id.*

708. *Id.*

709. *Id.*

710. *Id.*

711. *Id.*

712. *Id.*

713. *Id.*

714. *Id.*

715. *Id.*

716. *Id.*

717. *Id.*

718. *Id.*

719. *Id.*

720. *Id.*

721. To review the contents of a fairly typical reservation-of-rights letter, see *Moeller v. American Guaranty & Liability Insurance Co.*, 707 So. 2d 1062, 1066 (Miss. 1996).

American Guaranty agreed to provide a defense under a reservation of rights . . . stating: . . . The purpose of this letter is to advise you that we will, at this time, proceed with the investigation, handling, and defense of this case with a full reservation of all of our rights. This is done with the distinct understanding that no action [that we take] on your behalf shall constitute either an admission of coverage under the policy or an acknowledgment of any responsibility to pay damages in any judgment against you. We further reserve the right to withdraw from the handling of this matter upon notification to you. . . . [T]he company does not waive any of the other policy provisions.

Moeller, 707 So. 2d at 1066.

its right to deny coverage regarding the premises liability claim.⁷²² President also notified Genesis Insurance Company (Genesis), President's comprehensive general liability (CGL) insurer.⁷²³ At that time, Genesis hired counsel.⁷²⁴ Eventually, the Mississippi circuit court set a trial date for the underlying lawsuit and denied all motions for a continuance.⁷²⁵ However, the personal-injury trial never occurred.⁷²⁶ Negotiations among the parties ensued, and shortly thereafter, they reached a \$400,000 settlement.⁷²⁷ Wausau agreed to pay Baker \$200,000; and, Genesis and President agreed to pay the third-party victim \$200,000—each paying \$100,000.⁷²⁸

Genesis filed a declaratory-judgment action in the United States District Court for the Southern District of Mississippi.⁷²⁹ The CGL insurer asked the federal district court to declare that Wausau's business-automobile policy covered all of Baker's personal-injury claims.⁷³⁰ Genesis argued that it was President's excess insurer; therefore, it was liable, if at all, only for an amount above the \$1,000,000 primary coverage under the Wausau policy.⁷³¹ Before the district court issued its declaration, Genesis and President filed a joint motion for summary judgment.⁷³²

In their motion, Genesis and President asserted that Wausau's policy unambiguously covered all claims in the underlying lawsuit.⁷³³ The motion also alleged that Wausau was estopped⁷³⁴ from denying coverage on the grounds that Wausau exclusively undertook the claim, handling it for nearly five years, without issuing a non-waiver notice or a reservation-of-rights letter.⁷³⁵ Furthermore, Genesis and President asserted that they agreed to contribute \$200,000 to help settle the underlying suit with the belief that each

722. *Genesis*, 343 F.3d at 735.

723. *Id.*

724. *Id.*

725. *Id.*

726. *Id.*

727. *Id.*

728. *Id.*

729. *Id.* at 734.

730. *Id.*

731. *Id.*

732. *Id.* at 735; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986) (declaring that after viewing the evidence in the light most favorable to the nonmoving party, summary judgment is appropriate when the record reflects that no genuine issue of any material fact exists); *Sulzer Carbomedics, Inc. v. Or. Cardio-Devices, Inc.*, 257 F.3d 449, 456 (5th Cir. 2001) (embracing the view that a "material fact is one that 'might affect the outcome of the suit under the governing law' and a 'dispute about a material fact is "genuine" . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

733. *Genesis*, 343 F.3d at 735.

734. *See Brown v. Progressive Gulf Ins. Co.*, 761 So. 2d 134, 136 (Miss. 2000) (reaffirming that "[t]he doctrine of equitable estoppel is based upon fundamental notions of justice and fair dealing" and before a court applies the doctrine, a party must establish: (1) that he changed his position after relying on another's conduct; and (2) that he has suffered a detriment after relying on another's conduct and after changing his position).

735. *Genesis*, 343 F.3d at 735.

party involved reserved a right to demand reimbursement from each other.⁷³⁶ Therefore, in light of Wausau's alleged "bad faith" breach of that agreement, President and Genesis asked the district court to award contractual and punitive damages.⁷³⁷

Wausau also moved for summary relief, maintaining that President and Genesis voluntarily offered to pay \$200,000 to help settle the Baker suit.⁷³⁸ Therefore, the primary insurer asked the district court to deny Genesis's and President's petition of declaratory relief under the doctrine of voluntary payment.⁷³⁹ The district court granted Wausau's motion for summary judgment.⁷⁴⁰ The Southern District of Mississippi applied the voluntary payment doctrine⁷⁴¹ and concluded that President and Genesis relinquished all claims against Wausau when they voluntarily contributed to the Baker settlement.⁷⁴² President and Genesis—the alleged excess insurer—appealed to the Court of Appeals for the Fifth Circuit.⁷⁴³

First, the Fifth Circuit had to decide whether the parties contractually agreed to litigate each party's proportionate responsibility after settling the Baker case.⁷⁴⁴ The district court concluded that the Baker settlement occurred "in lieu" of an agreement to determine the parties' respective obligations under their insurance contracts.⁷⁴⁵ However, the appellate court disagreed, finding that the district court improperly granted Wausau's motion for summary judgment.⁷⁴⁶

The Fifth Circuit held that President and Genesis raised a fact issue: "[W]hether Genesis's reservation of rights was indeed unilateral or whether [the three parties] had agreed . . . to preserve the coverage issue for resolution at a later date."⁷⁴⁷ The court of appeals correctly observed that under Mississippi's law, a finding that President, Wausau, and Genesis mutually agreed to litigate their respective liabilities—after settling the third-party

736. *Id.*

737. *Id.*

738. *Id.*

739. *Id.*

740. *Id.*

741. See *McDaniel Bros. Constr. Co. v. Burk-Hallman Co.*, 175 So. 2d 603, 605 (Miss. 1965).

[A] voluntary payment can not be recovered back, and a voluntary payment within the meaning of this rule is a payment made without compulsion, fraud, mistake of fact, or agreement to repay a demand which the payor does not owe, and which is not enforceable against him, instead of invoking the remedy or defense which the law affords against such demand.

Id.

742. *Genesis*, 343 F.3d at 735.

743. *Id.*

744. *Id.* at 736.

745. *Id.* ("The court premised its decision upon the legal rule that a payment under 'protest' or accompanied by a unilateral reservation of rights will not escape the application of the volunteer doctrine.") (citing *Rowe v. Union Cent. Life Ins. Co.*, 12 So. 2d 431, 433 (Miss. 1943); *Home v. Time Warner Operations, Inc.*, 119 F. Supp. 2d 624, 629 (S.D. Miss. 1999)).

746. *Id.* at 737-38, 741.

747. *Id.* at 737.

lawsuit—would preclude a court's application of the volunteer doctrine.⁷⁴⁸ Therefore, the appellate court fittingly remanded that issue to the district court for a trial.⁷⁴⁹

The Fifth Circuit also agreed to declare whether President and Genesis's combined \$200,000 contribution to help settle the underlying dispute was voluntary or involuntary.⁷⁵⁰ Among other assertions, Genesis and President claimed that Wausau created compelling circumstances, which forced them to contribute to the Baker settlement.⁷⁵¹ Specifically, they asserted that after Wausau decided not to cover Baker's premises-liability claims, the primary insurer waited less than two months before trial to inform President of that decision.⁷⁵² Consequently, Wausau's "bad faith" reduced President and Genesis's ability to mount an adequate defense and forced them to contribute to the settlement.⁷⁵³

Certainly, the district court disagreed; it held that Wausau's failure to give a timely notice of its decision was insufficient to change an otherwise voluntary payment into an involuntary contribution.⁷⁵⁴ The Fifth Circuit embraced the district court's conclusion, stating that "[n]ot all pressure for payment amounts to compulsion"⁷⁵⁵ and that "the law does not permit us to grant Genesis and President immunity from the volunteer doctrine on the grounds that their settlement payments were compelled."⁷⁵⁶

The court of appeals acknowledged that "Wausau's questionable conduct placed Genesis in an unenviable position."⁷⁵⁷ But the Fifth Circuit found that Genesis, in particular, had two arguably favorable options: (1) immediately contribute to the settlement, or (2) agree to send the Baker case to trial and, from that point, wait for a judgment.⁷⁵⁸ From the Fifth Circuit's perspective, the first option did not contain any adverse consequences for the excess insurer.⁷⁵⁹ If Genesis had decided not to contribute \$1,000,000 to settle the case, the excess insurer would have faced only a first-party lawsuit for failing to settle the case.⁷⁶⁰ Further, if Genesis had waited and allowed the second

748. *Id.*; see, e.g., *McDaniel Bros. Constr. Co. v. Burk-Hallman Co.*, 175 So. 2d 603, 605 (Miss. 1965); *Presley v. Am. Guarantee & Liab. Ins. Co.*, 116 So. 2d 410, 416 (Miss. 1959); *McLean v. Love*, 157 So. 361, 362 (Miss. 1934); see also *Genesis*, 343 F.3d at 736 ("Genesis contends that its reservation of rights letter, combined with Wausau's internal e-mails, indicate the presence of an agreement.").

749. *Genesis*, 343 F.3d at 737-38.

750. *Id.* at 738.

751. *Id.*

752. *Id.*

753. *Id.*

754. *Id.*

755. *Id.* at 739.

756. *Id.* at 740.

757. *Id.*

758. *Id.* at 739.

759. *Id.*

760. *Id.* ("[This option] lacks the sense of immediacy [which] often accompanie[s] . . . compelled payments. . . . It is well-established that it is not duress to institute or threaten to institute civil suits.") (citing *Glantz Contracting Co. v. Gen. Elec. Co.*, 379 So. 2d 912, 917-18 (Miss. 1980) (quoting *Mobile Telecomm. Tech. Corp. v. Aetna Cas. & Sur. Co.*, 962 F. Supp. 952, 955 (S.D. Miss. 1997))).

option to run its course, Genesis still would not have experienced any liability greater than its obligation under the CGL contract.⁷⁶¹

But from this commentator's point of view, the Fifth Circuit clearly minimized the risks and adverse consequences that Genesis would have confronted if the CGL insurer had decided not to settle Baker's third-party suit.⁷⁶² Obviously, Genesis knew that the Mississippi jury could have returned a verdict and judgment against President that greatly exceeded the policy limits under the CGL policy.⁷⁶³ After all, Baker's injuries were extensive, severe, and even life-threatening.⁷⁶⁴ Consequently, President would have been exposed to excess liability that either it or Genesis would have had to satisfy.⁷⁶⁵

So, Genesis took the more prudent and responsible course, and Mississippi's law required such conduct. The law is quite clear: An insured may sue an insurer for breaching the implied covenant of good faith and fair dealing and for a bad-faith refusal to settle a claim in a timely manner.⁷⁶⁶ In addition, the insured may request and receive punitive damages.⁷⁶⁷ More important, a disgruntled insured—who has been exposed needlessly to excess liability—may assign a bad-faith claim to the third-party victim.⁷⁶⁸ The assignee may also ask a jury to award punitive damages for the insurer's bad-faith refusal to settle in a timely manner.⁷⁶⁹

761. *Id.* at 739-40.

[T]he stakes, in the event that President and Genesis refused to participate in the settlement, were of an insufficiently dire magnitude to justify finding that their settlement contributions were compelled. . . . Surely, the prospect of paying a maximum, as estimated by President and Genesis, of \$1,000,000 between them after the jury returned its verdict . . . did not threaten to have such 'a disastrous effect to business' that . . . Genesis . . . felt compelled to contribute to the Baker settlement.

Id.

762. See generally, Willy E. Rice, *Judicial Bias, The Insurance Industry and Consumer Protection—An Empirical Analysis of State Supreme Courts' Breach-of-Contract, Bad-Faith, Covenant-of-Good-Faith and Excess-Judgment Decisions, 1900-1991*, 41 *CATH. U. L. REV.* 325, 332-46 (1992) (presenting a fairly thorough review of the bad-faith doctrine, excess liability and insureds and assignees' rights under liability insurance contracts).

763. *Genesis*, 343 F.3d at 739.

764. See *id.* at 734.

765. See *id.* at 739.

766. See, e.g., *Hartford Accident & Indem. Co. v. Foster*, 528 So. 2d 255, 265 (Miss.1988).

When a suit covered by a liability insurance policy is for a sum in excess of the policy limits, and an offer of settlement is made within the policy limits, the insurer has a fiduciary duty to look after the insured's interest at least to the same extent as its own, and also to make a knowledgeable, honest and intelligent evaluation of the claim commensurate with its ability to do so.

Id.

767. See, e.g., *id.* (stressing that an insurer's "[f]ailure to fulfill [its] fiduciary duty makes the liability carrier liable for all damages resulting from the refusal to settle, which in this case is the excess of the judgment").

768. See, e.g., *Kaplan v. Harco Nat. Ins. Co.*, 716 So. 2d 673, 677 (Miss. App. 1998) ("We conclude that bad faith claims are actions for the recovery of damages that under Mississippi statutes are assignable.").

769. See, e.g., *id.* at 681-82 (concluding that "as assignee of the claim of an insured, Kaplan may bring the same claim for punitive damages that the insured could have brought").

The Fifth Circuit acknowledged that “[t]he meaning of compulsion [under] the voluntary payment doctrine is not well-defined in Mississippi.”⁷⁷⁰ Yet, it found that conditions did not compel Genesis and President to settle involuntarily.⁷⁷¹ In light of Mississippi’s bad-faith law, that conclusion is obviously suspect.⁷⁷² Therefore, the court of appeals should have also remanded this “compulsion” issue to the district court for a trier of fact’s deliberation because this issue is so closely associated with Mississippi’s doctrine of volunteer payment.⁷⁷³

*3. Injury to Persons: Whether Under Texas’s Law, a
Subcontractor’s Commercial General Liability Insurer May Recover
One Half of the Amounts Paid to Settle a Personal-Injury Suit
that the Subcontractor’s Employee Commenced Against the
Subcontractor and Contractor*

American Indemnity Lloyds v. Travelers Property & Casualty Insurance Co. also presents a dispute between two insurers that were engaged in the business of insurance in Texas.⁷⁷⁴ Once more, we find a conflict over whether one or both insurers should pay to settle a third-party, personal-injury lawsuit.⁷⁷⁵ Truly, the central question in *American Indemnity* is not complicated or novel. In fact, the dispute involves the same substantive question appearing in *Haspel* and *Genesis*: whether an insurer may obtain relief under Texas’s, rather than Louisiana’s, doctrine of equitable contribution.⁷⁷⁶

In this case, however, the Fifth Circuit did not thoroughly research Texas’s law to find relevant cases. Instead, the court of appeals decided highly inappropriately to treat this controversy as an “*Erie-guess*” case.⁷⁷⁷

770. *Genesis*, 343 F.3d at 738.

There are only a handful of Mississippi state cases that discuss the voluntary payment doctrine at any length, and neither the parties nor our [sic] independent research have revealed any that have been decided within the past twenty years. There has been a trend toward expanding the range of situations that are considered compelling that Mississippi has not yet had the opportunity to pass upon. As in many other areas of the law, whether a payment was compelled or made voluntarily is a highly factual determination, and none of the Mississippi cases address the issue of compulsion issue [sic] apart from its particular factual context. Accordingly, we enlist the assistance of cases from other jurisdictions and the legal literature. . . .

Id. at 738-39 (citations omitted).

771. *See id.* at 738-40.

772. *See id.* at 741.

773. *Id.* at 738 (observing that an involuntary payment does not evolve from choice, that payments—which are legal obligations, accidents or mistakes—are inherently involuntary, and that payments made under compulsion are not voluntary, and therefore are not barred under the volunteer doctrine).

774. *Am. Indem. Lloyds v. Travelers Prop. & Cas. Ins. Co.*, 335 F.3d 429, 431 (5th Cir. June 2003).

775. *Id.*

776. *See id.* at 435-36.

777. *Id.* at 435. “[I]t is the duty of the federal court to determine as best it can, what the highest court of the state would decide.” *Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992).

Without a Texas case resolving the issue . . . , the [c]ourt is required to follow the rule which it

Consequently, in *American Indemnity*, the Fifth Circuit needlessly injected other jurisdictions' tangential rulings into its analysis, thereby clouding settled principles of law in Texas.

The pertinent facts in the underlying personal-injury lawsuit are as follows: Caddell Construction Company, Inc. (Caddell) is a general contractor.⁷⁷⁸ It secured a contract to construct a prison in Beaumont, Texas.⁷⁷⁹ Elite Masonry, Inc. (Elite) is a subcontractor, which provides masonry services.⁷⁸⁰ Caddell selected Elite to help construct the prison.⁷⁸¹ The Caddell-Elite subcontract in general and the indemnity provision in particular were extremely elaborate.⁷⁸² More important, under the terms of the indemnity clause, Elite assumed a heavier burden.⁷⁸³ Arguably, such generosity left the subcontractor more exposed to potential liabilities and undermined its ability to prevail in this case.

Specifically, the subcontractor agreed to hold Caddell harmless from "any and all [third-party] claims" — including attorney's fees — arising out of the work described in the subcontract.⁷⁸⁴ Elite also agreed "to defend all claims, suits, and actions" against Caddell, involving "any injury, death or damage" and to reimburse Caddell for "all expenses, including reasonable attorney fees."⁷⁸⁵ Finally, the Caddell-Elite subcontract required Elite to purchase various liability-insurance contracts before commencing work and to keep those policies current during the life of the subcontract.⁷⁸⁶

During the course of the construction, Elite hired Mariano Alas (Alas), who was severely injured while constructing the prison.⁷⁸⁷ Some months later, Alas — individually and on behalf of his minor children — sued Elite and Caddell, claiming that both were negligent and grossly negligent.⁷⁸⁸ When Alas's injury occurred and when he sued the contractor and subcontractor, American Indemnity Lloyds (American) insured Elite under a commercial

believes the Texas Supreme Court would adopt. In making this *Erie* "guess," the [c]ourt may consider all available legal sources, including Restatements of Law, treatises, law review commentaries, decisions from other jurisdictions whose doctrinal approach is substantially the same, and the "majority rule."

Tex. Employers Ins. Ass'n v. Underwriting Members of Lloyds, 836 F. Supp. 398, 406 (S.D. Tex. 1993) (citations omitted).

778. See *Am. Indem. Lloyds*, 335 F.3d at 431.

779. *Id.*

780. *Id.*

781. *Id.*

782. See *id.*

783. See *id.*

784. *Id.*

785. *Id.*

786. *Id.* During the life of the Caddell-Elite contract, Elite had to purchase and keep current a public-liability contract as well as an employer's liability or a workmen's compensation insurance contract. *Id.* The Caddell-Elite subcontract did not require Caddell to purchase or maintain any insurance. *Id.*

787. *Id.*

788. *Id.*

general liability (CGL) insurance policy.⁷⁸⁹ The policy limit in the American CGL policy was \$1,000,000.⁷⁹⁰

Additionally, the American CGL contract listed the general contractor—Caddell—as an “additional named insured.”⁷⁹¹ But during that period, Travelers Property & Casualty Insurance Company—the successor to Aetna Casualty & Surety Company—insured Caddell under a separate commercial general liability insurance policy.⁷⁹² The Travelers CGL contract also had a policy limit of \$1,000,000.⁷⁹³ Elite, however, was not listed as a named insured under the Travelers CGL policy.⁷⁹⁴ More significant, both American’s and Travelers’s CGL contracts contained identical “other insurance” clauses.⁷⁹⁵ As discussed more thoroughly below, these two clauses, plus the indemnity clause in the Caddell-Elite agreement, form the basis of this controversy.⁷⁹⁶

Initially, Caddell’s own CGL insurer—Travelers—defended the general contractor against Alas’s claims in the underlying lawsuit.⁷⁹⁷ Eventually, Travelers withdrew after American complied with Travelers’s demand and assumed the defense.⁷⁹⁸ Nearly four years after Alas’s accident, Alas nonsuited Elite, his employer; consequently, that left Caddell as the only defendant.⁷⁹⁹ Presumably, acting in good faith, American constantly reported its defense strategies and the status of the underlying lawsuit to Travelers.⁸⁰⁰ Ultimately and without Travelers’s participation, American settled the suit for \$625,000 and incurred \$230,164 in attorney’s fees.⁸⁰¹

But a few months after assuming Caddell’s defense, American reminded Travelers that both American and Travelers’s respective CGL policies

789. *Id.* at 432.

790. *Id.*

791. *Id.* There is no universal definition of “named insured,” because typically a policy will identify the person or persons who are insured. *See, e.g., W. Indem. Ins. Co. v. Am. Physicians Ins. Exch.*, 950 S.W.2d 185, 188-89 (Tex. App.—Austin 1997, no writ) (defining “additional insured” as a party protected under an insurance policy, but not named therein, and defining additional named insured as one specifically named in the policy subsequent to the policy’s issuance); *id.* at 187 (observing that the policy defined named insured as being “the Named Insured and any member, partner, officer, director, or shareholder thereof while acting within the scope of their duties in providing Medical Professional Services for the Named Insured”).

792. *Am. Indem. Lloyds*, 335 F.3d at 432 (“At some point after March 16, 1998, [Traveler Property & Casualty], pursuant to its purchase of some or all of Aetna Casualty lines of insurance, succeeded to all of Aetna rights and obligations under the Aetna policy.”).

793. *Id.*

794. *Id.*

795. *Id.*

796. *See id.* at 435.

797. *Id.* at 433.

798. *Id.*

799. *Id.* at 433-34. Among other assertions, the plaintiffs alleged in their Fifth Amended Original Petition that Caddell negligently supervised the work site, failed to monitor its contractors and subcontractors’ operations, and negligently hired, directed and maintained Elite as a subcontractor at the work site. *Id.* at 434 n.6.

800. *Id.* at 434.

801. *Id.*

provided “concurrent primary coverage” for Caddell’s defense against the third-party lawsuit.⁸⁰² At that time, American also informed Travelers that it retained the right to seek an equitable contribution from Travelers for “all amounts [American] has paid and will pay in defense and settlement of this claim.”⁸⁰³ Significantly, Travelers did not respond.⁸⁰⁴

After settling Alas’s lawsuit, American asked Travelers to reimburse half of the \$625,000 that American paid to settle the Alas suit and half of American’s attorney’s fees and costs incurred in connection with its defense of Caddell.⁸⁰⁵ Again, Travelers did not respond.⁸⁰⁶ Therefore, American filed a declaratory-judgment action in the United States District Court for the Southern District of Texas.⁸⁰⁷ In the diversity action, American asked the district court to declare that Travelers must reimburse American for one-half the sums spent to defend Caddell and to settle the Alas lawsuit.⁸⁰⁸ American also asked the district court to award a money judgment against Travelers to force the insurer to satisfy its debt.⁸⁰⁹

At a pretrial conference, the district court decided to allow the insurers to file motions for summary judgment after an initial discovery period.⁸¹⁰ The lower court also agreed to resolve the dispute on the basis of those motions, instead of performing a full-blown, declaratory-judgment hearing on the merits.⁸¹¹ American’s motion relied upon the “other insurance” clause in the respective insurance contracts.⁸¹² From American’s viewpoint, an identical other-insurance provision in Travelers’s CGL policy justified American’s receiving an equitable contribution from Travelers.⁸¹³

802. *Id.*

803. *Id.*

804. *Id.*

805. *Id.*

806. *Id.*

807. *Id.*

808. *Id.*

809. *Id.*

810. *Id.*

811. *Id.*

812. *Id.* In both American and Travelers’s CGL contracts, other identical insurance clauses appeared. *Id.* Both clauses stated in relevant part:

a. *Primary Insurance*

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

...

c. *Method of Sharing*

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer’s share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

Id. at 432 n.2 (emphasis added).

813. See *id.* at 434.

Travelers based its motion for summary judgment on the indemnity provision appearing in the Caddell-Elite subcontract.⁸¹⁴ Travelers argued that (1) there had been no adjudication or determination of fault in the underlying lawsuit either before or after the settlement; (2) as a practical matter, attempting to determine fault and proportionality in the declaratory-judgment hearing was impossible; and (3) the various contractors and insurers' relative liabilities or fault in the underlying case was not before the court because the parties settled the underlying lawsuit.⁸¹⁵

The district court found that the indemnity provision controlled,⁸¹⁶ therefore, it granted Travelers's motion for summary judgment.⁸¹⁷ American appealed to the Fifth Circuit Court of Appeals.⁸¹⁸ Before that judicial body, American cited the identical other-insurance clauses in both CGL contracts again and asserted that the district court's ruling was clearly erroneous.⁸¹⁹ American maintained that equity required Travelers to reimburse American for half of the funds used to settle and defend against the third-party suit.⁸²⁰

As mentioned earlier, the Fifth Circuit decided to make an *Erie*-guess of the legal principles that the court of appeals believed the Texas Supreme Court would employ to resolve the conflict in *American Indemnity*.⁸²¹ After all, even though both Travelers and American agreed that Texas's law controlled, neither cited any case directly on point that applied Texas's law.⁸²² Even more amazing and a bit disturbing, the Fifth Circuit reported that "[n]or has our independent research disclosed any such case."⁸²³ Therefore, the Fifth Circuit decided to apply the "majority rule," after consulting various treatises and reviewing "decisions from other jurisdictions."⁸²⁴

After spending an inordinate amount of time and precious judicial resources examining and writing about non-Texas cases, the Fifth Circuit cited itself and stated what appeared to be the general rule: An insurer that pays more than its fair share to settle a third-party claim may recover the excess payment from the other insurer if (1) both insurers insured the same person under two different liability insurance policies, (2) both liability contracts provided "primary coverage [for] the same insured," (3) both liability

814. *Id.*

815. *Id.*

816. *Id.* at 435 n.7 ("The district court ruled that the indemnity agreement was valid and enforceable according to its terms under Texas law, which is concededly applicable, and met all the requirements of the Texas express negligence and conspicuousness doctrines.").

817. *Id.* at 435.

818. *Id.*

819. *Id.*

820. *Id.*

821. *Id.*

822. *Id.*

823. *Id.*

824. *Id.* (quoting *Jackson v. John-Manville Sales Corp.*, 781 F.2d 394, 398 (5th Cir. 1986); *Tex. Employers Ins. Ass'n v. Underwriting Members of Lloyds*, 836 F. Supp. 398, 406 (S.D. Tex. 1993)).

contracts covered the same third-party claim, and (4) both policies contained “mutually consistent ‘other insurance’ provisions.”⁸²⁵

Also, citing an inferior federal district court case, the Fifth Circuit stated that this rule “appears to be the general rule in Texas.”⁸²⁶ Yet, in the very next sentence, the court of appeals wrote: “Under [Texas’s] law such recovery is not based on the theory that . . . separate policies create[d] a contract between the two insurance companies . . . , nor upon common law contribution, but rather upon conventional or equitable subrogation to the rights of the common insured against the nonpaying insurer.”⁸²⁷ But the conflict in *American Indemnity* concerns the doctrine of contribution; therefore, this allegedly general rule has no application in the present controversy.⁸²⁸

Recognizing that the general rule was indeed flaccid under the present facts, the Fifth Circuit observed that “an equally widely recognized exception” exists for cases in which (1) an indemnity agreement binds two insureds, (2) the insureds’ activities are covered under separate liability insurance contracts, and (3) the liability contracts contain identical other-insurance clauses.⁸²⁹ That exception states: “[A]n indemnity agreement between the insureds or a contract with an indemnification clause . . . may shift an entire loss to a particular insurer notwithstanding the existence of an ‘other insurance’ clause in its policy.”⁸³⁰

The Fifth Circuit then observed: “[T]he clear majority of jurisdictions recognizes the foregoing exception and gives controlling effect to the indemnity obligation of one insured to [another] insured [rather than to] ‘other insurance’ or similar clauses. . . . We believe Texas would follow this well recognized exception to the general rule.”⁸³¹ Therefore, citing the indemnity clause in the Caddell-Elite subcontract, the court of appeals declared that Travelers, Caddell’s CGL insurer, did not have to reimburse American Indemnity, the Elite’s CGL insurer.⁸³²

825. *Id.* (citing *Employers Cas. Co. v. Employers Commercial Union Ins. Co.*, 632 F.2d 1215, 1218 (5th Cir. 1980)).

826. *Id.* (citing *Tex. Employers Ins.*, 836 F. Supp. at 404 n.5).

827. *Id.* at 435-36.

828. *See id.* at 434.

829. *Id.* at 436.

830. *Id.* (quoting LEE, R. RUSS & THOMAS F. SEGALLA, 15 COUCH ON INSURANCE § 19:1 (3d ed. 1999)).

831. *Id.* The court discussed several cases from multiple jurisdictions that have embraced this exception. *Id.* at 436-41 (citing *Wal-Mart Stores Inc. v. RLI Ins. Co.*, 292 F.3d 583, 588-94 (8th Cir. 2002); *J. Walters Constr., Inc. v. Gilman Paper Co.*, 620 So. 2d 219 (Fla. Dist. Ct. App. 1993); *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 532 P.2d 97 (Cal. 1975); *Aetna Ins. Co. v. Fid. & Cas. Co.*, 483 F.2d 471 (5th Cir. 1973); *Chubb Ins. Co. v. Mid-Continent Cas. Co.*, 982 F. Supp. 435 (S.D. Miss. 1997); *Reliance Nat’l Indem. Co. v. Gen. Star Indem. Co.*, 85 Cal. Rptr. 2d 927 (Cal. Ct. App. 1999)).

832. *Id.* at 445 (declaring that “[t]he district court correctly granted summary judgment denying [American] any recovery from [Travelers]” and that the district court “is accordingly affirmed”).

To repeat a previous observation, however, the Fifth Circuit's elaborate analysis in *American Indemnity* was unnecessary and an inefficient use of very limited judicial resources. But more important, the appellate court's holding needlessly introduced confusion into Texas's law. To support these conclusions, consider the Supreme Court of Texas's analysis and rulings in *Traders & General Insurance Co. v. Hicks Rubber Co.*⁸³³ Indeed, *Traders & General* is "a case on point" because the facts and substantive question on appeal are extraordinarily similar to those appearing in *American Indemnity*.⁸³⁴

More specifically, in the early 1940s, Hicks Rubber Company was doing business in Waco, Texas.⁸³⁵ On one occasion, one of Hicks's employees unloaded tires from a truck allegedly negligently, throwing the tires from the truck—across the sidewalk adjacent to Hicks's warehouse—into a chute inside the warehouse.⁸³⁶ One of the tires struck Mrs. J. W. Harper as she was walking past the truck.⁸³⁷ She was injured severely and later sued Hicks.⁸³⁸

When the accident occurred, both Traders & General Insurance (Traders) and Employers Casualty Company (Employers) insured Hicks under two public-liability insurance contracts.⁸³⁹ Employers's policy covered third-party claims originating in Hicks's building and on the adjacent sidewalks; Traders's policy covered third-party injuries stemming from Hicks's operating its trucks and other automobiles.⁸⁴⁰ Both contracts required the insurers to defend Hicks in underlying lawsuits, to pay and settle claims, and to reimburse Hicks for out-of-pocket expenses in the event that Hicks settled a third-party claim.⁸⁴¹ But more important, Employers's and Traders's policies contained other insurance provisions.⁸⁴²

833. *Traders & Gen. Ins. Co. v. Hicks Rubber Co.*, 169 S.W.2d 142 (Tex. 1943).

834. *See id.* at 143-47; *Am. Indem. Lloyds*, 335 F.3d at 431-35.

835. *See Traders & Gen. Ins.*, 169 S.W.2d at 144.

836. *Id.*

837. *Id.*

838. *Id.* ("Mr. J. W. Harper, the husband of Mrs. J. W. Harper, filed [a suit against Hicks] in the District Court of McLennan County, Texas . . . [He sued] to recover damages resulting from [his wife's] personal injuries . . .").

839. *Id.*

840. *Id.*

841. *Id.*

Both [insurance contracts] purported to protect or indemnify Hicks against liability on any judgment against it for damages on account of bodily injuries to any one person, in the respective sums already shown. [The] policies bound the above-named insurance companies to pay on behalf of Hicks all sums which it should become obligated to pay, by reason of the liability imposed upon it for damages, because of bodily injuries at any one time sustained by any person, and arising out of the thing or event insured. Also, [the] policies obligated [the] insurance companies to defend any suits against Hicks, alleging such injury and seeking damages on account thereof, even though such suits should be groundless or fraudulent. [The] policies also obligated these insurance companies to pay all premiums on appeal bonds required in any such defended suit; to pay all costs taxed against Hicks in any such suits; to pay all expenses incurred by Hicks in connection with such suits . . .

Id.

842. *Id.* Employers's policy stated: "'If the Assured has other insurance covering a loss or expense covered hereby, the Company shall be liable only for the proportion of such loss or expense which the sum hereby insured bears to the whole amount of valid and collectible insurance.'" Additionally, Traders's

Given the manner in which Harper's injuries occurred, both liability contracts covered her claims.⁸⁴³ Initially, the various parties discussed settling the lawsuit; however, for various reasons, a settlement never occurred.⁸⁴⁴ Instead, the case went to trial, where a jury awarded Harper a \$10,000 judgment against Hicks.⁸⁴⁵ Ultimately, Traders and Employers satisfied Harper's judgment, but in the process Traders paid more than its two-thirds proportionate share.⁸⁴⁶ Therefore, Travelers sued Employers under the doctrine of equitable contribution to recoup the excess payment.⁸⁴⁷

To help decide this conflict, the Texas Supreme Court reviewed several settled principles regarding insurers' right to receive contribution from another or other insurers.⁸⁴⁸ First, the supreme court stated the general rule: "[I]f two or more insurers *bind themselves* to pay the entire loss insured against, and one insurer pays the whole loss, the [latter] has a right of action against [the] coinsurer, or coinsurers, for a ratable proportion of the amount paid. . . ."⁸⁴⁹ And the reason is not complicated. The insurer's satisfying a judgment against an insured has paid a debt for the other insurers which is "equally and concurrently due."⁸⁵⁰

There is, however, another general rule: "[I]f each of several insurers contracts to pay such proportion of [a] loss . . . , [neither insurer has a right of] contribution from the others, nor will the payment of the whole loss by any of

policy stated:

"If the Named Insured has other insurance against a loss covered by the policy, the Company, as respects the Named Insured, shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability expressed in the Declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss."

Id.

843. *Id.* at 144-45.

844. *Id.* at 145.

J. W. Harper offered to settle for \$3,000 and court costs. Employers wanted to settle at the amount offered, and so informed Traders and Hicks. . . . Traders refused the offer of settlement, and insisted on trying the case. Employers, [assuming that under the terms of the respective other insurance provisions, both] companies were liable in proportion to their maximum coverages, offered to pay to J. W. Harper one-third of the \$3,000, and also offered to pay one-third of all court costs then incurred. [Harper refused the latter offer.] Employers then [decided to stop defending Harper] in any way. . . .

. . . The only excuse for Employers' act in refusing to further defend was the failure or refusal of Traders and Hicks to settle as above detailed. There is no showing that Harper would have settled with one of these companies, his offer being to settle the entire suit.

Id.

845. *Id.* The court of appeals later affirmed this judgment. *Id.*

846. *Id.* at 147-48.

847. *See id.* at 148.

When Employers refused to further assist in the defense of the Harper suit, Traders shouldered the entire burden, including the appeals to the Court of Civil Appeals and to this court. In so doing it paid out more than two-thirds of the costs and expenses incurred. Traders sues Employers to make it pay its proportionate one-third of such costs and expenses.

Id.

848. *See id.*

849. *Id.* (emphasis added).

850. *Id.*

them discharge the liability of the others.”⁸⁵¹ The Texas Supreme Court embraced this latter rule because, under the facts mentioned above, “the contracts are several, and independent of each other.”⁸⁵²

In *Traders & General*, the Supreme Court of Texas found that both insurance contracts contained an *other*-insurance clause that required each insurer to pay a proportion of the loss or injuries in the underlying personal-injury suit.⁸⁵³ Therefore, the Texas Supreme Court applied the second general principle and decided against Traders.⁸⁵⁴ Without doubt, in *American Indemnity*, the Fifth Circuit should have considered these very principles instead of making a highly unwarranted *Erie* guess of what the Texas Supreme Court might rule and muddling settled principles of insurance law in Texas.

4. *Injury to Persons: Whether Under Texas’s Law a
Commercial Professional Liability Insurer Has a Duty to
Defend and Indemnify Its Insured Where the Insured’s Employee
– “A Nanny” – Murdered an Infant*

The dispute in *Northfield Insurance Co. v. Loving Home Care, Inc.* also concerns whether a liability insurer has a duty to defend insureds in Texas against a third-party lawsuit.⁸⁵⁵ Sheila and Ronnie Daniels (Daniels) owned and operated Loving Home Care, Inc. (LHC), which provided nannies for in-home childcare.⁸⁵⁶ LHC employed Celia Giral (Giral), and she worked as a nanny for William and Catherine Barrows (Barrows).⁸⁵⁷ On an eventful day in mid-October 1997, Giral was babysitting the Barrows’ daughter, Bianca.⁸⁵⁸ Unexpectedly, Bianca received deadly injuries; the next day, Bianca died at a hospital.⁸⁵⁹

The Harris County coroner determined that Bianca’s death was a homicide.⁸⁶⁰ The autopsy found that Bianca’s injuries included “multiple skull fractures, brain hemorrhages, and blood behind the eyes.”⁸⁶¹ The cause of death was “cranio-cerebral injuries due to blunt force trauma of the head.”⁸⁶² Less than a year after the child’s death, a jury convicted Giral of first-degree

851. *Id.*

852. *Id.* (emphasis added).

853. *Id.*

854. *Id.* at 148-49 (“This rule will preclude any recovery by Traders against Employers. Also, since these contracts are independent and several, Traders will not be liable to Employers for any negligence on the part of Traders in refusing to settle the Harper suit.”).

855. *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523 (5th Cir. Mar. 2004).

856. *Id.* at 525.

857. *Id.*

858. *Id.*

859. *Id.*

860. *Id.* at 525-26.

861. *Id.* at 526.

862. *Id.*

felonious injury to a child in a Texas state court.⁸⁶³ The court sent Giral to prison for seven years.⁸⁶⁴

The Barrows filed a personal-injury suit, naming LHC and the Daniels as two of several defendants.⁸⁶⁵ Significantly and curiously, the Barrows amended their complaint three times.⁸⁶⁶ The original complaint alleged that Giral was guilty of criminal conduct and that she intentionally injured Bianca.⁸⁶⁷ But the Barrows' third-amended petition stated the following: (1) The six-month service agreement between Cathy Barrows and LHC provided that \$377.00 per week would be paid by the Barrows for services; (2) Bianca was 3-1/2 months old when she died; and (3) Giral, a Class-A nanny, negligently dropped Bianca and/or negligently shook Bianca, thereby causing severe head injuries that proximately caused the infant's death.⁸⁶⁸

On the day of Bianca's death, Northfield Insurance Co. (Northfield) insured LHC under a two-part, liability-insurance contract—coverage for both commercial general liability (CGL) and commercial professional liability (CPL).⁸⁶⁹ Citing the duty-to-defend clause in the insurance contract, LHC and the Daniels—LHC's owners and operators—asked Northfield to defend them against the Barrows' underlying lawsuit.⁸⁷⁰ The Daniels and LHC also asked Northfield to indemnify LHC and its owners for any and all out-of-pocket expenditures associated with the third-party lawsuit.⁸⁷¹

Northfield commenced a legal defense under a reservation of rights.⁸⁷² But the insurer also filed a declaratory-judgment action in the United States District Court for the Southern District of Texas.⁸⁷³ There, Northfield petitioned the district court to declare that the insurer had no duty to defend and no duty to indemnify LHC and the Daniels.⁸⁷⁴ In its motion for summary judgment, Northfield argued that the CGL part of the policy applied because the "designated professional services exclusion" clause barred coverage for

863. *Id.*

864. *Id.*

865. *Id.*

866. *Id.*

867. *Id.* ("In the alternative, Plaintiffs would show that Giral was reckless and/or criminally negligent as defined [under the] Texas Penal Code Sec. 6.03.")

868. *Id.*

Giral [admitted] that she had accidentally [sic] dropped the infant, then shook [the infant] in an attempt to revive her. Giral therefore admitted conduct that failed to meet the standard of care of an ordinarily prudent person acting under the same or similar circumstances . . . [Giral's conduct constituted] negligence, and was the proximate cause of . . . Bianca's bodily injury and death.

Id.

869. *Id.* at 526-27.

870. *Id.* at 527.

871. *Id.*

872. *Id.*

873. *Id.*

874. *Id.*

damages stemming from “the rendering [of] or failure to render any professional service.”⁸⁷⁵

In addition, Northfield claimed that the CPL portion of the policy did not obligate it to defend LHC and the Daniels.⁸⁷⁶ Certainly, that part of the policy covered injuries and accidents, which occurred “because of a negligent act, error or omission in the rendering of or failure to render professional services.”⁸⁷⁷ However, the CPL excluded from coverage “criminal acts and physical/sexual abuse.”⁸⁷⁸ More specifically, the exclusion for physical/sexual abuse denied coverage for “any damages arising out of” the following occurrences:

1. The actual, alleged, or threatened physical abuse, sexual abuse or molestation by anyone.
2. The investigation, hiring, training, placement, supervision, or retention of anyone who engages or has engaged in physical abuse, sexual abuse or molestation. *This endorsement applies whether damages arise from an act or failure to act.*
3. The reporting of or failure to report to authorities any physical abuse, sexual abuse, or molestation.⁸⁷⁹

In due course, the district court granted Northfield’s motion for summary judgment, holding that the insurer had no duty to defend or indemnify the insureds under the CGL part of the contract.⁸⁸⁰ On the other hand, the district court found that the exclusions for criminal acts and physical/sexual abuse were not applicable.⁸⁸¹ Therefore, under the CPL section of the contract, Northfield had a duty to defend the insureds.⁸⁸² The district court dismissed the duty-to-indemnify issue without prejudice and entered a final declaratory

875. *Id.*

The district court initially granted Northfield’s motion for summary judgment in its entirety, ruling that the professional services exclusion applied [and therefore] preclude[d] coverage under both parts of the policy. LHC, the Daniels, and the Barrows then filed motions for reconsideration of the summary judgment, pointing out that the professional services exclusion only applied to the CGL part of the policy.

Id.

876. *Id.*

877. *Id.*

878. *Id.* (“The criminal acts exclusion stated that coverage would not apply to “[a]ny damages arising out of any dishonest, fraudulent, criminal or malicious act or omission of any insured or “employee.””).

879. *Id.* (emphasis added).

880. *Id.*

881. *Id.*

882. *Id.*

judgment.⁸⁸³ After Northfield made a timely appeal, the Barrows then cross-appealed.⁸⁸⁴

At the outset, the Court of Appeals for the Fifth Circuit correctly noted that, under Texas's law, the duty to defend is distinct from the duty to indemnify.⁸⁸⁵ Actually, "the duty to defend is broader than the duty to indemnify."⁸⁸⁶ In Texas, courts apply the "eight corners" or "complaint allegation rule."⁸⁸⁷ Put simply, the allegations in the third-party victim's pleadings coupled with the language in the liability insurance policy determine whether an insurer has a duty to defend.⁸⁸⁸ "If a petition does not allege facts within the scope of coverage, an insurer is not legally required to defend a suit against its insured."⁸⁸⁹ But Texas's courts "resolve all doubts regarding the duty to defend in favor of the duty."⁸⁹⁰

In addition, Texas's courts determine whether insurers have a duty to defend by examining the third-party complainant's latest amended pleading.⁸⁹¹ Furthermore, courts must focus their inquiry on the alleged facts as opposed to the asserted legal theories.⁸⁹² And if there is doubt over whether the third-party victim's allegations state a cause of action under the liability policy's coverage provision, courts resolve all doubt regarding the duty to defend in favor of the insured.⁸⁹³ Contrarily, if the third-party complaint only alleges excluded facts under the policy's exclusion clause, the liability insurer does not have a duty to defend.⁸⁹⁴

883. *Id.* ("The Barrows . . . filed a motion to amend the judgment, requesting the district court delete the phrase 'This is a final judgment' because the duty-to-indemnify issue was still before the court. The district court denied the motion and dismissed the duty-to-indemnify issue without prejudice.")

884. *Id.*

885. *Id.* at 527-28.

886. *Id.* at 528 (citing *Am. States Ins. Co. v. Bailey*, 133 F.3d 363, 368 (5th Cir. 1998)).

887. *Id.* (quoting *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002)).

888. *See id.* "[T]he duty to defend arises only when the facts alleged in the complaint, if taken as true, would potentially state a cause of action falling within the terms of the policy." *Id.* (citing *Canutillo Indep. Sch. Dist. v. Nat'l Union Fire Ins. Co.*, 99 F.3d 695, 701 (5th Cir. 1996)).

889. *Id.* (quoting *King*, 85 S.W.3d at 187).

890. *Id.* (quoting *King*, 85 S.W.3d at 187).

891. *Id.*; *see also Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 119 (5th Cir. 1983) (holding that "the duty to defend is determined by examining the latest . . . amended pleadings" upon which the insurer based its refusal to defend the action). Furthermore, the insured has the initial burden to show that the alleged facts in the third-party petition state a potential claim against him. *Northfield Ins.*, 363 F.3d at 528. To defeat the duty-to-defend claim, "the insurer bears the burden of showing that the plain language of a policy exclusion or limitation allows the insurer to avoid coverage of *all* claims, also within the confines of the eight corners rule." *Id.* (citations omitted).

892. *Northfield Ins.*, 363 F.3d at 528 (citing *St. Paul Fire & Marine Ins. Co. v. Green Tree Fin. Corp.-Tex.*, 249 F.3d 389, 392 (5th Cir. 2001)).

893. *Id.* (quoting *Nat'l Union Fire Ins. Co. v. Merchant's Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997)).

894. *Id.* (citing *Fid. & Guar. Ins. Underwriters, Inc. v. McManus*, 633 S.W.2d 787, 788 (Tex. 1982)). "[F]acts ascertained before [a] suit, developed in the process of litigation, or determined by the ultimate outcome of the suit do not affect the duty to defend." *Id.* (citing *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 829 (Tex. 1997)).

Once again, an insurer's duty to indemnify is a distinct and separate duty from the duty to defend.⁸⁹⁵ First, the duty to indemnify is not based on the allegations appearing in a third-party complaint.⁸⁹⁶ Second, although an insurer often litigates the duty-to-indemnify issue after an insured establishes that she is liable in the underlying third-party suit, an insurer can resolve the indemnity issue before the establishment of liability by proving that the policy does not cover the third-party claims case.⁸⁹⁷ But the general rule is clear: No duty to indemnify arises unless the underlying litigation establishes liability for damages, which the liability-insurance contract covers.⁸⁹⁸

After reviewing those principles, the Fifth Circuit addressed a preliminary question: whether Texas's law permits courts to consider extrinsic evidence and deviate from a strict application of the eight corners rule to resolve duty-to-defend controversies.⁸⁹⁹ To repeat, in the underlying third-party suit, the Barrows amended their petition three times to remove all allegations involving the nanny's intentional acts and criminal conviction.⁹⁰⁰ On appeal, Northfield called those numerous amendments "artful pleadings" to remove all reference to Giral's intentional conduct and influence the district court's duty-to-defend ruling.⁹⁰¹ From the insurer's viewpoint, the district court should have

made an exception and read the nanny's criminal and intentional conduct into the pleadings to help determine whether Northfield had a duty to defend.⁹⁰²

But the Fifth Circuit found that "[t]he Texas Supreme Court has never recognized any exception to the strict eight corners rule that would allow courts to examine extrinsic evidence when determining an insurer's duty to defend."⁹⁰³ Nevertheless, Texas's appellate courts, the Fifth Circuit, and particular federal district courts in the Fifth Circuit have recognized a narrow exception to the eight corners doctrine.⁹⁰⁴ But the court of appeals declared

895. *Id.* at 527-28.

896. *Id.* at 528-29; *see also, e.g.,* Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc., 106 S.W.3d 118, 125 (Tex. App.—Houston [1st Dist.] 2002, *pet. denied*) (declaring that "[f]acts, [rather than] allegations, determine an indemnitor's duty to indemnify").

897. *See* Farmers Tex. County Mut. Ins. Co. v. Griffin, 955 S.W.2d 81, 84 (Tex. 1997).

898. *See Northfield Ins.*, 363 F.3d at 529 (holding that the duty-to-indemnify question is only justiciable under Texas law after liability has been established in the underlying suit, unless "the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify" (quoting *Griffin*, 955 S.W.2d at 84)); Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co., 130 S.W.3d 181, 190 (Tex. App.—Houston [14th Dist.] 2003, *no pet. h.*); Collier v. Allstate County Mut. Ins. Co., 64 S.W.3d 54, 62 (Tex. App.—Fort Worth 2001, *no pet.*) (declaring that "the duty to indemnify only arises after an insured has been adjudicated, whether by judgment or settlement, to be legally responsible for damages in a lawsuit").

899. *Northfield Ins.*, 363 F.3d at 529.

900. *Id.* at 526.

901. *Id.*

902. *See id.* at 532-33.

903. *Id.* at 529 (citing *Landmark Chevrolet Corp. v. Universal Underwriters Ins. Co.*, 121 S.W.3d 886, 890 (Tex. App.—Houston [1st Dist.] 2003, *pet. filed*)).

904. *Id.* The Fifth Circuit stated:

that the district court's ruling was proper because no narrow exception applied in this case.⁹⁰⁵ Furthermore, after making yet another *Erie*-guess,⁹⁰⁶ the Fifth Circuit concluded: "[T]he current Texas Supreme Court would not recognize any exception to the strict eight corners rule."⁹⁰⁷

The central appellate question was whether the district court committed reversible error by declaring that Northfield had a duty to defend LHC and the Daniels in the underlying suit.⁹⁰⁸ On appeal, Northfield stressed more fervently that it had no duty to defend LHC and the Daniels because Bianca's injuries arose from Giral's criminal and abusive acts.⁹⁰⁹ According to

[C]ertain Texas appellate courts, this Court, and district courts in this Circuit have appeared to recognize a narrow exception [to the eight corners rule]. See, e.g., *W. Heritage Ins. Co. v. River Entm't*, 998 F.2d 311, 313 (5th Cir. 1993) ("However, when the petition does not contain sufficient facts to enable the court to determine if coverage exists, it is proper to look to extrinsic evidence in order to adequately address the issue."); *McLaren v. Imperial Cas. & Indem. Co.*, 767 F. Supp. 1364, 1374 (N.D. Tex. 1991), *aff'd*, 968 F.2d 17 (5th Cir. 1992) ("[T]here appears to be a more general rule that the true facts always can be used to establish non-existence of a defense obligation, no matter what the plaintiff might allege in her damage suit complaint."); *State Farm Fire & Cas. Co. v. Wade*, 827 S.W.2d 448, 452-53 (Tex. App.—Corpus Christi 1992, writ denied) (concluding that extrinsic evidence could be admitted in deciding the duty to defend when the facts alleged are insufficient to determine coverage and "when doing so does not question the truth or falsity of any facts alleged in the underlying petition"); *Gonzales v. Am. States Ins. Co.*, 628 S.W.2d 184, 187 (Tex. App.—Corpus Christi 1982, no writ) (holding that facts extrinsic to the petition relating only to coverage, not liability, may be considered to determine a duty to defend, where such evidence does not contradict any allegation in the petition); *Cook v. Ohio Cas. Ins. Co.*, 418 S.W.2d 712, 715-16 (Tex. Civ. App.—Texarkana 1967, no writ) ("[T]he [Texas] Supreme Court draws a distinction between cases in which the merit of the claim is the issue and those where the coverage of the insurance policy is in question. In the first instance the allegation of the petition controls, and in the second the known or ascertainable facts are to be allowed to prevail."); *Int'l Serv. Ins. Co. v. Boll*, 392 S.W.2d 158, 161 (Tex. Civ. App.—Houston [1st Dist.] 1965, writ ref'd n.r.e.) (considering extrinsic evidence of identity of driver of insured boat by stipulation to conclude no duty to defend or indemnify arose).

Id. at 529 & n.1; see also *Mid-Continent Cas. Co. v. Safe Tire Disposal Corp.*, 16 S.W.3d 418, 421 (Tex. App.—Waco 2000, pet. denied) (holding that an exception to the eight corners rule applies when the underlying suit's petition does not allege facts sufficient to determine if the duty to defend is invoked). *But see* *Tri-Coastal Contractors, Inc. v. Hartford Underwriters Ins. Co.*, 981 S.W.2d 861, 863 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (apparently declining to follow *State Farm Fire & Casualty Co. v. Wade*).

905. *Northfield Ins.*, 363 F.3d at 531.

906. See *supra* note 485 and accompanying text.

907. *Northfield Ins.*, 363 F.3d at 531.

[I]n the unlikely situation that the Texas Supreme Court were to recognize an exception to the strict eight corners rule, we conclude any exception would only apply in very limited circumstances: when it is initially impossible to discern whether coverage is potentially implicated *and* when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case.

Id.

908. *Id.* at 532.

909. *Id.* at 535.

Although Northfield makes arguments that stress the artful pleading by the Barrows to keep the criminal and intentional allegations out, the latest pronouncement on the eight corners rule

Northfield, if the district court had deviated from the strict application of the eight corners rule and considered the nanny's intentional acts, the district court would have found that the insurer had no duty to defend.⁹¹⁰ But that was extrinsic evidence.⁹¹¹ Consequently, the Fifth Circuit correctly embraced the district court's rulings and declared that Northfield had a duty to defend the Daniels and LHC.⁹¹²

5. Injury to Persons: Whether Under New York's Law a Liability Insurer Has a Duty to Defend and Indemnify Its Insured—a Russian Orthodox Church—in an Underlying Personal-Injury Suit Where the Insured's Monk-Priests Allegedly Molested a Minor in Texas

The facts in *American States Insurance Co. v. Synod of the Russian Orthodox Church Outside of Russia* are fairly brief, and the decision is extremely short.⁹¹³ However, like *Northfield*, the central question in *Russian Orthodox* concerns whether an insurer has a duty to defend and a duty to indemnify a church.⁹¹⁴ But in the present case, the Fifth Circuit outlined and applied New York's rather than Texas's law to resolve a controversy that originated in Texas.⁹¹⁵

These are the limited facts in the underlying lawsuit. The Synod of the Russian Orthodox Church Outside of Russia (Church) has a monastery in Blanco County, Texas.⁹¹⁶ Two priest-monks—Sam Greene and Jonathan Hitt—are affiliated with the monastery.⁹¹⁷ In August 2000, a minor accused Greene and Hitt of sexually molesting him on six occasions.⁹¹⁸ The minor

by the Texas Supreme Court . . . reemphasized the strictness of the rule. Once the Barrows alleged facts that stated a cause of action that potentially fell within the scope of CPL coverage, no matter what facts the previous versions of their petition alleged, the burden shifted to Northfield to show that the plain language of the policy exclusions when compared against the facts alleged in the underlying petition precluded coverage. Northfield did not meet this burden under the duty to defend[,] eight corners inquiry.

Id.

910. *Id.* at 532.

911. *Id.*

912. *Id.* at 537.

Here, the district court correctly looked to the strict eight corners rule to determine the duty to defend. It properly focused on the alleged facts in the Barrows' petition about Bianca and Giral's behavior toward her, not legal theories, and [concluded] that they should be construed in the insured's favor.

Id. at 534.

913. *Am. States Ins. Co. v. Synod of the Russian Orthodox Church Outside of Russ.*, 335 F.3d 493 (5th Cir. July 2003).

914. *Id.* at 495.

915. *Id.*

916. *Id.* at 494.

917. *Id.*

918. *Id.*

sued the Church.⁹¹⁹ When the alleged molestation occurred, American Economy Insurance Company and American States Insurance Company insured the Church under separate liabilities insurance contracts.⁹²⁰ Therefore, before the minor filed his lawsuit, the Church notified American Economy of the claim.⁹²¹

American Economy agreed to defend the Church against the claim, subject to a reservation of rights.⁹²² American Economy stressed in its reservation-of-rights letter that its insurance contract excluded from the standpoint of the insured an “expected or intended” occurrence.⁹²³ Additionally, American Economy suggested its contract might exclude the minor’s claim.⁹²⁴ After hearing the chilly news, the Church commenced a declaratory-judgment action in a Texas trial court.⁹²⁵ The Church asked the state court to declare that both American Economy and American States had a contractual duty to defend and indemnify the Church up to the policy limits of the respective insurance contracts.⁹²⁶

Later, the two insurers removed the declaratory-judgment action to the United States District Court for the Western District of Texas, where the Church moved for partial summary judgment, and the insurers moved for summary judgment.⁹²⁷ However, before the district court’s ruling, the Church dismissed American States as a defendant.⁹²⁸ The district court granted the Church’s motion for partial summary judgment, holding that “American Economy had a duty to defend and indemnify.”⁹²⁹ The district court denied American Economy’s motion.⁹³⁰

919. *Id.*

920. *Id.*

921. *Id.*

922. *Id.*

923. *Id.*

924. *Id.*

The questions of whether the alleged sexual assault was an “accident” and therefore an “occurrence” within the meaning of the policy, and whether it was excluded from coverage as an act “expected or intended from the standpoint of the insured” are both controlled by *Agoado*

....

In *Agoado*, the issue was whether the insurer was required to indemnify its insureds, the landlords of a building, against a claim brought by the estate of a tenant who had been murdered in the building by an unknown assailant. We held that the murder, though obviously intended from the murderer’s point of view, was an “accident . . .” [W]e said that: “in deciding whether a loss is the result of an accident, it must be determined, *from the point of view of the insured*, whether the loss was unexpected, unusual and unforeseen.”

RJC Realty Holding Corp. v. Republic Franklin Ins. Co., 808 N.E.2d 1263, 1265 (N.Y. 2004) (quoting *Agoado Realty Corp. v. United Intern. Ins. Co.*, 733 N.E.2d 213, 215 (N.Y. 2000)).

925. *Am. States*, 335 F.3d at 494.

926. *Id.*

927. *Id.*

928. *Id.*

929. *Id.* at 494-95.

930. *Id.* at 495.

Shortly thereafter, the Church and American Economy reached a settlement agreement, thereby effectively ending the litigation and quieting the duty-to-defend controversy.⁹³¹ But both parties reserved their rights to litigate whether the other party adhered to the terms of the settlement agreement.⁹³² Given the latter reservation of rights, the issue of whether American Economy had a duty to indemnify the Church remained very much alive.⁹³³ Even after the settlement, American Economy maintained that the district court's adverse duty-to-indemnify ruling was erroneous.⁹³⁴ From American Economy's perspective, the Church did not meet its burden of proof because the Church's summary-judgment evidence was insufficient.⁹³⁵ Therefore, American Economy appealed the district court's ruling.⁹³⁶

Before the Fifth Circuit, American Economy asserted that the district court failed to apply the correct standard for determining whether the insurer had a duty to indemnify the Church.⁹³⁷ The district court declared: American Economy had a duty to indemnify the Church after finding that the insurer had a duty to defend the Church.⁹³⁸ But American Economy argued that the district court erred by incorrectly assuming that a duty to indemnify and a duty to defend are inexorably linked.⁹³⁹ The parties agreed the Fifth Circuit should apply New York's law to resolve this conflict.⁹⁴⁰

Therefore, the Fifth Circuit reviewed *Servidone Construction Corp. v. Security Insurance Co. of Hartford*, the leading duty-to-indemnify case in New York.⁹⁴¹ In *Servidone*, the insured and insurer settled a claim after the trial court found the insurer liable for failing to defend the insured in an underlying lawsuit.⁹⁴² The New York Court of Appeals reversed the trial court's ruling.⁹⁴³ New York's highest court declared that lower courts must base a duty-to-indemnify ruling on an independent factual finding.⁹⁴⁴ More specifically, trial courts must determine whether an insured's liability falls within the coverage provision of the liability-insurance contract.⁹⁴⁵

931. *Id.*

932. *Id.*

933. *Id.*

934. *Id.*

935. *Id.*

936. *Id.*

937. *Id.*

938. *Id.*

939. *Id.*

940. *Id.*

941. *Id.* (citation omitted).

942. *Id.* (citation omitted).

943. *Id.* at 496 (citation omitted).

944. *Id.* (citation omitted).

945. *Id.* (citation omitted).

In *Servidone*, the New York Court of Appeals observed that the duty to defend and the duty to indemnify are not synonymous.⁹⁴⁶ Courts must determine the duty to defend by examining the allegations of the third-party pleadings.⁹⁴⁷ On the other hand, “an insurer’s breach of duty to defend does not create coverage [in New York], even in cases of negotiated settlements”⁹⁴⁸ Therefore, “there can be no duty to indemnify unless there is first a covered loss.”⁹⁴⁹ Citing the principles from *Servidone*, American Economy argued that the Church was required to prove actual liability before receiving reimbursements from an insurer.⁹⁵⁰ The Church countered, asserting that *Servidone* only requires an insured to prove a settled claim is a covered loss under a liability policy.⁹⁵¹

The Fifth Circuit, however, could not reach a sound and intelligible resolution of this conflict.⁹⁵² The appellate court was “unable to determine whether the settled claim was a covered loss under the policy;” and the district court should have clearly determined that issue.⁹⁵³ Therefore, the Fifth Circuit vacated the district court’s duty-to-indemnify summary judgment and remanded the case to the district court.⁹⁵⁴

B. Third-Party Liability Claims: Injury to Property

1. Injury to Property: Whether Under Louisiana’s Law a Co-Insurer Has a Duty to Indemnify a Primary Insurer that Spent Funds to Settle Environmental-Pollution Claims and Paid Clean-up Costs in an Underlying Third-Party Lawsuit

American International Specialty Lines Ins. Co. v. Canal Indemnity Co. also presents a dispute between two insurers that were engaged in the business of insurance in Louisiana.⁹⁵⁵ Again, the conflict involved whether one or both insurers should pay to settle a third-party lawsuit.⁹⁵⁶ Actually, the dispute

946. *Id.* (citation omitted).

947. *Id.* (citation omitted).

948. *Id.* (quoting *Servidone Constr. Corp. v. Sec. Ins. Co.*, 477 N.E.2d 441, 444 (N.Y. 1985)).

949. *Id.* (quoting *Servidone Constr.*, 477 N.E.2d at 444).

950. *Id.*

American Economy asserts that Judge Brown’s dissent in *W.R. Grace & Co. v. Continental Casualty Co.* supports this reading of *Servidone*. American Economy highlights Judge Brown’s emphasis on the following language from *Servidone*: “the duty to defend is measured against the *allegations of pleadings* but the duty to *pay* is determined by the *actual basis* for the insured’s liability to a third person.”

Id. (quoting *W.R. Grace & Co. v. Cont’l Cas. Co.*, 896 F.2d 865, 878 (5th Cir. 1990)).

951. *Id.*

952. *Id.* at 496-97.

953. *Id.*

954. *Id.* at 497.

955. *Am. Int’l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 257 (5th Cir. Dec. 2003).

956. *Id.*

involves the same substantive question that appears in *Haspel*, *Genesis*, and *American Indemnity*: whether an insurer may obtain relief under Louisiana's doctrine of equitable contribution.⁹⁵⁷

Furthermore, like the litigants in *Haspel*, the insurers in *American International* fought over whether an other insurance clause should determine the outcome of the conflict.⁹⁵⁸ But more important, embracing the methodology employed in *Haspel* to resolve a substantive question, the Fifth Circuit decided to treat *American International* as another *Erie*-guess case.⁹⁵⁹ For reasons appearing below, deciding to make yet another *Erie* guess rather than certifying this case to the Supreme Court of Louisiana was an error of judgment.

But first, a review of the pertinent and undisputed facts in the underlying case would be helpful. Among its various business activities, Travis Fixed Based Operation and Service Corporation (Travis) delivers petroleum products and fuels throughout the Southwest.⁹⁶⁰ In December 1998, one of Travis's employees fell asleep while driving a Travis truck in Comal County, Texas.⁹⁶¹ The truck flipped over, spilling hundreds of gallons of diesel fuel.⁹⁶² The accident caused extensive pollution and generated huge clean-up costs (Comal Claims).⁹⁶³

Six months later, while traveling through Bexar County, Texas, another Travis employee accidentally discharged diesel fuel, causing environmental pollution, property-injury claims, clean-up costs, and damages (Bexar Claims).⁹⁶⁴ When both accidents occurred, Canal Indemnity Company—the primary carrier—and American International Specialty Lines Insurance Company (AISLIC) insured Travis under a “Basic Automobile Liability” contract and a “Supplemental Environmental Automobile Liability” policy, respectively.⁹⁶⁵ Canal's primary policy had “a combined single limit of \$1,000,000,” and the AISLIC supplemental policy had “a per occurrence and aggregate limit of \$2,000,000 for any claims presented during the policy period.”⁹⁶⁶

Both the primary and supplemental liability-insurance contracts contained clauses that allegedly reduced or eliminated the respective insurers' liabilities if Travis was liable for third-party injuries, losses, or damages.⁹⁶⁷

957. *Id.*

958. *Id.*

959. *See id.*; *see also supra* note 485 and accompanying text (explaining the *Erie*-guess concept).

960. *See Am. Int'l*, 352 F.3d at 257 (discussing deliveries to Comal and Bexar Counties in Texas).

961. *Id.*

962. *Id.*

963. *Id.*

964. *Id.*

965. *Id.* at 257-58.

966. *Id.* at 258.

967. *See id.*

Although the clauses had different titles — “pro-rata” and “escape” — each was essentially an other-insurance provision.⁹⁶⁸

To illustrate the pro-rata coverage, Canal’s other-insurance provision stated:

Other Insurance: The insurance [in] this policy is *primary insurance*, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is *primary* and the insured has *other insurance which* [applies] to the loss on an excess or contingent basis, the amount of [Canal’s] liability under the policy shall *not* be reduced by the existence of such other insurance.

When both this insurance and other insurance apply *on the same basis*, whether primary, excess, or contingent, the company shall *not* be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below.⁹⁶⁹

On the other hand, the escape clause in AISLIC’s policy read: “Section II—EXCLUSIONS: This insurance does not apply to any of the following: . . . bodily injury, property damages, cleanup costs, or claims expenses covered by any other valid and collectible insurance.”⁹⁷⁰

Canal gave Travis \$23,058.54, as a reimbursement for cleaning up the diesel spill in Comal County.⁹⁷¹ In February 1999, Canal demanded that AISLIC contribute \$11,529.95 to help remove the pollution.⁹⁷² Unable to determine whether the company had a duty to help pay for the cleanup cost, an AISLIC adjuster sent a check to Canal for the entire amount of \$11,529.35.⁹⁷³ Travis later submitted the Bexar Claim to both AISLIC and Canal, just as it had done with the Comal Claim, requesting that both insurers pay for pollution-related clean up costs.⁹⁷⁴

By this time, AISLIC had a change of heart regarding whether it had a contractual duty to indemnify Travis even for the Comal payments.⁹⁷⁵

968. See *id.* The following are three categories that other insurance clauses will generally fall into: (1) pro-rata clauses, which apportion responsibility for coverage among the insurers, “usually either in proportion to their respective policy limits or in equal shares up to the limits of each policy”; (2) excess clauses, which provide excess coverage only after insurance proceeds have been exhausted under a primary policy; and (3) escape clauses, which release the insurer from all liability if the insured has other insurance coverage. *Id.* at 258 n.1 (citation omitted). Actually, under this latter category a policy’s coverage is contingent upon the insured’s having no coverage under any other insurance contract. *Id.* (citation omitted). Insurers generally design other insurance clauses to reduce an insured’s temptation to over insure property or inflict self injury when attempting to defraud insurance companies. *Id.* (quoting *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 206 (5th Cir. 1996)).

969. *Id.* at 258.

970. *Id.*

971. *Id.*

972. *Id.*

973. *Id.*

974. *Id.* at 259.

975. *Id.* at 258-59.

Therefore, after carefully reviewing the escape clause in its policy, a different adjuster concluded that AISLIC had no duty to indemnify Travis for using out-of-pocket dollars to clean up the Comal and Bexar County pollution sites.⁹⁷⁶ From the second adjuster's perspective, the escape clause in AISLIC's policy released the insurer from all liability when another liability-insurance contract covered Travis's losses.⁹⁷⁷

Accordingly, AISLIC rejected the Bexar Claim.⁹⁷⁸ In November 2000, AISLIC filed a declaratory-judgment action, in the United State District Court for the Eastern District of Louisiana, seeking a ruling that it had no duty to indemnify Travis for using out-of-pocket funds to remove the pollution from Bexar County.⁹⁷⁹ Later, AISLIC amended its complaint, seeking a reimbursement of the \$11,529.35 it paid to Canal as contribution for cleaning up the Comal County pollution site.⁹⁸⁰ AISLIC argued that Canal was the primary insurer and was totally responsible—up to its policy's limits—for reimbursing Travis for removal of the pollution from both sites.⁹⁸¹ AISLIC strongly argued its escape clause expressly excluded all claims covered under another insurance policy.⁹⁸²

Canal answered and asserted that according to Louisiana's law, other insurance clauses in respective liability policies are mutually repugnant.⁹⁸³ Consequently, courts must disregard such clauses and force insurers to pay a pro-rata share when it becomes obvious that insurers are liable for the same property loss under their respective policies.⁹⁸⁴ Granting AISLIC's motion for summary judgment, the district court concluded that (1) Canal had primary responsibility for covering the loss in Bexar County and was not entitled to contribution from AISLIC until Canal's policy limits were reached, and (2) AISLIC did not waive its right to contest its good-faith contribution of \$11,529.35 to help clean up the Comal County pollution.⁹⁸⁵ After a bench trial, the district court declared that AISLIC could not recoup the \$11,529.35, citing a Louisiana statute rather than Louisiana's common law.⁹⁸⁶ Both insurers appealed the district court's rulings.⁹⁸⁷

976. *Id.* at 259.

977. *Id.* "[AISLIC's adjuster] also obtained a copy of the Canal policy and determined that its pollution exclusion did not apply to sudden and accidental pollution occurrences [like] the Bexar County loss." *Id.*

978. *Id.*

979. *See id.*

980. *Id.*

981. *Id.*

982. *Id.*

983. *Id.*

984. *Id.*

985. *Id.*

986. *Id.*

987. *See id.*

Curiously, the Fifth Circuit Court of Appeals first concluded that it had to make an *Erie*-guess to decide these questions because “there is no Louisiana Civil Code provision or statute specifically directed at the prioritization of coverage responsibilities among co-insurers.”⁹⁸⁸ But after spending an extraordinary amount of time combing and discussing various Louisiana statutes, the appellate court correctly observed that Louisiana has adopted a blanket, judge-made rule: Co-insurers’ other insurance clauses are “mutually repugnant and . . . null,” requiring each carrier to pay a pro-rata share of a common insured’s loss once the loss is reported and a claim is filed.⁹⁸⁹

Therefore, applying Louisiana’s general rule of contract construction⁹⁹⁰ and the rule cited above, the Fifth Circuit adopted AISLIC’s position that Canal’s policy provided primary coverage even though the latter policy contained a pro-rata clause.⁹⁹¹ The court of appeals also declared that AISLIC had no duty to pay pollution-related damages if Canal’s contract covered those expenses.⁹⁹² Furthermore, the Fifth Circuit ruled AISLIC did not waive its right to challenge Canal’s claim that AISLIC had a duty to help clean up the Bexar County pollution, despite AISLIC’s good-faith contribution to help clean up the pollution in Comal County.⁹⁹³

Once more, declaring that it was “*Erie*-bound,” the Fifth Circuit began by reviewing the Louisiana Civil Code and Louisiana Supreme Court’s decisions to determine whether Canal had a duty to return the \$11,529.35 to AISLIC.⁹⁹⁴ The court of appeals eventually concluded that Canal had to return the money because “the Louisiana Supreme Court would agree with [the Fifth Circuit’s] interpretation of article 2299” of the Louisiana Civil Code.⁹⁹⁵ But the language in article 2299 is exceedingly clear and needs no interpretation: “A person who has received a payment or a thing not owed to him is bound to restore it to the person from whom he received it.”⁹⁹⁶

Moreover, the Louisiana Supreme Court recently decided *Gootee Construction, Inc. v. Amwest Surety Insurance Co.*, a case of first

988. *Id.* at 262.

989. *Id.* at 261-62.

990. *Id.* at 262. “[I]f ‘the policy wording . . . is clear and unambiguously expresses the parties’ intent, the insurance contract must be enforced as written.’” *Id.* (quoting *Cadwallader v. Allstate Ins. Co.*, 02-1637, p.4 (La. 6/27/03), 848 So. 2d 577, 580). “‘The rules of construction do not authorize a perversion of the words or the exercise of inventive powers to create an ambiguity where none exists or the making of a new contract when the terms express with sufficient clearness the parties’ intent.’” *Id.* (quoting *Cadwallader*, 02-1637 at p.3-4, 848 So. 2d at 580).

991. *Id.*

992. *Id.*

993. *Id.* at 271 (“[L]ike the district court, we reject the contention that AISLIC waived the right to rely on its ‘other insurance’ clause to contest liability for the Bexar County loss by having paid the prior Comal County claim.”).

994. *Id.* at 272-73.

995. *Id.* at 273.

996. *Id.* (quoting LA. CIV. CODE ANN. art. 2299 (West 1997)).

impression.⁹⁹⁷ In *Gootee*, the supreme court held that a party had a right to recoup funds it paid to satisfy an adverse ruling if a subsequent ruling reverses the original ruling.⁹⁹⁸ To reach that conclusion, the Louisiana Supreme Court cited and applied article 2299.⁹⁹⁹ Without doubt, the Fifth Circuit's painting its *Erie*-guess rulings in this case is quite bewildering. The Fifth Circuit even admitted that the Louisiana Supreme Court's ruling and the Louisiana Civil Code clearly have addressed the questions appearing in this diversity action.¹⁰⁰⁰ Therefore, the Fifth Circuit's perceived need to conduct inappropriate *Erie* guesses is somewhat problematic.

2. Injury to Property: Whether Under Louisiana's Law a Commercial Liability Insurer Must Indemnify Its Insured After the Insured Retained an Independent Attorney to Represent the Insured in an Underlying Property-Injury Lawsuit

Trinity Universal Insurance Co. v. Stevens Forestry Service, Inc. is also a duty-to-defend and duty-to-indemnify case that originated in Louisiana.¹⁰⁰¹ This case presents an extremely important insurance-defense question, one that occurs frequently among insurers and their insured.¹⁰⁰² But the Fifth Circuit reported very few facts.¹⁰⁰³ Even more critical, among the reported facts, the court of appeals cited a number of allegedly important dates.¹⁰⁰⁴ However, the sequence of those dates is confusing at best and completely erroneous at worst.¹⁰⁰⁵

More disquieting, the Fifth Circuit did not cite a single Louisiana case in its analysis.¹⁰⁰⁶ In fact, the appellate court only cited one case in the analysis.¹⁰⁰⁷ Yet, there is a large body of settled law that addresses the very question presented in *Trinity*.¹⁰⁰⁸ As discussed and established below, the

997. *Gootee Constr., Inc. v. Amwest Sur. Ins. Co.*, 856 So. 2d 1203 (La. 2003).

998. *Id.* at 1207.

999. *Id.* at 1205-06.

1000. *Am. Int'l*, 352 F.3d at 269.

We conclude that neither the Code articles governing contractual interpretation nor their interpretation by the Louisiana Supreme Court leaves any room for the approach advocated by Canal, which *ignores the clear legal precept under Louisiana law . . .* Canal asks that we disregard the policies' plain contractual language and effectively legislate mandatory pro rata clauses from the bench for insurance contracts containing "other insurance" provisions. We find . . . that request [greatly exceeding] any conceivable *bounds of our Erie-mandate*, and decline the invitation.

Id. (emphasis added).

1001. *Trinity Universal Ins. Co. v. Stevens Forestry Serv., Inc.*, 335 F.3d 353 (5th Cir. June 2003).

1002. *See id.* at 354-55.

1003. *Id.*

1004. *Id.*

1005. *See id.*

1006. *Id.* at 356. The court did distinguish two Louisiana appellate court decisions being relied upon by Stevens, the defendant, as not on point in this proceeding. *Id.* at 356 n.3.

1007. *Id.* at 356.

1008. *See infra* note 1037 and accompanying text.

Fifth Circuit's failure to carefully research and apply settled Louisiana principles seriously clouds one's understanding of, and substantially decreases one's esteem for, the appellate court's findings, analysis, and decision in *Trinity*.

To repeat, the facts in *Trinity* are extremely sparse.¹⁰⁰⁹ The defendant-consulting firm, Stevens Forestry Service (Stevens), bases its operations in Arkansas; but it has a registered agent in Louisiana.¹⁰¹⁰ Abe Mitchell is a landowner in Louisiana.¹⁰¹¹ Stevens managed Mitchell's timberland for a number of years.¹⁰¹² In March 1999, Mitchell's attorney wrote a letter to Stevens, accusing the forestry-consulting firm of mismanaging Mitchell's timberland.¹⁰¹³ At this time, Trinity Universal Insurance Company insured Stevens under a commercial-liability insurance contract.¹⁰¹⁴

But immediately after receiving the letter from Mitchell's attorney, Stevens hired attorney Michael Percy to help Stevens respond to the accusations and prepare to meet with Mitchell.¹⁰¹⁵ Evidently, the meeting between Stevens and Mitchell soured.¹⁰¹⁶ In September 1999, Mitchell insisted on \$1,120,634.70 in compensatory damages from Stevens.¹⁰¹⁷ At that point, Stevens notified Trinity, disclosed the conflict, and "tendered the claim to Trinity, its liability insurer."¹⁰¹⁸ The record does not disclose whether Stevens asked Trinity to defend the firm against Mitchell's accusations or to pay the alleged damages.¹⁰¹⁹

On October 20, 1999, Trinity mailed a reservation-of-rights letter to Stevens (1999 ROR Letter).¹⁰²⁰ In the letter, the liability insurer agreed to hire an insurance-defense lawyer and to start investigating Mitchell's complaint against Stevens.¹⁰²¹ On the other hand, Trinity expressly reserved its right "[to] deny coverage and to deny a defense [under] the policy's provisions."¹⁰²² Most curiously, Trinity's 1999 ROR Letter stated: "We have noted that you are represented by counsel in this matter. Because . . . the policy provisions [may limit or remove our duty to defend and/or indemnify], we encourage you

1009. See *Trinity Universal*, 335 F.3d at 354-55.

1010. *Id.* at 354.

1011. *Id.*

1012. *Id.*

1013. *Id.*

1014. *Id.*

1015. *Id.*

1016. *See id.*

1017. *Id.*

1018. *Id.*

1019. *Id.*

1020. *Id.*

1021. *Id.*

1022. *Id.*

to continue to employ [attorney Michael Percy to help you with] this claim."¹⁰²³

On October 22, 1999, Mitchell filed a suit against Stevens in a Louisiana state court, claiming that Stevens negligently mismanaged Mitchell's timberland.¹⁰²⁴ Very significantly, Mitchell commenced the underlying action just two days after Trinity wrote the 1999 ROR Letter.¹⁰²⁵ Later, the parties removed the case to the United States District Court for the Western District of Louisiana.¹⁰²⁶ Among the scanty reported facts, the Fifth Circuit inserted the following confusing sentence: "*Within three weeks [of October 22, 1999], on January 10, 2000, Trinity [sent a second reservation-of-rights letter to] Stevens, informing Stevens that it had received a copy of the [u]nderlying [a]ction.*"¹⁰²⁷

But there is a major problem: The actual date—within three weeks of October 22, 1999—would have been November 12, 1999. Assuming that the Fifth Circuit intended to write "within *three months of October 22, 1999*," the problem remains. The correct date would have been *January 22, 2000*. So we ask: When did Trinity write the second letter of reservation? As discussed below, securing the precise date of the second letter is quite important. In Trinity's second letter to Stevens, the insurer wrote:

Trinity will continue to investigate Mr. Mitchell's claims and will continue to provide Stevens with an attorney, at Trinity's *expense*. However, Trinity's continued investigation and defense is subject to the reservation of Trinity's right to deny coverage for Mr. Mitchell's claim and to withdraw from Stevens' defense. . . .

. . . [Y]ou may wish to continue to retain an attorney at Stevens' expense to protect the company's interest in this litigation.

. . . [Trinity] encourage[s] you to continue to employ counsel at Stevens' expense with regard to this claim. Mr. Caldwell Roberts, who has been appointed by Trinity to defend Stevens, will cooperate with your personal defense attorney and will continue to defend Stevens, but subject to the reservations of right discussed herein and in [the 1999 ROR Letter].¹⁰²⁸

On January 28, 2000, Trinity filed a declaratory-judgment action in the district court claiming that it had no duty to defend Stevens in the underlying suit.¹⁰²⁹ Trinity also claimed that it had no contractual duty to indemnify Stevens after Trinity encouraged the firm to spend out-of-pocket dollars to

1023. *Id.*

1024. *Id.*

1025. *Id.*

1026. *Id.* at 354 n.2.

1027. *Id.* at 354-55 (emphasis added).

1028. *Id.* at 355 (emphasis added).

1029. *Id.*

retain an independent attorney.¹⁰³⁰ Stevens filed a counteraction, asking the court to declare that Trinity had a duty to reimburse Stevens for spending \$105,000 to retain Michael Percy's legal services.¹⁰³¹

The district court failed to appreciate and apply a settled rule in Louisiana: "The duty to indemnify and the duty to defend clearly are separate and distinct duties."¹⁰³² Therefore, the district court declared that because Trinity had no duty to defend Stevens in the underlying, property injury suit, the insurer had no duty to indemnify Stevens for expenditures associated with that third-party suit.¹⁰³³ Stevens appealed.¹⁰³⁴

At the outset, the Court of Appeals for the Fifth Circuit correctly identified the substantive question on appeal: "[W]hether Trinity . . . must reimburse Stevens" for spending \$105,000 to retain an independent attorney.¹⁰³⁵ To be sure, that is a duty-to-indemnify rather than a duty-to-defend question. Yet, the Fifth Circuit concluded: "Neither the Louisiana legislature nor the Louisiana Supreme Court has spoken on this issue."¹⁰³⁶ That is an incredible statement because it is untrue. Louisiana's cases are replete with examples of courts' forcing various insurers to reimburse insureds after the latter filed claims and employed independent counsel.¹⁰³⁷

1030. *Id.*

1031. *Id.* ("Stevens then filed a motion for summary judgment seeking recovery of Percy's attorneys' fees and expenses, which totaled approximately \$105,000.")

1032. *Fed. Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 638 So. 2d 1132, 1137 (La. Ct. App. 1994).

1033. *See Trinity Universal*, 335 F.3d at 355.

The district court, assuming that Trinity had a duty to defend Stevens in the [u]nderlying [a]ction, granted Trinity's [summary judgment] motion, holding that "even when the insurer reserves the right to deny coverage, it is not obligated to pay for an attorney that the insured unilaterally decides to hire as an extra defense counsel."

Id.

1034. *Id.*

1035. *Id.*

1036. *Id.* at 356.

1037. *See Moody v. Arabie*, 498 So. 2d 1081, 1085-86 (La. 1986) (concluding that if an insured employee relieves an employer or workers' compensation insurer of probable future liability for compensation, the employer or insurer should pay for this benefit by contributing additional recovery costs proportionate to the present value of probable future compensation liability), *modified*, LA. REV. STAT. ANN. § 23:1103 (West 1998); *Thompson v. Gray & Co.*, 590 So. 2d 1318, 1321 (La. Ct. App. 1991) (embracing *Moody* and declaring that:

[A workers'] compensation carrier *should pay a proportionate share of the attorneys' fees* . . . where the worker's attorney effects recovery without filing suit. . . . [T]he compensation carrier, who is a co-owner with the employee of the right to recover damages from the negligent third party, should *not be unjustly enriched at the expense* of the employee when the efforts of the latter's attorney resulted in benefits accruing to the compensation carrier, especially *where the carrier has tacitly consented to the acts* of the employee's attorney.)

(emphasis added); *Wood v. State Farm Mut. Auto. Ins. Co.*, 591 So. 2d 1266, 1271 (La. Ct. App. 1991) (citing *Moody* and ordering the insurer to pay reasonable attorney's fees); *see also Shaffer v. Stewart Const. Co.*, 865 So. 2d 213, 215-16 (La. Ct. App. 2004) ("The trial court ruled in favor of ICE . . . finding that ICE was an additional insured under Pacific's CGL policy, thus . . . ordering Pacific to reimburse ICE's defense costs. . . . [W]e find no error in the trial court's ruling requiring Pacific to reimburse ICE for attorney's fees . . .").

Also, as stated earlier, it is truly remarkable and unsettling that the Fifth Circuit did not cite a single Louisiana case—including duty-to-indemnify decisions—to reach this highly questionable conclusion: “[W]e find that Trinity is not required to reimburse Stevens for the fees or costs associated with Stevens’ hiring of additional counsel [since] Trinity . . . provided Stevens with competent defense counsel in the [u]nderlying [a]ction.”¹⁰³⁸ To reach that conclusion, the Fifth Court, wittingly or unwittingly, overlooked some important principles of law in Louisiana.

First, like the district court judge, the Fifth Circuit substantially polluted its duty-to-indemnify analysis with an unwarranted discussion of a duty to defend.¹⁰³⁹ Trinity gladly defended Stevens *after reviewing Mitchell’s pleadings*, and that behavior comported precisely with the insurer’s duty to defend under the contract.¹⁰⁴⁰ In addition, a jury heard the case, deliberated, and entered a judgment in favor of Stevens, finding that Stevens did not owe Mitchell \$1.12 million dollars.¹⁰⁴¹ The debate is over who should pay the independent counsel’s fees for service rendered *before and after* Mitchell filed his complaint.¹⁰⁴² This is the central question because the evidence is undisputed: “Stevens retained an attorney, Michael Percy, to assist Stevens in responding [to Mitchell] and preparing for a meeting with Mitchell.”¹⁰⁴³

Without doubt, Trinity encouraged the client-attorney relationship between its insured and the independent counsel.¹⁰⁴⁴ Trinity continued to encourage Stevens to retain the independent attorney from October 20, 1999 until Trinity sent the second reservation-of-rights letter (2000 ROR Letter), just a few days before Trinity filed the declaratory-judgment action.¹⁰⁴⁵ Assuming January 22nd was the correct date of the 2000 ROR Letter, the insurer nurtured that client-attorney relationship, at Stevens’s expense, for more than three months.¹⁰⁴⁶

Arguably, the independent counsel’s assistance significantly reduced the amount that Trinity would have had to pay in attorney’s fees to its appointed insurance-defense attorney. Therefore, in light of Trinity’s encouraging Stevens to retain independent counsel, the Fifth Circuit should have decided

1038. *Trinity Universal*, 335 F.3d at 356.

1039. *See id.* at 355-56.

1040. *See id.*; *Meloy v. Conoco, Inc.*, 504 So. 2d 833, 838 (La. 1987) (holding that a court must determine an insurer’s duty to defend its insured against a third-party suit by examining the allegations in the third party’s petition and comparing what appears there with the insurer’s unambiguous obligation under the insurance contract).

1041. *Trinity Universal*, 335 F.3d at 355.

1042. *Id.* at 354.

1043. *Id.*

1044. *Id.* at 355 (“[W]e encourage you to continue to employ [your independent] counsel at Stevens’s expense [We have appointed] Mr. Caldwell Roberts, who . . . will cooperate with your personal defense attorney and will continue to defend Stevens.”).

1045. *Id.* at 354-55.

1046. *See id.*

the duty-to-indemnify question in favor of Stevens. Arguably that would have been the just outcome, for Louisiana's law is clear: When an insurer chooses to rely on the efforts of its insured's independent counsel, the insurer must pay attorney's fees for retained counsel's services.¹⁰⁴⁷

3. Injury to Property: Whether Under Mississippi's Law a Commercial General Liability Insurer Has a Duty to Indemnify an Insured Contractor Who Paid Money to Correct a Subcontractor's Defective Repairs on a Third Party's Property

Under many liability-insurance contracts, the coverage clause states in pertinent part: "This Company agrees to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage . . . caused by an occurrence."¹⁰⁴⁸ Generally the coverage section defines an "occurrence" as an "accident," which produces "bodily injury or property damage."¹⁰⁴⁹ But a definition section, a proviso, or an exclusion clause states that the accident must be "neither expected nor intended from the standpoint of the insured."¹⁰⁵⁰

Amazingly, for more than a half century, insurers have pitched and otherwise-sophisticated businesses have purchased contracts that contain such confusing and nearly indecipherable language.¹⁰⁵¹ But more astounding, both

1047. See *Barreca v. Cobb*, 668 So. 2d 1129, 1132 (La. Ct. App. 1996) (holding that "an insurer who has notice of the insured's claim but fails to bring its own action or to intervene in plaintiff's action will be assessed a proportionate share of the recovery costs incurred by the insured, including reasonable attorney fees").

1048. See *Patrons-Oxford Mut. Ins. Co. v. Dodge*, 426 A.2d 888, 889 (Me. 1981) (emphasis omitted).

1049. See, e.g., *Dennis Cain Motor Co. v. Universal Underwriters Ins. Co.*, 614 S.W.2d 275, 276 (Mo. Ct. App. 1981).

[The insurer] issued a policy of insurance providing "Garage Liability" coverage . . . [that] provided in part: "The company will pay on behalf of the INSURED all sums which the INSURED shall become legally obligated to pay as damages because of . . . BODILY INJURY or . . . PROPERTY DAMAGE . . . caused by an OCCURRENCE and arising out of GARAGE OPERATIONS."

. . . Occurrence in the policy "means an accident. . . ."

Id.

1050. See *Zurich Ins. Co. v. Northbrook Excess & Surplus Ins. Co.*, 494 N.E.2d 634, 638 (Ill. App. Ct. 1986). The definitions section stated: "'Occurrence' means an accident, including injurious exposure to conditions, which results in bodily injury during the policy period neither expected nor intended from the standpoint of the insured." *Id.*

1051. See generally *Farm Bureau Mut. Auto. Ins. Co. v. Hammer*, 177 F.2d 793, 796 (4th Cir. 1949).

[The insured argued] that even though the insured deliberately drove his truck into the car, the resulting injuries were "caused by accident" within the meaning of the policy. [The insured also argued] that the test of what is an accident in such event should be determined not from the standpoint of the insured but from the standpoint of the injured parties. . . . [Furthermore, the insured maintained] that the term "accident" has been interpreted [this way when] the injury was caused by the intentional act of some one other than the insured It is obvious, however, that this rule may not be applied to a policy like [the one in this] suit in which [the insured's] intentional injuries . . . are expressly excluded from the coverage.

state and federal courts continue to spend an awful amount of time and valuable judicial resources attempting to decipher the meanings of an occurrence, an accident, and the phrase “neither expected nor intended from the standpoint of the insured.”¹⁰⁵² Liability-insurance contracts, however, rarely define or even attempt to define this latter phrase.

Arguably, courts’ willingness to spend judicial resources this way is a gross mismanagement of funds. But for sure, such judicial exercises are puzzling, for the doctrine of ambiguity is still a useful tool to help courts interpret insurance contracts generally and to resolve disagreements about the meaning of archaic and poorly defined words and phrases, like the three appearing above. The ambiguity doctrine simply states that courts must construe insurance contracts’ allegedly ambiguous words and phrases against the insurer and in favor of the insured.¹⁰⁵³

More important, nearly every state has adopted the doctrine of ambiguity,¹⁰⁵⁴ including Mississippi.¹⁰⁵⁵ Yet, cases and controversies about

Id.

1052. For example, on September 4, 2004, even a cursory search of WESTLAW’S database—MINCS—produced 1285 cases. The author used the following query: “(EXPECT! INTEN!) /P (STANDPOINT /6 ASSURED INSURED).”

1053. See *Romero v. State Farm Mut. Auto. Ins. Co.*, 595 So. 2d 402, 404 (La. Ct. App. 1992) (reaffirming that “any ambiguity will be construed against the insurer”).

1054. See *Ala. Ins. Guar. Ass’n v. Magic City Trucking Serv., Inc.*, 547 So. 2d 849, 855 (Ala. 1989) (declaring that “ambiguities are to be construed liberally in favor of the insured and against the insurer, in order to provide the maximum coverage for the insured”); *State Farm Mut. Auto. Ins. Co. v. Lawrence*, 26 P.3d 1074, 1080 (Alaska 2001) (“We interpret ambiguities in insurance contracts in favor of the insured.”); *Samsel v. Allstate Ins. Co.*, 59 P.3d 281, 284 (Ariz. 2002) (stating that to determine “whether . . . ambiguity . . . should be construed against the insurer, the language should be examined from the viewpoint of one not trained in law or the insurance business”); *Smith v. Prudential Prop. & Cas. Ins. Co.*, 10 S.W.3d 846, 850 (Ark. 2000) (“It is . . . a cardinal rule of insurance law that a policy of insurance is to be construed liberally in favor of the insured and strictly against the insurer. . . .”); *Ensign v. Pac. Mut. Life Ins. Co.*, 306 P.2d 448, 450 (Cal. 1957) (concluding that “in insurance law that any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer”) (citation omitted); *Simon v. Shelter Gen. Ins. Co.*, 842 P.2d 236, 239 (Colo. 1992) (holding that ambiguity in the policy language must be “construed against the insurer and in favor of coverage to the insured”); *Izzo v. Colonial Penn Ins. Co.*, 524 A.2d 641, 643 (Conn. 1987) (holding that “ambiguities are to be construed against the insurer” when the contract language is unclear); *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) (declaring that to the extent an ambiguity exists, courts must employ the doctrine of *contra proferentum* and construe policy language most strongly against the insurer who drafted it); *Chase v. State Farm Fire & Cas. Co.*, 780 A.2d 1123, 1127 (D.C. 2001) (reaffirming that “ambiguities in an insurance policy are construed against the insurer”); *Aetna Cas. & Sur. Co. v. Cartmel*, 100 So. 802, 803 (Fla. 1924) (holding that ambiguities in insurance contracts “must be liberally construed in favor of the insured”) (citation omitted); *Richards v. Hanover Ins. Co.*, 299 S.E.2d 561, 563 (Ga. 1983) (reiterating that “[a]ny ambiguities in the contract are strictly construed against the insurer as drafter of the document”); *Sturla, Inc. v. Fireman’s Fund Ins. Co.*, 684 P.2d 960, 964 (Haw. 1984) (restating that ambiguities in insurance contracts are resolved against the insurer); *Clark v. Prudential Prop. & Cas. Ins. Co.*, 66 P.3d 242, 245 (Idaho 2003) (reasserting that ambiguities in insurance contracts “must be construed most strongly against the insurer”); *Healey v. Mut. Accident Ass’n*, 25 N.E. 52, 53 (Ill. 1890) (holding that “in all cases [ambiguities] must be liberally construed in favor of the insured”) (citation omitted); *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 947 (Ind. 1996) (holding that “[w]here there is ambiguity, insurance policies are to be construed strictly against the insurer” and the policy language is viewed from the standpoint of the insured); *Gen. Cas.*

Co. v. Hines, 156 N.W.2d 118, 122 (Iowa 1968) (holding that ambiguous terms in insurance contracts "will be accorded [a] construction most favorable to the insured"); Nat'l Inspection & Repair, Inc. v. Valley Forge Life Ins. Co., 56 P.3d 807, 817 (Kan. 2002) (declaring that "'ambiguous terms must be decided in favor of the insured'") (citation omitted); St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc., 870 S.W.2d 223, 225 (Ky. 1994) (holding that all ambiguities in insurance policies must be construed against the insurer); Fannaly v. Lafayette Ins. Co., 805 So. 2d 1134, 1138 (La. 2002) (repeating that "ambiguous contractual provision[s] are construed against the insurer who furnished the contract's text and in favor of the insured"); Patrons-Oxford Mut. Ins. Co. v. Dodge, 426 A.2d 888, 891 (Me. 1981) (declaring that any ambiguity in an insurance contract is construed "strictly against the insurer and liberally in favor of the insured"); Cody v. Conn. Gen. Life Ins. Co., 439 N.E.2d 234, 237 (Mass. 1982) (holding that ambiguous words in insurance contracts must be resolved against the insurance company that employed them and in favor of the insured); State Farm Mut. Auto. Ins. Co. v. Enter. Leasing Co., 549 N.W.2d 345, 351 (Mich. 1996) (reaffirming that courts must construe ambiguities against the insurer); Columbia Heights Motors, Inc. v. Allstate Ins. Co., 275 N.W.2d 32, 36 (Minn. 1979) (reiterating that ambiguities in insurance contracts must be resolved against the insurer); Meyer Jewelry Co. v. Gen. Ins. Co. of Am., 422 S.W.2d 617, 623 (Mo. 1968) (embracing that the ambiguity in an insurance contract should be resolved against the insurer); Bauer Ranch, Inc. v. Mountain W. Farm Bureau Mut. Ins. Co., 695 P.2d 1307, 1309 (Mont. 1985) (reaffirming that contractual ambiguities are construed against the insurer); Farm Bureau Ins. Co. v. Martinsen, 659 N.W.2d 823, 827 (Neb. 2003) (repeating that "an ambiguous insurance policy will be construed in favor of the insured"); Rubin v. State Farm Mut. Auto. Ins. Co., 43 P.3d 1018, 1020 (Nev. 2002) (reaffirming that any ambiguity in an insurance contract "must be construed against the insurer and in favor of coverage for the insured"); Trombly v. Blue Cross/Blue Shield, 423 A.2d 980, 985 (N.H. 1980) (adopting the proposition that "an ambiguous insurance policy will be construed in favor of the insured and against the insurer," but only where there is ambiguity in the contract); Mazzilli v. Accident & Cas. Ins. Co. of Winterthur, Switz., 170 A.2d 800, 803 (N.J. 1961) (concluding that "[i]f the controlling language will support two meanings, one favorable to the insurer, and the other favorable to the insured, the interpretation sustaining coverage must be applied"); Lopez v. Found. Reserve Ins. Co., 646 P.2d 1230, 1232 (N.M. 1982) (reemphasizing that courts must construe ambiguous language in insurance contracts against the insurers); Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co., 314 N.E.2d 37, 39 (N.Y. 1974) (holding that "ambiguities in an insurance policy must be construed against the insurer"); Williams v. Nationwide Mut. Ins. Co., 152 S.E.2d 102, 107 (N.C. 1967) (holding that uncertainty or ambiguous language in an insurance policy must be resolved in the insured's favor); Mills v. Agrichemical Aviation, Inc., 250 N.W.2d 663, 671 (N.D. 1977) (reasserting that ambiguous policies are construed most strongly against the insurers and in favor of providing insurance coverage); Faruque v. Provident Life & Accident Ins. Co., 508 N.E.2d 949, 952 (Ohio 1987) (reiterating that doubtful, uncertain, or ambiguous language in insurance contracts must be construed strictly against the insurer and liberally in favor of the insured); N.Y. Life Ins. Co. v. Sullivan, 129 P.2d 71, 73 (Okla. 1942) (holding that ambiguous terms in an insurance contract must be resolved against the insurer); N. Pac. Ins. Co. v. Hamilton, 22 P.3d 739, 741 (Or. 2001) (restating that courts must resolve an ambiguous term in an insurance contract "by construing the term against the drafter of the policy"); Bateman v. Motorists Mut. Ins. Co., 590 A.2d 281, 283 (Pa. 1991) (reiterating that courts must construe ambiguous provisions in insurance contracts against the insurer and in favor of the insured); Sjogren v. Metro. Prop. & Cas. Ins. Co., 703 A.2d 608, 612 (R.I. 1997) (reasserting that courts must construe ambiguous language in insurance contracts against insurers and in favor of the insureds); Spinx Oil Co. v. Federated Mut. Ins. Co., 427 S.E.2d 649, 651 (S.C. 1993) (reiterating that "[a]mbiguous or conflicting terms in an insurance contract should be construed in favor of the insured and strictly construed against the insurer"); State Farm Mut. Auto. Ins. Co. v. Vostad, 520 N.W.2d 273, 275 (S.D. 1994) (reiterating that courts must choose an interpretation most favorable to the insured if provisions in an insurance policy are "fairly susceptible" to different interpretations); Palmer v. State Farm Mut. Auto. Ins. Co., 614 S.W.2d 788, 789 (Tenn. 1981) (reiterating that courts must resolve any ambiguity and doubt in favor of the insured when interpreting insurance contracts); Nat'l Union Fire Ins. Co. v. Hudson Energy Co., 811 S.W.2d 552, 555 (Tex. 1991) (reemphasizing that ambiguous language in an insurance contract must be construed in favor of the insured); Gressler v. N.Y. Life Ins. Co., 163 P.2d 324, 330 (Utah 1945) (endorsing the principle that ambiguous insurance policies should be construed in favor of the insured and against the insurer); Noyes v. Order of United Commercial Travelers of Am., 215 A.2d 495, 497 (Vt. 1965) (declaring that ambiguous

the meaning of “expected or intended results” and about whether such results eliminate an insurer’s duty to defend, pay, or indemnify continue to flood state and federal courts.¹⁰⁵⁶ *ACS Construction Co. of Mississippi v. CGU* is one of those cases.¹⁰⁵⁷ And as explained more fully before, the Fifth Circuit’s *Erie*-bound analysis raises more questions and generates more confusion than it resolves.

ACS Construction Company is a general contractor whose principle place of business is located in Mississippi.¹⁰⁵⁸ In May 1996, ACS and the U.S. Army Corps of Engineers entered into a contract.¹⁰⁵⁹ ACS agreed to construct munitions bunkers at Pope Air Force Base in North Carolina (Pope Project).¹⁰⁶⁰ Later that year, ACS hired Chamberlin Co., Inc. — a subcontractor to install waterproofing membranes on the roofs of the bunkers.¹⁰⁶¹ Shortly thereafter, Chamberlin and Southern Commercial Waterproofing Co. of Alabama merged.¹⁰⁶² The new company, Chamberlin/Southern, accepted full responsibility for the work performed under the subcontract.¹⁰⁶³

After Chamberlin/Southern installed the waterproofing membranes, the roofs on some of the bunkers developed leaks.¹⁰⁶⁴ ACS asked Chamberlin/Southern to correct the leaks.¹⁰⁶⁵ The subcontractor refused.¹⁰⁶⁶ Therefore, as the Pope Project’s general contractor, ACS had to spend their own funds to repair the subcontractor’s allegedly negligent installations.¹⁰⁶⁷ ACS spent

language in insurance contracts will be strictly construed against the insurer); *Vadheim v. Cont’l Ins. Co.*, 734 P.2d 17, 20 (Wash. 1987) (declaring that ambiguous clauses must be construed in favor of the insured, regardless of whether the insurer may have intended a different meaning); *Thompson v. State Auto. Ins. Co.*, 11 S.E.2d 849, 850 (W. Va. 1940) (adopting “a cardinal rule of construction that clauses in insurance contracts should be construed liberally [in favor of] the insured”); *Badger Mut. Ins. Co. v. Schmitz*, 2002 WI 98, 647 N.W.2d 223, 234 (reiterating that courts construe ambiguous terms in insurance contracts against the insurer); *T.M. ex rel. Cox v. Executive Risk Indem. Inc.*, 59 P.3d 721, 725 (Wyo. 2002) (reemphasizing that courts must construe ambiguous terms in insurance contracts against the insurer). Maryland is the only state that has not embraced the doctrine of ambiguity. *See Cheney v. Bell Nat’l Life Ins. Co.*, 556 A.2d 1135, 1138 (Md. 1989) (declaring that “Maryland does not follow the [ambiguity] rule, adopted in many jurisdictions, that an insurance policy is to be construed most strongly against the insurer”).

1055. *See Nationwide Mut. Ins. Co. v. Garriga*, 636 So. 2d 658, 662 (Miss. 1994) (reaffirming that “[a]ny ambiguities in an insurance contract must be construed against the insurer and in favor of the insured and a finding of coverage”).

1056. *ACS Constr. Co. v. CGU*, 332 F.3d 885 (5th Cir. June 2003).

1057. *Id.*

1058. *See id.* at 887.

1059. *Id.*

1060. *Id.*

1061. *Id.*

1062. *Id.*

1063. *Id.*

1064. *Id.*

1065. *Id.*

1066. *Id.*

1067. *Id.*

more than \$190,000 to correct the problems.¹⁰⁶⁸ At that time, General Accident Insurance Company (CGU) insured ACS under a commercial general liability (CGL) insurance contract.¹⁰⁶⁹ The relevant portions of the contract read as follows: “[CGU] will pay those sums that [ACS] becomes legally obligated to pay as damages because of . . . ‘property damage’ to which this insurance applies. . . . The insurance applies to . . . ‘property damage’ only if . . . [the] ‘property damage’ [was] caused by an ‘occurrence. . . .”¹⁰⁷⁰

The contract’s definitions section defined an *occurrence* as “*an accident, including continuous or repeated exposure to substantially the same harmful conditions.*”¹⁰⁷¹ But, from its inception, the CGL contract provided *no coverage* for any “‘property damage’ *expected or intended from the standpoint of the insured.*”¹⁰⁷² Arguably, a fair reading of those definitions, words, and phrases would lead a fairly intelligent, reasonable person to the conclusion that CGU would gladly reimburse ACS’s Pope-Project expenditures if the general contractor establishes (1) that an accident caused the leaks in the roofs—property damage—on the base and (2) that ACS did not want, intend, or expect the leaks to occur.¹⁰⁷³

But given that an occurrence and an accident are synonymous under the CGL policy, several questions go unanswered.¹⁰⁷⁴ For instance, what was the *cause-in-fact* of the *neither expected nor intended* water leaks—the property damages? Surely, the leaks were the *results* or *consequences* of something. Thus, a reasonable person would want to know: Was an intentional act or an act of God the *cause-in-fact* of those leaks, or was someone’s negligence—either action or inaction—the *cause-in-fact* of the *property damages*?¹⁰⁷⁵

Certainly, a reasonable person would admit that CGU has no duty to indemnify if some intentional conduct produced those leaks. After all, from a reasonable layperson’s perspective, the definition of an accident does not turn on whether an unfavorable outcome stems from an “accidental means” or

1068. *Id.*

1069. *Id.*

1070. *Id.*

1071. *Id.*

1072. *Id.* (emphasis added).

1073. *See id.*

1074. *See id.* at 888.

1075. *See id.* at 891.

is an “accidental result.”¹⁰⁷⁶ Instead, the layperson only knows that *accidents* and *unintended or unexpected results* are synonymous.¹⁰⁷⁷

Now, let us return to the controversy in this case. When ACS asked its liability insurer for a reimbursement of over \$190,000, CGU denied the claim.¹⁰⁷⁸ According to CGU, from the very inception of the contract there was *no coverage* for ACS’s claim.¹⁰⁷⁹ The insurer added that because “an occurrence/accident,” as defined in the policy, was not *the cause-in-fact* of the property damage on Pope Air Force Base.¹⁰⁸⁰ Stated another way, the insurer asserted that an accident did not occur on the base; therefore, an accident was not *the cause-in-fact* of the *leaking roofs* on the bunkers.¹⁰⁸¹

ACS filed suit in a Mississippi court; but CGU removed it to the District Court for the Northern District of Mississippi, claiming diversity of jurisdiction.¹⁰⁸² Subsequently, each party filed a motion for summary judgment regarding whether the liability contract covered the Pope-Project property damage.¹⁰⁸³ The district court granted CGU’s motion after the court found *no evidence of an accident* that would allow ACS to recover under the policy.¹⁰⁸⁴ Since ACS did not establish *coverage*—the existence of a valid accident—under the contract, the district court found no need to address the *cause-in-fact* of the accident.¹⁰⁸⁵ ACS appealed.¹⁰⁸⁶

1076. See, e.g., *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491 (1934). The Court held that death resulting from sunstroke was not death caused by external, violent, and *accidental means*. *Id.* at 497. In his dissent, Justice Cardozo stated:

The attempted distinction between *accidental results* and *accidental means* will plunge this branch of the law into a Serbionian Bog. “Probably it is true to say that in the strictest sense and dealing with the region of physical nature there is *no such thing as an accident*.” *On the other hand, the average man is convinced that there is, and so certainly is the man who takes out a policy of accident insurance.* It is his reading of the policy that is to be accepted as our guide, with the help of the established rule that ambiguities and uncertainties are to be resolved against the company.

Id. at 499 (Cardozo, J., dissenting) (emphasis added) (citations omitted).

Texas courts have waded through Justice Cardozo’s Serbionian bog, and we are now convinced that the terms “*accidental death*” and “*death by accidental means*,” *as those terms are used in insurance policies, must be regarded as legally synonymous* unless there is a definition in the insurance contract itself which requires a different construction. *These terms in an insurance contract should be given their ordinary and popular meaning according to the understanding of the average man*; the court’s guide should not be the technical meaning of the words used, but rather the intention of the parties as inferred from the contract as a whole. A fine distinction between means and results would never occur to an average policyholder. . . .

Republic Nat’l Life Ins. Co. v. Heyward, 536 S.W.2d 549, 557 (Tex. 1976) (emphasis added).

1077. *Heyward*, 536 S.W.2d at 577.

1078. *ACS Constr.*, 332 F.3d at 887.

1079. *Id.*

1080. *Id.*

1081. See *id.*

1082. *Id.*

1083. *Id.*

1084. *Id.*

1085. See *id.*

1086. *Id.*

Although the district court ruled on a very narrow question of fact, the Court of Appeals for the Fifth Circuit chose to frame the question considerably more broadly. Undeniably, that was an exceedingly poor decision because it unnecessarily generated more unanswered questions, an excruciatingly unintelligible analysis, and a highly questionable conclusion. For example, at the outset, the Fifth Circuit stated: “We must . . . determine whether, under [Mississippi’s] law, an ‘accident’ refers to the *unintended consequences* of installing the waterproofing membrane *or* whether an ‘accident’ refers to the *underlying act* of the installation itself.”¹⁰⁸⁷

Certainly, the first prong of that broad appellate question concerns and requires an inquiry about “causation.”¹⁰⁸⁸ In particular, it requires one to determine whether the poor installation of membranes was the cause-in-fact of an accident.¹⁰⁸⁹ But we must note that CGU never claimed that a faulty installation was the cause-in-fact or even the “proximate cause” of an accident.¹⁰⁹⁰ Instead, the insurer argued that an accident was not the cause-in-fact of an *unintended consequence* (property damage evidenced by the leaking roofs).¹⁰⁹¹

To enhance the confusion, the Fifth Circuit succinctly stated that “[t]he core of this dispute is . . . whether the *installation* of the waterproofing membrane or whether the *consequential leaks* constitute an ‘occurrence’ under

1087. *Id.* at 888 (emphasis added).

1088. *See id.*

1089. *See id.*; *Burnham v. Tabb*, 508 So. 2d 1072, 1074 (Miss. 1987) (A “[p]laintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough.”) (quoting *W. KEETON, PROSSER & KEETON ON TORTS* § 41 (5th ed. 1984)).

1090. *See ACS Constr.*, 332 F.3d at 887. Under Mississippi law, there are two theories of proximate cause. The first one is often called “legal cause” and it requires a plaintiff to prove that an injury—intentional tort, negligence, breach of contract, or some other violation or breach under civil common law or a statute—was “foreseeable” or was the “natural and probable” outcome of some violation. *See, e.g., Delahoussaye v. Mary Mahoney’s, Inc.*, 783 So. 2d 666, 671 (Miss. 2001) (declaring that the proximate cause of an injury is an act which produces an injury in a natural and continuous sequence without the influence of an efficient intervening variable or event). On the other hand, under a property insurance contract or contracts that cover property losses or property damages, proximate cause has a different meaning. To recover from an insurer for a property loss, Mississippi law requires the insured to prove that “a peril insured against” was the “proximate,” “nearest,” or “most immediate” cause of the loss, in either time or space. A foreseeable consequence is not the focus of interest. *See, e.g., Lititz Mut. Ins. Co. v. Boatner*, 254 So. 2d 765, 766 (Miss. 1971) (embracing the view that

[a plaintiff does not have to prove a] loss or injury sustained beyond a reasonable doubt; but it is sufficient to warrant a recovery if he show by a fair preponderance of evidence that the loss or injury was . . . covered [under] the policy, [or] that it was . . . a risk or cause insured against Evidence is not sufficient, however, which merely creates a suspicion or speculation as to the cause of the loss or injury

(quoting 46 C.J.S. *Insurance* § 1356 (1946)); *Evana Plantation, Inc. v. Yorkshire Ins. Co.*, 58 So. 2d 797, 798 (Miss. 1952) (reaffirming that “[t]he general rule [states] that, if the cause designated in the policy is the dominant and efficient cause of the loss the right of the insurer to recover will not be defeated by the fact that there were contributing causes”).

1091. *ACS Constr.*, 332 F.3d at 887 (“CGU determined that . . . no ‘property damage’ caused by an ‘occurrence’ took place and therefore, denied ACS’s claim.”) (emphasis added).

the CGL insurance policy."¹⁰⁹² It is important to note that the appellate court did not include causation or fault as a part of this core dispute.¹⁰⁹³ Nevertheless, to resolve the dispute the Fifth Circuit cited *Allstate Insurance Co. v. Moulton*, insisting that "the *Moulton* test is dispositive of the dispute over the interpretation of an 'occurrence' in the CGL policy."¹⁰⁹⁴

In *Moulton*, the Supreme Court of Mississippi held that "the term accident refers to [the insured's] action and not whatever unintended damages flowed from that act."¹⁰⁹⁵ But the Mississippi Supreme Court stated:

"An accident is anything that happens or is the result of that which is unanticipated and takes place without the insured's foresight or anticipation. . . . As used in insurance policies it is simply an undersigned, sudden, and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force, but it does not mean the natural and ordinary consequences of a negligent act."

With this focus on the *expectability of the event or its consequences* we can avoid the need to consider [the insured's] subjective state of mind. . . . The only relevant consideration is whether . . . the *chain of events leading to the injuries* complained of was set in motion and followed a course consciously devised and controlled by [the insured] without the unexpected intervention of any third person or extrinsic force.¹⁰⁹⁶

Even the most conservative reading of that language reveals: Under Mississippi's law, one cannot discuss or define an accident without discussing causation. To help support this point of view, one needs only to review the Fifth Circuit's reason for affirming the district court's ruling against ASC. Applying *Moulton*, the court of appeals stated: "[T]he faulty workmanship of the waterproofing membrane *resulting in the leaks* does not constitute an 'occurrence' under the policy. . . . ACS intended to hire Chamberlin/Southern to install the membrane but did not intend for the work to be *faulty or result in a leak*."¹⁰⁹⁷ Thus, we must ask: Which is the accident—the "*faulty workmanship*" or the "*resulting leaks*"? Once more, the Fifth Circuit's analysis or explanation is exceedingly unintelligible.

Regrettably, there is more confusion. In *Southern Farm Bureau Casualty Insurance Co. v. Allard*, the Mississippi Supreme Court suggested that "an 'accident' refers to the *unintended consequences* of the initial act."¹⁰⁹⁸ But when ACS raised this point, the Fifth Circuit simply dismissed it as being

1092. *Id.* at 888.

1093. *See id.*

1094. *Id.*

1095. *Id.* at 888-89 (alteration in original) (emphasis added) (quoting *Allstate Ins. Co. v. Moulton*, 464 So. 2d 507, 510 (Miss. 1985)).

1096. *Moulton*, 464 So. 2d at 509 (emphasis added) (citation omitted).

1097. *ACS Constr.*, 332 F.3d at 889 (emphasis added).

1098. *Id.* (emphasis added) (citing *S. Farm Bureau Cas. Ins. Co. v. Allard*, 611 So. 2d 966 (Miss. 1992)).

irrelevant.¹⁰⁹⁹ Later, however, the appellate court acknowledged that tension did exist between *Moulton* and *Allard*, but the appellate court insisted that the Supreme Court of Mississippi resolved the conflict in *United States Fidelity & Guaranty Co. v. Omnibank*.¹¹⁰⁰

Of course, that was an overstatement because the ruling in *Omnibank* only exacerbated the confusion. In that case, the Mississippi Supreme Court held: “[E]ven if an insured *acts in a negligent* manner, that action must still be *accidental and unintended* in order to implicate policy language.”¹¹⁰¹ So, after *Omnibank* are negligent acts also occurrences under CGL policies in Mississippi? It appears they are.

However, stressing that it was *Erie*-bound to apply the rulings in *Moulton* and *Omnibank*, the Fifth Circuit held: “[If] a CGL [contract] . . . defines an ‘occurrence’ as an ‘accident,’ coverage is triggered if the underlying act [is] *intentional and deliberate*. These cases also make clear that an ‘occurrence’ defined as an ‘accident’ in a CGL insurance policy *does not refer to the unintended consequences of the act*.”¹¹⁰² Therefore, from the Fifth Circuit’s point of view, “the district court did not err when it applied *Moulton* and *Omnibank* and concluded that ACS’s *intent to subcontract with Chamberlin/Southern* and its *intent to install the waterproofing membrane* to the bunker roofs did *not constitute an ‘occurrence’* under its CGL insurance policy with CGU. . . .”¹¹⁰³

The analysis and the conclusion are remarkably incomprehensible. On the one hand, the court of appeals declares that underlying *intentional and deliberate acts*—occurrences or accidents—trigger coverage under CGU’s contract.¹¹⁰⁴ On the other hand, *intent to subcontract* and *intent to install waterproofing membranes* were not occurrences.¹¹⁰⁵ Well, why not? More significantly, the Fifth Circuit’s holding does not even attempt to address the central issue: whether ACS’s decision to repair the leaking roofs—the undisputed *property damage*—required the insurer to reimburse ACS.¹¹⁰⁶ The CGL policy clearly stated: “[CGU would] pay those sums that the insured becomes legally obligated to pay as damages because of . . . ‘property

1099. *Id.* “We are not persuaded that *Allard* has changed the law.” *Id.* The Fifth Circuit explained that the *Allard* court relied on *Coleman v. Sanford*, which held that “‘an act is intentional if the actor desires to cause the consequences of his act, or believes that the consequences are substantially certain to result from it.’” *Id.* (quoting *Coleman v. Sanford*, 521 So. 2d 876, 878 (Miss. 1988)).

1100. *Id.* at 890 (“Notwithstanding the apparent conflict that *Allard* created when it was decided, the Mississippi Supreme Court very recently reaffirmed its holding in *Moulton* and resolved the tension between *Allard* and *Moulton*.”) (citing *United States Fid. & Guar. Co. v. Omnibank*, 812 So. 2d 196 (Miss. 2002)).

1101. *Id.* (emphasis added) (citation omitted).

1102. *Id.* at 892 (emphasis added).

1103. *Id.* at 892-93 (emphasis added).

1104. *Id.* at 892.

1105. *Id.* at 892-93.

1106. *See id.*

damage' . . . only if . . . [t]he . . . 'property damage' . . . [was not] expected or intended from the standpoint of the insured."¹¹⁰⁷

At this point, it would be beneficial to reiterate some earlier points. First, courts should strive to preserve precious judicial resources and to issue intelligible and fairly consistent rulings. To help achieve these ends, federal and state courts, in general, and the Fifth Circuit, in particular, should simply refuse to decide controversies surrounding the meaning and purported significance of terms like expected or intended from the standpoint of the insured.

Actually, it would be useful for courts to consider and embrace what the Texas Supreme Court so appropriately observed years ago regarding a somewhat related matter:

A fine distinction between *means* and *results* would never occur to an average policyholder. . . . If [an] insurer wishes to distinguish between accidental results and injuries *caused by* accidental means, [the insurer] *should do so expressly*, so as to give the policyholder clear notice of any limitations of liability which the insurer wishes to impose by use of the latter term.¹¹⁰⁸

Alternatively, if requiring insurers to insert more precise terms in their contracts seems a bit too intrusive, the author suggests: In these types of disputes, courts should routinely employ the doctrine of ambiguity to avoid issuing disappointing and nearly indecipherable opinions. This approach would save time and preserve very limited judicial resources.

4. Injury to Property: Whether Under Texas's Law a Commercial General Liability Insurer Has a Duty to Pay Damages to a Judgment Creditor After the Creditor Successfully Secured a Judgment Against the Insured for Negligently Misrepresenting the Quality of Certain Construction Materials

Valmont Energy Steel, Inc. v. Commercial Union Insurance Co. also presents a disagreement over the meaning of an occurrence, property damage, and other questionable phrases appearing in two general-liability insurance contracts.¹¹⁰⁹ But unlike the nearly impossible to comprehend analysis in *ACS Construction*, the Fifth Circuit's presentation in *Valmont* is lucid and rather meticulous. Furthermore, the court of appeals based its holding on a careful review and application of settled law in Texas.

1107. *Id.* at 887 (emphasis added).

1108. *Republic Nat'l Life Ins. Co. v. Heyward*, 536 S.W.2d 549, 557 (Tex. 1976) (emphasis added).

1109. *Valmont Energy Steel, Inc. v. Commercial Union Ins. Co.*, 359 F.3d 770 (5th Cir. Feb. 2004).

More important, the Fifth Circuit's decision in *Valmont* is impressive, partly because the appellate court employed the very methodology that the author suggested in the immediately preceding section.¹¹¹⁰ The court of appeals cautiously and intelligibly applied the doctrine of ambiguity. In the process, the learned justices arguably avoided spending valuable judicial resources irrationally. But for sure, the Fifth Circuit did not sink, this time, into a veritable "Serbonian bog," attempting unsuccessfully to give precise meanings to virtually undecipherable, awkwardly constructed, and outmoded words and phrases in insurance contracts.¹¹¹¹

Consider the relevant facts in the underlying case. Valmont Corporation is an extremely diverse company.¹¹¹² Although its principal place of business is located in Nebraska, the corporation sells goods and services worldwide.¹¹¹³ Valmont Energy Steel, Inc. and Valmont Microflex, Inc. (collectively Valmont) are consolidated subsidiaries and current divisions of Valmont Corporation.¹¹¹⁴ One division of the corporation—Valmont Structures—designs, manufactures, and erects various types of structures and microwave towers for the telecommunications industry and others.¹¹¹⁵ Another division—Valmont Tubing—sells a wide range of tubular steel products and services to an assortment of consumers.¹¹¹⁶

1110. See *supra* text following note 1108.

1111. See *Mamsi Life & Health Ins. Co. v. Callaway*, 825 A.2d 995, 1001 n.2 (Md. 2003). "Serbonian bog is derived judicially from Justice Cardozo's dissenting opinion" in *Landress v. Phoenix Mutual Life Insurance Co.*, 291 U.S. 491, 499 (1934) (Cardozo, J., dissenting). *Id.* "He explained therein that, in an insurance case, attempting to distinguish 'between accidental results and accidental means will plunge this branch of law into a Serbonian bog.'" *Id.* (quoting *Landress*, 291 U.S. at 499 (Cardozo, J., dissenting)). "Although the reference is perhaps more obscure today than it was in Justice Cardozo's time, the message is clear in context. It refers to a 'mess from which there is no way of extricating oneself.'" *Id.* (quoting E. COBHAM BREWER, *DICTIONARY OF PHRASE AND FABLE*, 1121-22 (1898)) (emphasis added). See also *O'Toole v. N.Y. Life Ins. Co.*, 671 F.2d 913, 914 (5th Cir. 1982). "In granting recovery under the double indemnity clause of the insurance agreement, the Louisiana Supreme Court rejected the postulate that if the means of triggering an injury is intended then the result cannot be accidental." *Id.* "The error inherent in this semantical confusion was highlighted earlier by Justice Cardozo's inimitable prose: 'The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian bog.'" *Id.* at 914 n.1 (citation omitted).

1112. See VALMONT, at <http://www.valmont.com> (last visited Feb. 27, 2005).

1113. See VALMONT, HISTORY, at <http://www.valmont.com/asp/company/company11.asp> (last visited Feb. 27, 2005).

1114. See VALMONT, DIVISIONS, at <http://www.valmont.com/asp/divisions/default.asp> (last visited Feb. 27, 2005).

1115. See VALMONT, STRUCTURES, at <http://www.valmont.com/asp/structures/default.asp> (last visited Feb. 27, 2005).

1116. See VALMONT, CAPABILITIES & PRODUCTS, at <http://www.valmont.com/asp/tubing/tubing8.asp> (last visited Feb. 27, 2005).

Continental Manufacturing, Inc. manufacturers steel flanges and has offices in Nacogdoches, Texas.¹¹¹⁷ A variety of industries, including the telecommunications industry, use welded, stainless steel tubes and pipes.¹¹¹⁸ To increase safety and efficiency, companies either make or purchase flanges and other fittings to secure the stainless steel tubes and pipes.¹¹¹⁹ Valmont needed flanges to complete the construction of microwave towers; therefore, Valmont agreed to purchase the flanges from Continental (ValCon Contract).¹¹²⁰

The terms of the ValCon Contract were specific: (1) Each steel flange had to have a 50,000-pound yield and tensile strength, and (2) Continental had to include a Material Test Report (MTR) with each shipment that would verify the grade and quality of the steel Continental used to produce the flanges.¹¹²¹ As an alternative to the second requirement, Continental could certify that it had the original MTR on file in their Nacogdoches, Texas's office.¹¹²² Continental shipped the flanges to Valmont; the latter company used the flanges to construct a microwave tower.¹¹²³ Continental also assured Valmont an MTR was on file verifying that each steel flanges satisfied the strength and quality specifications.¹¹²⁴

Later, one of Valmont's customer-service representatives discovered inconsistencies in Continental's verification papers and asked Continental to send the MTRs.¹¹²⁵ After reviewing the MTRs, Valmont contacted U.S. Steel Corporation, the steel manufacturer listed in Continental's verification documents.¹¹²⁶ U.S. Steel reported that someone had substantially altered the MTRs; therefore, U.S. Steel could not certify that Continental used U.S. Steel's products to make the flanges.¹¹²⁷ In addition, U.S. Steel could not verify the quality and strength of the steel in the flanges.¹¹²⁸

To arrest the uncertain and obtain sound measurements, Valmont hired an independent company to test the tensile strength of the flanges.¹¹²⁹ Valmont gave the independent evaluator six flanges to test.¹¹³⁰ To secure

1117. *Valmont Energy Steel, Inc. v. Commercial Union Ins. Co.*, 359 F.3d 770, 771 (5th Cir. Feb. 2004).

1118. *See, e.g.*, Outokumpu Group, at http://www.outokumpu.com/pages/Page____5778.aspx (last visited Feb. 27, 2005).

1119. *See, e.g., id.*

1120. *Valmont Energy*, 359 F.3d at 771.

1121. *Id.*

1122. *Id.*

1123. *Id.* at 772.

1124. *Id.* at 771-72.

1125. *Id.* at 772.

1126. *Id.*

1127. *Id.*

1128. *Id.*

1129. *Id.*

1130. *Id.*

accurate results, the tester had to destroy each flange.¹¹³¹ Ultimately, the tests revealed that the flanges did not conform to the specifications outlined in the ValCon Contract.¹¹³² Shortly thereafter, Valmont filed a breach-of-contract diversity action against Continental in the United States District Court for the Eastern District of Texas.¹¹³³

The district court conducted a bench trial and found that Continental was liable for making negligent misrepresentations to Valmont.¹¹³⁴ The district court awarded Valmont \$118,519.47 in damages, which represented “the difference between the purchase price of the flanges and the value received, plus pecuniary loss.”¹¹³⁵ As a bona-fide-judgment creditor, however, Valmont’s victory was bittersweet.¹¹³⁶ Shortly after the district court entered the final judgment in favor of Valmont, Continental filed for bankruptcy.¹¹³⁷

When Continental made the material misrepresentations, CU Lloyd’s of Texas (CLloyd’s)—the primary carrier—and Commercial Union Insurance Company (Commercial)—the excess carrier—insured Continental under a general liability contract and under an umbrella policy, respectively.¹¹³⁸ Under both insurance contracts, the insurers agreed to “pay those sums that the insured becomes legally obligated to pay as damages because of . . . ‘property damage’ to which the insurance applies.”¹¹³⁹ Also, the primary and excess insurance contracts covered property damage only if an occurrence caused the damage.¹¹⁴⁰ Additionally, both defined an occurrence as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”¹¹⁴¹

1131. *Id.*

1132. *Id.*

1133. *Id.*

1134. *Id.* The district court found that (1) Continental communicated false information to Valmont about the quality and strength of the steel in the flanges, (2) Continental failed to keep the original, certified MTRs on file, (3) Continental failed to exercise reasonable care by not delivering the certifications to Valmont, and (4) the tests precluded Valmont’s using the flanges because the necessary evaluations destroyed the flanges. *Id.*

1135. *Id.*

1136. *See id.* at 772-73. “A judgment creditor is one to whom a money judgment is payable, while a judgment debtor is one obligated to pay a money judgment.” *Natural Gas Clearinghouse v. Midgard Energy Co.*, 113 S.W.3d 400, 413 n.12 (Tex. App.—Amarillo 2003, no pet.) (citing TEX. FIN. CODE ANN. §§ 301.002(a)(5)-(6) (Vernon Supp. 2003)).

[A] *bona fide* judgment creditor, without any notice of the equities of other parties, may sell the land levied on; and if his judgment is rendered in another county from that in which the land is situated, the lien attaches by the levy of the execution, and . . . a purchaser with notice, at a sale under said execution, would acquire a good title.

Cavanaugh v. Peterson, 47 Tex. 197, 207 (Tex. 1877) (citation omitted).

1137. *Valmont Energy*, 359 F.3d at 772.

1138. *Id.* “The umbrella policy . . . provided similar coverage on an excess basis.” *Id.*

1139. *Id.* “The general policy defined ‘property damage’ either as ‘[p]hysical injury to tangible property, including all resulting loss of use of that property,’ or as ‘[l]oss of use of tangible property that is not physically injured.’” *Id.*

1140. *Id.*

1141. *Id.*

Furthermore, Commercial and CLloyd's policies contained an identical exclusion clause, stating that the respective contracts would not cover damages to "your product' arising out of it or any part of it."¹¹⁴² The definitions section of the general policy defined "your product" as "[a]ny goods or products . . . manufactured, sold, handled, distributed or disposed of by" the insured.¹¹⁴³ The "your product" definition also expressly included the insured's "[w]arranties or representations [that were] made at any time . . . [respecting] the fitness, quality, durability, performance or use of 'your product.'"¹¹⁴⁴

As mentioned earlier, Continental filed for bankruptcy, and its two insurers refused to indemnify Continental and pay the \$118,519.47 third-party damages because the litigated underlying claims were beyond the scope of coverage in the two insurance contracts.¹¹⁴⁵ Therefore, as a judgment creditor, Valmont filed a diversity suit against CLloyd's and Commercial in the United States District Court for the Eastern District of Texas, alleging that the insurers had a duty to pay the awarded damages and satisfy the judgment in the underlying suit.¹¹⁴⁶

The insurers moved for summary judgment, citing three grounds to justify a favorable ruling.¹¹⁴⁷ First, CLloyd's and Commercial argued that Continental's negligent misrepresentation was neither the cause-in-fact nor the proximate cause of any property damage.¹¹⁴⁸ They stressed that the district court awarded only economic damages—rather than property damages—to Valmont in the underlying suit.¹¹⁴⁹ Second, the insurers insisted that the negligent misrepresentation was not an occurrence under the liability insurance contracts.¹¹⁵⁰ And finally, the carriers asserted that the "your product" exclusion clauses barred Valmont's recovering any damages under the contracts.¹¹⁵¹

The district court refused to grant summary relief in light of the following three findings: (1) Valmont's inability to use the flanges was property damage; (2) Continental's negligent misrepresentation was an occurrence; and (3) the "your product" exclusion did not bar coverage because that clause conflicted with two other provisions in the policies.¹¹⁵² Specifically, the language in the exclusion clause conflicted with the definition of "products-

1142. *Id.* "The umbrella policy also contained an identical 'your product' exclusion and [a similar definition of] 'your product.'" *Id.*

1143. *Id.* (alteration in original).

1144. *Id.*

1145. *Id.* at 772-73.

1146. *Id.* at 773.

1147. *Id.*

1148. *Id.*

1149. *Id.*

1150. *Id.*

1151. *Id.*

1152. *Id.*

completed operations hazard” and with the “Products-Completed Operations Aggregate Limit” clauses, which arguably provided coverage.¹¹⁵³ In light of these latter conflicts, the district court applied the doctrine of ambiguity and decided in favor of Valmont.¹¹⁵⁴ CLloyd’s and Commercial timely appealed.¹¹⁵⁵

Although the district court gave three reasons for ruling against the insurers, the Fifth Circuit quickly and correctly determined that the dispute involved only one question: whether the district court improperly declared that the “your product” exclusion clauses in the respective insurance policies were ambiguous and, therefore, unenforceable.¹¹⁵⁶ To repeat, both insurers insisted that the unambiguous “your product” exclusion provisions barred Valmont’s receiving any compensation for the defective flanges, which were allegedly property damage under the contracts.¹¹⁵⁷

The parties agreed that the court should apply Texas’s law to decide the outcome of this controversy.¹¹⁵⁸ And those principles are very clear regarding the interpretation of insurance contracts.¹¹⁵⁹ First, under Texas’s law, courts must evaluate an insurance contract as a whole, giving each part of the contract “effect and meaning.”¹¹⁶⁰ Second, “[t]he terms of an insurance policy are unambiguous as a matter of law if [a court can give disputed words and phrases a] definite or certain legal meaning.”¹¹⁶¹ And, if a court finds no ambiguity in the policy, the court must enforce the insurance contract according to the plain and ordinary meaning of the language.¹¹⁶²

On the other hand, ambiguous language in an insurance contract must be construed in favor of the insured.¹¹⁶³ But a disagreement between an insurer and its insured over the meaning of language in a coverage clause ““does not create an ambiguity”” necessarily, and courts must not consider ““extrinsic evidence . . . for the purpose of creating an ambiguity.””¹¹⁶⁴ Furthermore, if

1153. *Id.*

1154. *Id.* “Valmont [also] moved for summary judgment The district court relied on its findings from its order denying [CLloyd’s and Commercial’s] motion for summary judgment and granted Valmont’s motion for summary judgment” *Id.*

1155. *Id.*

1156. *Id.* at 774.

1157. *Id.* Commercial and CLloyd’s argued that “the district court’s refusal to enforce the ‘your product’ exclusion [clause was] legal error.” *Id.* They also claimed that any physical damage to the flanges and Continental’s misrepresentations, which made the flanges unusable, constituted property damages to and arising out of Continental’s product. *Id.*

1158. *Id.* at 773.

1159. *See id.*

1160. *Id.* (citing *Canutillo Indep. Sch. Dist. v. Nat’l Union Fire Ins. Co.*, 99 F.3d 695, 700 (5th Cir. 1996)); *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994).

1161. *Valmont Energy*, 359 F.3d at 773 (citing *Nat’l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex.1995)).

1162. *Id.* (citing *Puckett v. United States Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex. 1984)).

1163. *Id.* at 774; *see also* *Nat’l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991) (reemphasizing that ambiguous language in an insurance contract must be construed in favor of the insured). An insurance contract is ambiguous if language in a policy or contract generates “two or more reasonable interpretations.” *Valmont Energy*, 359 F.3d at 774 (quoting *CBI Indus.*, 907 S.W.2d at 520)).

1164. *Valmont Energy*, 359 F.3d at 773-74 (quoting *Sharp v. State Farm Fire & Cas. Ins. Co.*, 115

a court finds ambiguity in an insurance policy's exclusion clause, Texas's law requires the court to construe the ambiguous language strictly against the insurer.¹¹⁶⁵

To reach its conclusion, the district court compared the language in the your-product-exclusion clause with that appearing in the policies' definitions sections and in two other provisions.¹¹⁶⁶ In particular, both insurance contracts defined "products-completed operations hazard" as "all . . . 'property damage' occurring away from premises you own or rent and arising out of 'your product' . . . except . . . [p]roducts that are still in your physical possession."¹¹⁶⁷ Under both policies, however, another provision—a "Limits of Insurance" clause—qualified the amount the insurers were willing to pay for property damage under the products-completed operations hazard clause.¹¹⁶⁸ From the district court's perspective, those sections created too much ambiguity because they were too difficult to harmonize.¹¹⁶⁹

But the Fifth Circuit disagreed.¹¹⁷⁰ Put simply, the court of appeals found that the district court had misconstrued the significance of the language appearing in the insurance contracts' respective definitions sections.¹¹⁷¹ Consequently, comparing those alleged "coverage" clauses with the respective contracts' exclusion provisions, the district court found ambiguity where there was none.¹¹⁷²

F.3d 1258, 1261 (5th Cir. 1997)).

1165. *Id.* at 774. The Fifth Circuit cited *Balandran v. Safeco Insurance Co. of America*, 972 S.W.2d 738, 741 (Tex. 1998), which emphasized that courts should adopt the insured's interpretation of disputed language in a policy as long as it is reasonable, even if the insurer presents a more reasonable interpretation. *Id.*

1166. *Id.*

1167. *Id.* at 774-75 (alterations in original) (emphasis added).

1168. *Id.* at 775. In the general policy, the Limits of Insurance section stated as follows:

2. The General Aggregate Limit is the most we will pay for the sum of:

...

b. Damages under Coverage A, except damages because of . . . "property damage" included in the "products-completed operations hazard";

...

3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of . . . "property damage" included in the "products-completed operations hazard."

Id. (alterations in original). "The umbrella policy contained similar provisions laying out that policy's 'General Aggregate Limit' and 'Products-Completed Operations Aggregate Limit,' also located in its 'Section III-Limits of Insurance.'" *Id.*

1169. *Id.* "[T]he district court refused to apply the 'your product' exclusion because [the court] determined that other provisions in the policies—the provisions relating to 'products-completed operations hazard'—appeared to grant coverage and thus rendered the 'your product' exclusion ambiguous." *Id.* at 774.

1170. *Id.* at 775.

1171. *Id.* at 775-76.

1172. *Id.* at 776 ("Therefore, because the 'Products-Completed Operations Aggregate Limit' provision did not separately grant 'products-completed operations hazard' coverage, there is no discord with the 'your product' exclusion. The three clauses can easily be read together without conflict.").

Applying Texas's plain-meaning rule,¹¹⁷³ the Fifth Circuit appropriately held that the district court erred when it declared that CLloyd's and Commercial had a duty to pay Continental's judgment creditor, Valmont, \$118,519.47 in damages.¹¹⁷⁴ Therefore, the Fifth Circuit reversed the district court's summary-judgment award in favor of Valmont and rendered a judgment in favor of the primary and excess insurers instead.¹¹⁷⁵

C. Third-Party Liability Claims: Injury to Businesses and Professions

Collectively, the conflicts in the remaining three cases concern whether liability insurers have a duty to defend or indemnify business associations, officers and directors, and professionals.¹¹⁷⁶ Certainly, the issues in the underlying lawsuits are easy to comprehend as they primarily concern breach-of-contract and securities-fraud claims. Determining the Fifth Circuit's methodology for reaching its conclusion in at least one of these cases, however, is a bit problematic.

Put simply, the court of appeals correctly identified the relevant and settled duty-to-defend and duty-to-indemnify principles in Mississippi and Texas to resolve these remaining disputes. Moreover, even the conclusions in the majority of these latter cases are arguably correct. But the manner in which the Fifth Circuit applied settled Mississippi's and Texas's law to resolve this category of cases was less than ideal.

1. Injury to Business: Whether Under Texas's Law a Business Liability Insurer Has a Duty to Indemnify an Insured Business that Paid Monies to Defend Itself in an Underlying Third-Party, Trademark-Infringement Lawsuit

To support the assertion that the Fifth Circuit's analysis was less than stellar, consider the underlying facts and the court's conclusion in *Sport Supply Group, Inc. v. Columbia Casualty Co.*¹¹⁷⁷ MacMark Corporation is a Delaware corporation whose principal place of business is in Chicago, Illinois.¹¹⁷⁸ MacMark owns and licenses the well-known trademark,

1173. *Id.* ("[O]ur duty is to enforce the policy according to its plain meaning."); *see also* *Transp. Ins. Co. v. Standard Oil Co.*, 337 S.W.2d 284, 288 (Tex. 1960) (reiterating that courts must give words appearing in insurance contracts their plain meaning when there is no ambiguity).

1174. *Valmont Energy*, 359 F.3d at 776 ("Because we find that the 'your product' exclusion is susceptible to only one reasonable interpretation and can be given definite meaning within each policy as a whole, such exclusion is unambiguous as a matter of law.").

1175. *Id.* at 777.

1176. *See* discussion *infra* Part V.C.1-3.

1177. *Sport Supply Group, Inc. v. Columbia Cas. Co.*, 335 F.3d 453 (5th Cir. July 2003).

1178. TRADEMARK APPLICATIONS & REGISTRATIONS RETRIEVAL, at <http://tarr.uspto.gov/servlet/tarr?regser=serial&entry=71634945> (last visited Feb. 27, 2005).

“Macgregor.”¹¹⁷⁹ On the other hand, Sport Supply Group, Inc. is a Texas-based corporation, and its principal place of business is located in Dallas, Texas.¹¹⁸⁰ Sport Supply is “the nation’s largest institutional direct marketer of sports equipment and supplies.”¹¹⁸¹ It markets and sells institutional-quality products through targeted catalogs with the assistance of an outside-sales force.¹¹⁸²

MacMark formed a licensing agreement with Sport Supply, which allowed Sport Supply to attach the Macgregor trademark to certain sporting goods.¹¹⁸³ Sometime thereafter, MacMark accused Sport Supply of breaching the licensing agreement.¹¹⁸⁴ MacMark believed Sport Supply was trying to sell products over the Internet that bore the Macgregor trademark.¹¹⁸⁵ To stop the illegitimate use of its trademark, MacMark sent a letter to Sport Supply.¹¹⁸⁶ The letter stated that MacMark was preparing to terminate the licensing agreement.¹¹⁸⁷

Sport Supply responded to the unexpected announcement by commencing a declaratory-judgment action in a Texas state court.¹¹⁸⁸ Sport Supply asked the Texas court to declare that Sport Supply did not breach the licensing contract.¹¹⁸⁹ In response, MacMark filed a cause of action for breach of contract, “alleg[ing] in relevant part that Sport Supply . . . breached the licensing agreement by advertising, offering to sell, and selling products with the Macgregor trademark [over] the Internet.”¹¹⁹⁰

1179. *Id.*

1180. SPORT SUPPLY GROUP INC., FINANCIAL INFORMATION, at <http://www.sportsupplygroup.com/gym/New%20Pages/finance1.html> (last visited Feb. 27, 2005).

1181. SPORT SUPPLY GROUP INC., CORPORATE INFO, at <http://www.sportsupplygroup.com/gym/index.html> (last visited Feb. 27, 2005).

1182. *Id.*

1183. *Sport Supply Group, Inc. v. Columbia Cas. Co.*, 335 F.3d 453, 456 (5th Cir. July 2003).

1184. *Id.*

1185. *Id.*

1186. *Id.*

1187. *Id.*

1188. *Id.*

1189. *Id.*

1190. *Id.*

According to MacMark, Sport Supply’s Internet sales violated the agreement “in numerous ways.” First of all, the licensing agreement did not give Sport Supply the authority to use the Macgregor trademark on the Internet. Second, the agreement permitted Sport Supply to advertise and sell Macgregor products only in the United States, Canada, and Mexico (and Internet sales are necessarily worldwide). Third, the licensing agreement permitted Sport Supply to sell products with the Macgregor label only to institutional customers and, by advertising and selling Macgregor products on the Internet, Sport Supply was offering those products to non-institutional customers.

Id. at 456 n.1.

When the alleged breach of contract occurred, Columbia Casualty Company (Columbia) insured Sport Supply under a liability-insurance policy.¹¹⁹¹ The policy covered an “[a]dvertising injury” caused by an offense committed in the course of advertising . . . goods, products, or services[.]”¹¹⁹² Among other definitions, the liability contract defined an “advertising injury” as an injury “arising out of” a “[m]isappropriation of advertising ideas or style of doing business.”¹¹⁹³ However, the insurance contract explicitly excluded from coverage any “[a]dvertising injury” arising out of [a] . . . [b]reach of contract, other than misappropriation of advertising ideas under an implied contract.”¹¹⁹⁴

More relevant, during the period when the liability-insurance contract was in effect, Sport Supply hired RSKCo Claims Service, Inc. (RSKCo).¹¹⁹⁵ RSKCo is a “loss adjusting” company.¹¹⁹⁶ Stated briefly, Sport Supply employed RSKCo to help file insurance claims with Columbia.¹¹⁹⁷ Among its other responsibilities, RSKCo had a contractual duty to notify the insurer about newly filed suits and about the status of pending lawsuits against Sport Supply.¹¹⁹⁸ For unexplained reasons, RSKCo did not give Columbia timely notice about MacMark’s breach-of-contract action against Sport Supply.¹¹⁹⁹

Ultimately, Sport Supply and MacMark settled the trademark-use dispute.¹²⁰⁰ Under the settlement agreement, MacMark did not force Sport Supply to pay any damages.¹²⁰¹ Sport Supply alleged, however, that it had spent a considerable amount of money defending itself against MacMark’s breach-of-contract counterclaim.¹²⁰² As a result, Sport Supply contacted Columbia and demanded that the insurer pay a part of the defense costs.¹²⁰³ Columbia denied the claim.¹²⁰⁴

1191. *See id.* at 456.

1192. *Id.* at 457 (alterations in original).

1193. *Id.*

1194. *Id.* at 458 (alterations in original).

1195. *Id.* at 455.

1196. *Id.*; *see also, e.g., Am. Union Ins. Co. v. Stull Bros. Co.*, 7 A.2d 866, 867 (N.J. Ch. 1939). The court explained that

[t]he bill does not charge that [the expert] has any pecuniary interest or concern whatever in the award, or that he has manifested bias. If the widest inferences are allowed, the bill charges that he is engaged in a business, namely, loss adjuster, which brings him into frequent conflict with insurance companies and in which as an intermediary he seeks to obtain for his employers the full amount of their losses, or . . . in which he seeks to obtain more than the companies [want to pay].

Id.

1197. *Sport Supply*, 335 F.3d at 465.

1198. *See id.*

1199. *Id.*

1200. *Id.* at 456.

1201. *Id.*

1202. *Id.*

1203. *Id.*

1204. *Id.*

In response, Sport Supply filed a lawsuit against Columbia in a Texas state court, seeking to recoup the expenditures that the company used to retain independent legal representation in the underlying lawsuit.¹²⁰⁵ At that time, Sport Supply also brought numerous state law claims against RSKCo.¹²⁰⁶ Later, the Texas court removed the lawsuits to the United States District Court for the Northern District of Texas.¹²⁰⁷ The district court had diversity jurisdiction over the disputes.¹²⁰⁸ The district court granted Columbia and RSKCo's motions for summary judgment.¹²⁰⁹ Sport Supply appealed the adverse rulings.¹²¹⁰

From the very outset, the Court of Appeals for the Fifth Circuit seriously mischaracterized the essence of the appellate question. The appellate court stated: "[T]his case involves the 'duty to defend.'"¹²¹¹ Then, the court of appeals concluded that it had to apply Texas's "eight corners rule"¹²¹² to determine whether Columbia indeed had a contractual duty to defend Sport Supply.¹²¹³ As the Fifth Circuit has observed on many occasions, the duty to defend and the duty to indemnify in Texas are distinct and separate duties.¹²¹⁴ Furthermore, an insurer's duty to defend is substantially broader than the insurer's duty to indemnify.¹²¹⁵

1205. *Id.*

1206. *Id.*

1207. *Id.*

1208. *Id.*

1209. *Id.*

1210. *Id.*

1211. *Id.* at 457 (emphasis added).

1212. *See, e.g., Nat'l Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997).

If a petition does not allege facts within the scope of coverage, an insurer is not legally required to defend a suit against its insured. An insurer's duty to defend is determined by the allegations in the pleadings and the language of the insurance policy. This is sometimes referred to as the "eight corners" rule.

When applying the eight corners rule, we give the allegations in the petition a liberal interpretation.

Id. (citations omitted).

1213. *Sport Supply*, 335 F.3d at 457 & n.2. "Thus, in determining whether Columbia must reimburse Sport Supply for its defense costs, we consider the factual allegations in MacMark's counterclaim and the terms of the policy issued by Columbia." *Id.* at 457. "Because a court can examine only the four corners of the complaint and the four corners of the insurance policy, this approach is often described as 'the eight corners rule.'" *Id.* at 457 n.2 (citations omitted).

1214. *See, e.g., Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 527-28 (5th Cir. Mar. 2004); *Quorum Health Res., L.L.C. v. Maverick County Hosp. Dist.*, 308 F.3d 451, 468 (5th Cir. 2002); *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002).

1215. *See, e.g., Quorum Health*, 308 F.3d at 468 (citations omitted) (applying Texas law and reaffirming that "[t]he duty to indemnify arises from the actual facts that are developed to establish liability in the underlying suit. An insurer may have a duty to defend but, eventually, not to indemnify."); *Am. Nat'l Gen. Ins. Co. v. Ryan*, 274 F.3d 319, 324 (5th Cir. 2001) (citation omitted) ("The duty to defend is broader than the duty to indemnify; if the insurer does not have a duty to defend the insured, then the insurer also does not have a duty to indemnify."); *Am. States Ins. Co. v. Bailey*, 133 F.3d 363, 368 (5th Cir. 1998) (concluding that the duty to defend is broader than the duty to indemnify); *St. Paul Ins. Co. v. Tex. Dep't*

Based on the reported facts in *Sport Supply*, the proper question on review was whether Columbia had a duty to indemnify its insured. We should remember that Sport Supply sued RSKCo under two theories of recovery — for breaching a contractual duty “to notify Columbia about MacMark’s counterclaim” and for negligently “failing to report the . . . counterclaim to Columbia in a timely manner.”¹²¹⁶ Apparently, those material facts did not impress the Fifth Circuit.¹²¹⁷ More likely, the court of appeals simply overlooked them.

But it is more difficult to explain how the appellate court could inadvertently overlook two additional important facts: (1) Columbia never received a duty-to-defend request or a notice-of-loss claim from Sport Supply until after the insured secured independent legal counsel, which explains the company’s decision to sue its risk adjuster; and (2) Sport Supply settled the underlying third-party suit without the insurer’s consent and participation, which surely violates Texas’s law and arguably prevents the insured from later complaining about Columbia’s failure to either defend or indemnify.¹²¹⁸

Perhaps the best evidence that Sport Supply presented a duty-to-indemnify, instead of a duty-to-defend question, controversy comes from the Fifth Circuit itself. The appellate court tells us: “Sport Supply filed [this] suit against Columbia, alleging that the insurer [failed] to reimburse Sport Supply for part of the cost of defending [MacMark’s counterclaim].”¹²¹⁹ Still, the Fifth Circuit insisted that “[i]n order to complete the analysis required in duty to defend cases, we examine whether this exception to the breach-of-contract exclusion could apply in this case.”¹²²⁰

of Transp., 999 S.W.2d 881, 884 (Tex. App.—Austin 1999, pet. denied) (citations omitted) (concluding that an insurance company’s “duty to defend is broader than the duty to indemnify”).

1216. *Sport Supply*, 335 F.3d at 465-66.

1217. *Id.* Conceivably, the Fifth Circuit overlooked the relevance of these two bits of information and mischaracterized the substantive question for appellate review because the court of appeals affirmed the district court’s summary judgment ruling in favor of RSKCo. The trial court ruled that Sport Supply failed to present sufficient *prima facie* evidence to support a breach of contract or a negligence action against RSKCo, the loss adjuster. *See id.*

1218. *See id.* at 456, 465; G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544, 547 (Tex. Comm’n App.1929, holding approved). The court concluded that although the insurer had a duty to defend its insured:

[T]he indemnity company had the right to take complete and exclusive control of the suit against the assured, and the assured was absolutely prohibited from making any settlement, except at his own expense, or to interfere in any negotiations for settlement or legal proceeding without the consent of the company; the company reserved the right to settle any such claim or suit brought against the assured.

Id. (emphasis added).

1219. *Sport Supply*, 335 F.3d at 455 (emphasis added).

1220. *Id.* at 459.

As stated earlier, under the terms of the exclusion clause, Columbia had no third-party responsibilities if Sport Supply breached a contract and an advertising injury arose out of that breach.¹²²¹ But, there was *an exception to the exception*: Columbia would be liable if Sport Supply misappropriated advertising ideas under an implied contract.¹²²² After carefully researching federal and Texas's law,¹²²³ the Fifth Circuit issued the following findings and conclusion:

Sport Supply's alleged infringement of the Macgregor trademark does not constitute the "misappropriation of [an] advertising [idea]." As a result, the *exception to the [exception]* . . . does not apply. In other words, the breach of contract exclusion *does* apply in this case. Therefore, Sport Supply is not entitled to reimbursement for any of its defense costs. The district court properly granted Columbia's motion for summary judgment.¹²²⁴

On the basis of the reported facts and in light of the language in the exclusion clause, one might readily conclude that the Fifth Circuit reached the correct decision in *Sport Supply* by ruling in favor of the insurance company. Regardless of whether the appellate question involved Columbia's duty to defend or duty to indemnify, it is likely the court made the proper decision. But there are several troublesome sentences in one of the footnotes, and the Fifth Circuit's response to what appears there only exacerbates the author's concern.

The Fifth Circuit stated:

Sport Supply contends that we need not reach the merits of this case. According to Sport Supply, we can reverse the district court's judgment in favor of Columbia based on the *insurance company's failure to offer valid summary judgment evidence*. Sport Supply argues that *the insurance policy*

1221. *Id.* at 458.

1222. *Id.*

1223. *Id.* at 464-65.

Under Texas law, it appears that the term "advertising" in an insurance policy is used in a conventional sense: to refer to a public announcement (such as on a billboard, in a newspaper, on a signpost, or in a television or radio commercial) that "induce[s] the public to patronize" a particular establishment or to buy a particular product. In other words, the term "advertising" refers to a common device for soliciting business. . . . Texas law does not appear to view a trademark as a marketing device. Texas law has adopted the more conventional understanding of a trademark as a *label* that serves primarily to *identify* and *distinguish* products. Thus, under Texas law, the Macgregor trademark would not appear to be "advertising." It follows that the idea for the Macgregor trademark is not an "advertising idea," and that the infringement of the Macgregor trademark [is not a] "misappropriation of [an] advertising idea[]."

Id. (alterations in original except [is not a]) (citations omitted).

1224. *Id.* at 465 (alteration in original).

that Columbia presented to the district court constituted invalid evidence because *Columbia did not provide a complete copy of the policy*. Sport Supply's argument *lacks merit*.¹²²⁵

From the author's perspective, the court of appeals's response is flaccid at best and unconvincing at worst. A careful search of the case reveals that the Fifth Circuit never described the insurance contract between Sport Supply and Columbia in its opinion.¹²²⁶ We do not know whether the agreement was a comprehensive general liability (CGL), a general liability, a commercial property, or a commercial professional liability (CPL) contract.¹²²⁷ In fact, we do not know whether the Columbia policy was even a liability contract.¹²²⁸ It could have been an indemnity contract.¹²²⁹ We only know that the agreement was an "insurance policy," and the courts of appeals reported that fact twenty times.¹²³⁰

Most definitely, Sport Supply's concern about Columbia's insufficient summary-judgment evidence was legitimate.¹²³¹ If the Columbia contract was a "true" liability-insurance contract, one would have found either a right-to-settle or a duty-to-settle clause, along with a duty-to-defend provision.¹²³² However, those provisions are not present in a true indemnity insurance contract. Instead, under the latter policy the insurer only agrees to indemnify—to reimburse the insured after the insured spends funds to secure independent legal counsel or to settle a third-party lawsuit without the

1225. *Id.* at 457 n.3 (emphasis added).

1226. *See id.* at 457.

1227. *See id.*

1228. *See id.*

1229. *See id.*

1230. *See id.* at 455-65.

1231. *See id.* at 456-58.

1232. *See* Willy E. Rice, *Insurance Contracts and Judicial Discord Over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments—1900-1997*, 47 AM. U. L. REV. 1131, 1145-1146 (1998).

In most instances, insurance consumers purchase third-party insurance to help pay third-party victims' claims in the event of a loss of property, bodily injuries, or death. . . . More significantly, third-party insurance falls into two very broad categories—liability contracts and indemnity contracts.

Liability contracts have several common features: (1) a coverage clause that outlines the types of risks the insurer is willing to assume; (2) a broad exclusion provision that highlights various types of risks or behaviors that the insurance company is unwilling to assume; (3) a narrower "intentional acts" provision stating that injuries or acts "expected or intended" from the insured's perspective are excluded; (4) a right-to-settle clause that gives the insurer the exclusive right to settle all third-party claims filed against the insured; (5) a duty-to-defend provision that compels the company to hire legal counsel for the insured and pay defense costs; and (6) a duty-to-pay clause that outlines the conditions under which the insurer will pay once liability has been established.

Id. (citations omitted).

insurer's input or consent, or both.¹²³³ Put simply, there are major legal differences between true liability and indemnity insurance contracts.¹²³⁴

In conclusion, the Fifth Circuit's analysis in *Sport Supply* certainly would have been more enlightening if the court had given the industry-wide name for the Columbia contract and had described other relevant provisions in the contract. But more important, the analysis would have been more convincing if the court would have discussed whether the Columbia contract was an indemnity or a liability contract—one with a duty-to-defend clause.

Arguably, assuming that the Columbia contract was an indemnity agreement, Sport Supply might have prevailed even though the contract contained a breach-of-contract exclusion. Again, the reported facts revealed that MacMark and Sport Supply settled their disagreement.¹²³⁵ There was no finding, by a trier of fact, that Sport Supply actually breached the MacMark contract.¹²³⁶ There was only *an allegation*.¹²³⁷ Very likely, under the terms of an indemnity contract, that allegation of a breach of contract would have had no relevance. To repeat, in Texas the complaint allegation rule or the eight corners rule does not apply to duty-to-indemnify cases.¹²³⁸ Certainly, Texas's

1233. *Id.* at 1146-47.

A major purpose of liability insurance is to help shield the insured from having to pay damages to a third-party victim. In addition, "[u]nder a liability policy . . . the insurer's obligation to pay arises *as soon as* the insured incurs liability for [a] loss . . ." Under an indemnity contract, however, the insurer is only required to make whole the insured after he has sustained an actual loss after the insured has paid or been compelled to make a payment to a third-party claimant. In comparison, an insurer incurs an obligation to the insured whereupon the insured has paid, or is obligated to pay a third-party claimant. Although both liability and indemnity insurance contracts exclude coverage for malicious, dishonest, and fraudulent conduct and for claims involving libel or slander, indemnity agreements generally do not contain a duty-to-defend provision. Therefore, with indemnity agreements, control of the legal defense resides exclusively with the policyholder and with the legal counsel chosen to defend the policyholder against the third-party allegations.

Insurers sell several types of so-called indemnity contracts: Professional indemnity plans, hospital indemnity insurance, workers compensation indemnity plans, excess employers indemnity policies, and industrial indemnity insurance. Directors' and officers' policies ("D&O"), however, appear to be the most widely distributed and well-known type of indemnity contracts.

Id. (alterations in original) (citations omitted).

1234. *See id.*

1235. *Sport Supply*, 335 F.3d at 456.

1236. *See id.*

1237. *Id.*

1238. *See King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002).

The duty to defend and the duty to indemnify are distinct and separate duties. An insurer's duty to defend is determined solely by the allegations in the pleadings and the language of the insurance policy. This is the "eight corners" or "complaint allegation rule." "If a petition does not allege facts within the scope of coverage, an insurer is not legally required to defend a suit against its insured."

Id. (citations omitted). *See also Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821-22 (Tex. 1997).

[U]nder the "complaint allegation rule," factual allegations in the pleadings and the policy language determine an insurer's duty to defend. "If a petition does not allege facts within the scope of coverage, an insurer is not legally required to defend a suit against its insured." The

settled principles are not foreign to the Fifth Circuit. As we will see in the next subsection, the court of appeals acknowledged and emphasized the difference between these two doctrines.¹²³⁹

2. *Injury to Shareholders: Whether Under Texas's Law a Directors' and Officers' Liability Insurer Has a Duty to Indemnify Corporate Directors and Officers Who Paid Certain Monies to Settle an Underlying Securities-Fraud, Shareholders' Class-Action Lawsuit*

Although the reported facts in *Medical Care America, Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pennsylvania* are fairly extensive, the essence of the dispute between the insured and insurer is easy to comprehend.¹²⁴⁰ The Fifth Circuit's analysis is an uncomplicated reading, and it represents a genuine effort to apply Texas's law intelligibly and to reach a sound and fair result. At the outset, it certainly appeared that the court of appeals achieved the latter goals. After a keen examination of the reported facts and of what the court did not mention or discuss, however, the author left the Fifth Circuit's presentation feeling that the appellate court simply did not fully appreciate the importance of several facts—and consequently several legal arguments—that the insureds raised on appeal.

Unlike prior cases appearing in this Survey, the underlying litigation in *Medical Care* involves a lot of dates.¹²⁴¹ In fact, the outcome in this controversy turns on the importance or weight that both federal courts assigned to certain dates. Therefore, the author encourages the reader to carefully observe the various time periods outlined in the underlying lawsuit, along with the other pertinent facts. Furthermore, the Fifth Circuit did not carefully scrutinize or fully incorporate all relevant evidence—identified and discussed below—into its discussion. The analysis would likely have been more stellar and less troublesome if the appellate court discussed the highly pertinent, excluded evidence.

The underlying litigation in *Medical Care* is quite interesting and very familiar. Medical Care International, Inc. (MCI) and Critical Care America

duty to indemnify is triggered by the actual facts establishing liability in the underlying suit.

Thus, the duty to defend and the duty to indemnify by an insurer are distinct and separate duties.

Id. (citations omitted).

1239. See *Med. Care Am., Inc. v. Nat'l Union Fire Ins. Co.*, 341F.3d 415, 424 (5th Cir. Aug. 2003).

First, it is not true, as Medical Care contends, that the coverage issue must be resolved by looking at the *allegations* of the underlying shareholders suit. Under well-established Texas law, an insurer's *duty to defend* its insured is determined by considering the allegations in the underlying litigation in the light of the policy provisions. . . . Instead we must look to the rule governing an insurer's *duty to indemnify* its insured. Under Texas law, this duty depends on the actual facts of the underlying litigation.

Id. (citations omitted).

1240. See *id.* at 415.

1241. See *id.* at 417-20.

(CCA) announced plans for a merger in the summer of 1992.¹²⁴² They reported that MCI and CCA would become wholly-owned subsidiaries of Medical Care America, Inc., a new company.¹²⁴³ MCI and CCA then issued statements that painted a rosy picture regarding the future success of the new company.¹²⁴⁴ Their pronouncements generated high expectations regarding Medical Care's future earnings.¹²⁴⁵ Before the merger was official, Medical Care's would-be "new directors" filed a joint-proxy prospectus with the Securities and Exchange Commission (SEC).¹²⁴⁶ The directors sent a copy of this prospectus to each shareholder of both companies.¹²⁴⁷

Marsh & McLennan Companies, Inc. is a large conglomerate that sells risk and insurance services.¹²⁴⁸ Larry Waldie is an insurance broker, soliciting agent, and employee at Marsh & McLennan (collectively Marsh-Waldie).¹²⁴⁹ Also before the merger was completed, Medical Care's newly selected director of risk management, Theresa Major-Gable, contacted Larry Waldie and reported that the new company wanted to "purchas[e] directors and officers ('D&O') liability insurance for Medical Care 'going forward' from the date of the merger. . . . Acting on Medical Care's behalf, [Marsh-]Waldie solicited quotes from several insurance companies, including National Union Fire Insurance Company. . . ." ¹²⁵⁰ After considering various policies and quotes, Major-Gable instructed Marsh-Waldie "to bind National Union's quote."¹²⁵¹

On September 4, 1992, National Union sent a letter to Waldie.¹²⁵² That document served as the temporary conditional binder (Original Binder).¹²⁵³

1242. *Id.* at 417-18.

1243. *Id.*

1244. *See id.* at 418.

1245. *Id.*

1246. *Id.*

1247. *Id.*

1248. *See* MMC, ABOUT MMC, at <http://www.mmc.com/frameset.php?embed=about/index.php> (last visited Feb. 27, 2005).

[Marsh & McLennan Companies, Inc.] is a global professional services firm with annual revenues exceeding \$11 billion. . . .

In 2003, revenues from MMC's risk and insurance services businesses totaled \$6.9 billion. [Marsh Inc.] is the world leader in delivering risk and insurance services and solutions to clients. It has approximately 38,000 employees, more than 400 offices, and serves clients in over 100 countries.

[Marsh] provides global risk management, risk consulting, insurance broking, financial solutions, and insurance program management services for businesses, public entities, associations, professional services organizations, and private clients.

Operations within Marsh Inc. also perform underwriting management and wholesale broking services for a wide range of clients.

Id.

1249. *Medical Care Am.*, 341 F.3d at 418.

1250. *Id.*

1251. *Id.*

1252. *Id.*

1253. *Id.*

Under the agreement in the Original Binder, National Union promised “to provide Medical Care with \$10 million worth of D&O coverage from September 9, 1992 to September 9, 1993.”¹²⁵⁴ Significantly, the official date of the merger was September 9, 1992; this was also the date MCI and CCA’s “old directors” became the new directors of Medical Care.¹²⁵⁵ The Original Binder declared that coverage would commence after Medical Care submitted a completed application and after National Union reviewed the application and other relevant information about the new company.¹²⁵⁶

More important, National Union stated unambiguously in the Original Binder that it would deliver a D&O contract to Medical Care outlining the terms, conditions, and exclusions of coverage.¹²⁵⁷ The Original Binder also stated that the insurer would ultimately deliver “*ten endorsements, including one for ‘prior acts as of September 9, 1992.’*”¹²⁵⁸ From the author’s perspective, however, Marsh-Waldie performed an exceedingly astonishing and arguably illegal act under Texas’s law. On September 15, 1992—nearly two weeks after sending the Original Binder—Waldie read the contents of National Union’s temporary-insurance contract, summarized what appeared in the original temporary binder, and wrote a completely new, independent, and modified temporary conditional binder (Modified Binder).¹²⁵⁹ Curiously, the Fifth Circuit neither mentioned nor discussed this very pertinent fact in its opinion.

Unlike the Original Binder, the Modified Binder stated that the final D&O insurance contract “*would exclude ‘all prior acts prior to [the] policy[’s] inception date.’*”¹²⁶⁰ On September 15, 1992, Marsh-Waldie sent the Modified Binder to Medical Care’s director of risk management, and on September 28, 1992, Medical Care unconditionally satisfied all of the conditions precedent to coverage outlined in the Original Binder.¹²⁶¹ But strangely, National Union did not deliver the D&O contract to Medical Care until January 30, 1993.¹²⁶²

Remarkably, the delivery date was nearly five months after Medical Care completed the application for D&O liability insurance, four months after the company had satisfied all of the conditions precedent, and four months after shareholders commenced a lawsuit against Medical Care, on or about

1254. *Id.*

1255. *Id.*

1256. *Id.*

1257. *See id.*

1258. *Id.* (emphasis added).

1259. *See id.* (“Waldie summarized the temporary conditional binder in a separate binder . . . he sent to [Theresa] Major-Gable on September 15, 1992.”).

1260. *Id.* (emphasis added).

1261. *Id.*

1262. *Id.*

September 25, 1992.¹²⁶³ Yet, the Court of Appeals for the Fifth Circuit either deliberately or inadvertently overlooked this highly pertinent evidence, or perhaps the court considered and then cavalierly dismissed that information.

Even more relevant and disturbing, when Medical Care received the D&O insurance contract, the final “prior acts” endorsement (Endorsement #7) contained language that deviated appreciably from the terms in the Original Binder and Modified Binder.¹²⁶⁴ In relevant part, Endorsement #7 stated:

In consideration of the premium charged, it is . . . understood and agreed that this policy only provides coverage for Loss arising from claims for alleged Wrongful Acts occurring on or after September 9, 1992 and prior to the end of the Policy Period. . . . *Loss(es) arising out of the same or related Wrongful Act(s) shall be deemed to arise from the first such same or related Wrongful Act.*¹²⁶⁵

Unmistakably, the italicized sentence in Endorsement #7 was an unexpected addition and certainly proved fateful for Medical Care.¹²⁶⁶

After Medical Care announced flat earnings on September 25, 1992, the value of the new company’s stock dropped more than fifty percent in one day.¹²⁶⁷ In response, the New York Stock Exchange suspended the trading of Medical Care’s stock.¹²⁶⁸ Shortly thereafter, disgruntled shareholders filed at least fifteen class-action lawsuits against Medical Care, CCA, MCI, and their directors and officers in the United States District Court for the Northern District of Texas.¹²⁶⁹ Later, the district court consolidated the lawsuits.¹²⁷⁰

The shareholders claimed that the defendants made material misrepresentations and failed to disclose material information in their public statements and filings with the SEC.¹²⁷¹ Those acts and omissions allegedly violated sections 10(b) and 20(a) of the Securities Exchange Act of 1934¹²⁷² and SEC Rule 10b-5.¹²⁷³ Medical Care immediately notified National Union about the underlying lawsuit.¹²⁷⁴ However, on two occasions—January 27th and May 21st of 1993—the D&O insurer denied the claim.¹²⁷⁵ National Union asserted

1263. *See id.*

1264. *See id.* at 418-19.

1265. *Id.* (alterations in original).

1266. *See id.* at 418-21, 425.

1267. *Id.* at 418.

1268. *Id.*

1269. *Id.*

1270. *Id.*

1271. *Id.*

1272. *Id.* (citing 15 U.S.C. §§ 78j(b), 78i(a) (2000)).

1273. *Id.* (citing 17 C.F.R. § 240.10b-5 (2004)).

1274. *See id.* at 418-19.

1275. *Id.* at 419.

that the italicized “related wrongful acts” language in Endorsement #7 did not cover the alleged securities-fraud claims in the underlying suit.¹²⁷⁶

Medical Care, MCI, CCA, and the various officers and directors ultimately settled the lawsuit for \$60 million.¹²⁷⁷ As consideration, the shareholders gave the defendants a full release of all liability.¹²⁷⁸ Once more, Medical Care contacted National Union and disclosed the terms of the settlement agreement.¹²⁷⁹ The company also asked the insurer to reconsider its denial of coverage.¹²⁸⁰ National Union refused.¹²⁸¹ Therefore, in November 1996, Medical Care filed a lawsuit against National Union in the United States District Court for the Northern District of Texas.¹²⁸² The complaint listed several claims against the insurer¹²⁸³—a breach of an implied duty of good faith and fair dealing,¹²⁸⁴ “bad faith,”¹²⁸⁵ and violations under the Texas Insurance Code.¹²⁸⁶ However, the company only listed one theory of recovery—a cause of action for breach of contract.¹²⁸⁷ Each party filed a motion for summary judgment.¹²⁸⁸ Significantly, the district court ruled in

1276. *Id.*

1277. *Id.*

1278. *Id.*

1279. *Id.* “The revised agreement allocated [liability] as follows: MCI, \$10 million; the directors of MCI, \$10 million; CCA, \$10 million; the directors of CCA, \$10 million; Medical Care, \$10 million; and the directors of Medical Care, \$10 million.” *Id.* at 419 n.6.

1280. *Id.* at 419.

1281. *Id.*

1282. *Id.*

1283. *Id.*

1284. *See Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 666 (Tex. 1995) (reaffirming that an “insurer’s failure to deal fairly and in good faith with its insured [allows the insured to commence] a *cause of action that sounds in tort*, [which] is distinct from the contract cause of action for the breach of the terms of an underlying insurance policy”) (emphasis added).

1285. *See Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. Dec. 2003) (reaffirming that “[u]nder Texas law, a plaintiff’s cause of action for bad-faith breach of a first-party insurance contract accrues at the time the insurer denies the insured’s claim”).

1286. *Medical Care Am.*, 341 F.3d at 419; TEX. INS. CODE ANN. § 21.21 (Vernon Supp. 2004-05). *See also Med. Care Am.*, 341 F.3d at 426 (stating that:

Medical Care’s statutory claims arise under article 21.21 § 16(a) of the Texas Insurance Code, which allows an individual who has been damaged by “unfair methods of competition or unfair or deceptive acts or practices in the business of insurance” to bring a statutory cause of action. Medical Care alleged that National Union engaged in four unfair or deceptive practices:

(a) National Union misrepresented the benefits of the Policy to Medical Care and its officers and directors in violation of [Texas Insurance Code] Art. 21.21 § 4(1).

(b) National Union made untrue and misleading statements regarding the coverage it would provide pursuant to the Policy, in violation of [Texas Insurance Code] Art. 21.21 § 4(2).

(c) National Union engaged in unfair settlement practices in violation of [Texas Insurance Code] Art. 21.21 § 4(10).

(d) National Union misrepresented the Policy by making untrue statement of material fact, failing to state material facts, or making misleading statements to Medical Care and its officers and directors in violation of [Texas Insurance Code] Art. 21.21 § 4(11).)

(alterations in original) (quoting TEX. INS. CODE ANN. art. 21.21 § 16(a)).

1287. *Med. Care Am.*, 341 F.3d at 420.

1288. *Id.* at 419.

favor of Medical Care and held that “‘*the binder[s] [were] the controlling contracts of insurance*’ in this dispute.”¹²⁸⁹ But the district court ruled against Medical Care and dismissed the company’s bad-faith, extra-contractual liability claims with prejudice.¹²⁹⁰

More important, Medical Care cited the doctrine of equitable estoppel¹²⁹¹ and encouraged the district court to estop National Union from employing the related wrongful acts language in Endorsement #7 as an affirmative defense.¹²⁹² The company argued that National Union concealed the true scope of Endorsement #7 by intentionally deleting any reference to related wrongful acts from the Original Binder and Modified Binder.¹²⁹³ After reviewing pertinent facts and applying the doctrine of equitable estoppel, the lower federal court decided that National Union was not estopped from raising the related wrongful-acts exclusion as an affirmative defense.¹²⁹⁴

A jury decided Medical Care’s claim for breach of contract.¹²⁹⁵ The jury found that (1) Medical Care established that its directors and officers incurred losses arising from the shareholders’ securities-fraud allegations, (2) the alleged wrongful acts of the directors and officers occurred on or after September 9, 1992, and (3) Medical Care lost money by settling the underlying lawsuit on behalf of its directors and officers.¹²⁹⁶ But National Union established that the directors and officers’ post-September 9, 1992 wrongful acts were “*the same as or related to*” their pre-September 9, 1992 wrongful acts.¹²⁹⁷ Therefore, the jury returned a take-nothing verdict for

1289. *Id.* (emphasis added).

1290. *Id.* “Medical Care contends that the district court erred in granting partial summary judgment for National Union and dismissing its extracontractual claims alleging breach of the duty of good faith and fair dealing and violation of article 21.21 of the Texas Insurance Code.” *Id.* at 425.

1291. *See id.* at 422 (reaffirming that Texas law requires a plaintiff who relies on the doctrine of equitable estoppel to show that (1) the defendant made a false representation or concealed material facts, (2) the defendant misrepresented or concealed material facts with actual or constructive knowledge of those facts, (3) the defendant engaged in such conduct expecting the misrepresentation or concealment to influence another party’s action, (4) the defendant’s misrepresentation or concealment affected a party who does not have knowledge of the facts or the means to obtain the truth surrounding the matter, and (5) the plaintiff relied on the misrepresentation or concealment to the plaintiff’s detriment) (quoting *Johnson & Higgins, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 515-16 (Tex. 1998)).

1292. *Id.* at 422-23.

1293. *Id.* at 423.

1294. *Id.* at 420.

At the close of the evidence, both parties filed motions for judgment as a matter of law (“JMOL”). The court denied Medical Care’s motion *in toto*. . . . [The district court] held that Medical Care had not shown that it was due coverage as a matter of law. The court granted National Union’s motion in part, ruling that the insurance contract included a “related acts” exclusion and that National Union was not equitably estopped from relying on that “related acts” exclusion.

Id.

1295. *Id.*

1296. *Id.*

1297. *Id.* (emphasis added).

Medical Care,¹²⁹⁸ and after the district court denied Medical Care's motions for a new trial and judgment as a matter of law (JMOL),¹²⁹⁹ the company appealed.¹³⁰⁰

The Court of Appeals for the Fifth Circuit framed the appellate question as follows: "[W]hether the *ordinary form of prior acts endorsement* used in D&O policies contains language *excluding coverage of subsequent related acts*."¹³⁰¹ Under Texas's law, "an insurance binder provides coverage according to the terms and provisions of the *ordinary form* of the contemplated policy."¹³⁰² Applying this principle and examining Waldie's Modified Binder that contained the exclusionary language—which did not appear in Marsh's Original Binder—the Fifth Circuit supported the district court's rulings.¹³⁰³ National Union did not have to indemnify Medical Care.¹³⁰⁴

But the Fifth Circuit reached that conclusion after considering Medical Care's argument: The court should equitably estop National Union from citing and using, as an affirmative defense, the exclusionary and "the same as or related to" language in Endorsement #7.¹³⁰⁵ Regarding this issue, the Fifth Circuit found that the district court's JMOL ruling and the jury's findings were proper because Medical Care did not establish all of the essential elements to prevail under the doctrine of equitable estoppel.¹³⁰⁶ In particular, the Fifth Circuit found "no positive evidence" to support Medical Care's allegation that National Union misrepresented or concealed coverage terms for nearly five months and until after Medical Care settled the underlying lawsuit.¹³⁰⁷

1298. *Id.*

1299. *Id.*

JMOL is appropriate when "a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue." In reviewing the record, we draw all reasonable inferences in favor of the nonmovant, make no credibility determinations, and do not weigh the evidence.

Id. (citations omitted).

1300. *Id.*

1301. *Id.* at 421 (emphasis added).

1302. *Id.* at 420-21 (emphasis added). The Fifth Circuit cited *Ranger County Mutual Insurance Co. v. Chrysler Credit Corp.*, 501 S.W.2d 295, 298 (Tex.1973), which declared that "[a]s long as a binder is in effect, the insured may look to the form of the contemplated policy for coverage, duration, cancellation, and other terms." *Id.* at 421 n.15.

1303. *Id.* at 422.

1304. *Id.*

After carefully reviewing the record, we conclude that the evidence and inferences point so strongly and overwhelmingly in favor of a finding that National Union's standard prior acts endorsement normally or ordinarily used in its D&O liability policies contained related acts language that JMOL in National Union's favor is warranted.

Id.

1305. *Id.* at 422-23.

1306. *Id.* at 423.

1307. *Id.*

Because the evidence points so strongly and overwhelmingly in favor of National Union, we

The court of appeals also observed that under Texas's law, "[a] party claiming an estoppel must have used due diligence to ascertain the truth of the matters upon which he relies in acting to his detriment."¹³⁰⁸ Evaluating the facts in light of this principle, the Fifth Circuit concluded that neither Medical Care nor its representatives contacted Marsh or National Union to determine "the scope or effect of the prior acts endorsement."¹³⁰⁹ The court of appeals stated additionally that Medical Care presented no positive evidence establishing that the company had insufficient means to make the necessary inquiry or that extraneous factors prevented Medical Care from conducting such an investigation.¹³¹⁰

The Fifth Circuit's analysis, findings, and ultimate conclusion present several major problems. First, the court of appeals mischaracterized, and therefore, failed to appreciate Lawrence Waldie's true legal status in this litigation. Waldie was an insurance broker and agent; he was not "Medical Care's agent" as the court represented.¹³¹¹ The Fifth Circuit stated that Medical Care selected Marsh and Waldie—the soliciting agent—as "*its exclusive agent of record*."¹³¹² But, soliciting agents are regarded as agents for insurers rather than for insureds when legal disputes evolve between insurers and their insured under Texas's law.¹³¹³ Therefore, Marsh and Waldie were agents for National Union Fire Insurance Company and not for Medical Care as a matter of law.¹³¹⁴

conclude that a jury could not reasonably infer that National Union had anything to conceal, intended to conceal anything, or in fact concealed anything from Medical Care. Because Medical Care failed to establish the first element of equitable estoppel, summary judgment was appropriate.

Id.

1308. *Id.* (alteration in original) (quoting *Barfield v. Howard M. Smith Co.*, 426 S.W.2d 834, 838 (Tex. 1968)).

1309. *Id.*

1310. *Id.*

1311. *Id.* at 421.

1312. *Id.* at 418 (emphasis added).

1313. TEX. INS. CODE ANN. § 21.04 (Vernon Supp. 2004-05). This provision of the Texas Insurance Code states in relevant part:

Any person who solicits an application for life, accident, or health insurance, or property or casualty insurance, shall, in any controversy between the insured . . . and the company issuing any policy upon such application . . . *be regarded as the agent of the company, and not the agent of the insured*, but such agent shall not have the power to waive, change or alter any of the terms or conditions of the application or policy.

Id. (emphasis added).

1314. *See Med. Care Am.*, 341 F.3d at 418.

Second, a soliciting agent's conduct may prevent an insurer from raising an otherwise effective affirmative defense under Texas's doctrine of equitable estoppel.¹³¹⁵ Remember, the court of appeals declared that Medical Care did not try diligently to determine the true "scope or effect of the [prior-acts] endorsement."¹³¹⁶ But Medical Care did try when it relied on Waldie's input.¹³¹⁷ Furthermore, a significant part of Waldie's conduct—modifying a temporary binding receipt without authority and disclosing that information to Medical Care—involved at best a material misrepresentation and at worst fraud.¹³¹⁸

Even worse, the Fifth Circuit dismissed the insured's equitable estoppel argument largely because of Waldie's testimony at trial.¹³¹⁹ Characterizing Waldie as one of "[t]wo disinterested witnesses," the court of appeals wrote: "Lawrence Waldie, the insurance broker . . . , testified that Endorsement # 7 was in a form that was the 'customary and normal form of a prior acts endorsement issued by National Union' and other carriers writing D&O policies under similar circumstances. Hence, he was not surprised that it contained related acts language."¹³²⁰

Finally, the Fifth Circuit either failed to appreciate or completely overlooked that neither the Original nor the Modified Binder contained any related wrongful-acts language like that appearing in Endorsement # 7.¹³²¹ Although the Modified Binder mentioned "excluded prior acts," the Original Binder just mentioned "prior acts."¹³²² A reasonable person could have

1315. See Preferred Risk Mut. Ins. Co. v. Rabun, 561 S.W.2d 239, 243 (Tex. Civ. App.—Austin 1978, writ dismissed).

The doctrine of waiver and the often associated and resultant doctrine of estoppel have been applied in the situation where an agent agreed orally to renew an insurance policy, but thereafter for some reason failed to do so. Generally the insurer has been estopped to deny renewal of a policy, or [prevented from arguing that the agent had no] authority . . . to make such agreement, or [found] to have waived the renewal conditions of the policy, particularly with respect to payment of the renewal premium. In such cases, the waiver by, or an estoppel against, an insurer arose from the act, conduct, or knowledge of a duly authorized representative, acting within the scope of actual or apparent authority.

Id. (emphasis added) (citation omitted).

1316. *Med. Care Am.*, 341 F.3d at 423.

1317. See *id.* at 418.

1318. See *id.*

1319. See *id.* at 421-23.

1320. *Id.* at 421.

[Waldie] agreed that Endorsement # 7 was the type of prior acts endorsement that he had anticipated when he wrote out the Binder in September 1992. He testified that he had no recollection of ever negotiating a prior acts endorsement that did not contain related acts language on behalf of any client with either National Union or any other insurer. Furthermore, he could not recall ever seeing a D&O policy with a prior acts endorsement that did not contain related acts language. Indeed, he was not aware that any such policy was available in the industry.

Id.

1321. See *id.* at 418-19.

1322. See *id.* at 418.

concluded, after evaluating the latter binder, that the drafter meant either "coverage for" or "exclusion of" prior acts.¹³²³ In other words, the following statement is ambiguous: "[National Union will issue a policy] with ten endorsements, including one for 'prior acts as of September 9, 1992.'"¹³²⁴

The law in Texas is clear: "[W]hen the language of an insurance contract is ambiguous [and] is subject to two or more reasonable interpretations, then that construction which affords coverage will be the one adopted."¹³²⁵ Additionally, in Texas "[i]t is well-established law that where an ambiguity exists in a contract, the contract language will be construed strictly against the party who drafted it since the drafter is responsible for the language used."¹³²⁶ But more important, when insurers draft poorly written and confusing endorsements or temporary binders, Texas's law requires courts to construe ambiguous words and phrases in favor of the insureds.¹³²⁷ To be sure, the Fifth Circuit's opinion in *Medical Care America* would have been stellar if the court had addressed this and other relevant issues.¹³²⁸

3. Injury to Business Interests: Whether Under Mississippi's Law a Title Insurer Has a Duty to Defend and Indemnify an Indenture Trustee Who Paid Certain Monies to Settle an Underlying Breach-of-Contract Lawsuit

The final decision, *In re Biloxi Casino Belle Inc.*, did not present any unfamiliar questions of law, and the surrounding facts and various parties in the underlying lawsuit were fairly interesting.¹³²⁹ But, the legal conflict in

1323. See *id.* at 418-21. Of course, the yet-to-be-issued prior acts endorsement could have been a "prior acts exclusion endorsement" rather than a "prior acts coverage endorsement." See *id.* At a minimum, the binder was ambiguous and required a court of law to construe its meaning in favor of *Medical Care*. *Id.* But see *Matthews v. Home Ins. Co.*, 916 S.W.2d 666, 667 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

Matthews contends that the contract consists solely of the declarations page . . . and nothing else because he never received anything else from Home. He contends that even the endorsements listed there do not bind him because Home never furnished them to him on or after June 14, 1990, the "issue date" of the policy.

Matthews cannot prevail because 1) he signed a prior acts exclusion endorsement on June 8, 1990, that excludes this claim from coverage, 2) that endorsement is part of the policy because it is listed on the declarations page, and 3) such endorsements are valid even though they limit broader statements of coverage elsewhere in the policy.

Id. (emphasis added).

1324. *Med. Care Am.*, 341 F.3d at 418 (emphasis added).

1325. *Glover v. Nat'l Ins. Underwriters*, 545 S.W.2d 755, 761 (Tex. 1977).

1326. *Gonzalez v. Mission Am. Ins. Co.*, 795 S.W.2d 734, 737 (Tex. 1990) (citation omitted).

1327. See *Glover*, 545 S.W.2d at 761.

1328. See *Med. Care Am.*, 341 F.3d at 415; see, e.g., *Gonzalez*, 795 S.W.2d at 737 (concluding that the insurer's "interpretation requires the reader to conclude that either [the] Endorsement [was] ambiguous or that Mission's policy construction [required rewriting]" and stressing that if the insurer had intended to limit its liability under the endorsement, it could have easily drafted the policy to limit liability for all damages).

1329. *First Am. Title Ins. Co. v. First Trust Nat'l Ass'n (In re Biloxi Casino Belle Inc.)*, 368 F.3d 491

Biloxi Casino is somewhat novel because it concerns whether a title insurer has a duty to defend as well as a duty to indemnify an insured under a title insurance contract.¹³³⁰ Title insurers generally do not have a contractual obligation to defend their insureds in an underlying lawsuit, unlike liability insurers in Mississippi and in other Fifth-Circuit states. Instead, they only have a duty to indemnify insureds when a defective title causes some financial loss.¹³³¹

The facts in the underlying lawsuit are brief. Commencing in the early 1990s, Mississippi permitted gambling on riverboat casinos.¹³³² The law allowed persons in the gaming industry to operate and moor riverboats on the Mississippi River and on the coastal waters just south of the state's three southern-most counties.¹³³³ Biloxi Casino Belle, Inc. (BCBI), a wholly-owned subsidiary of Belle Casinos, Inc. (BCI), planned to operate two casinos—one in Tunica and the other along the waterfront in Biloxi.¹³³⁴

BCBI selected Charles N. White Construction Company (White Construction) as the general contractor for the project.¹³³⁵ The general-contractor agreement required White Construction to construct the Tunica casino boat on-site.¹³³⁶ But the general contractor had to build the *Biloxi Belle II* casino in Gulfport and transport the boat to Biloxi, where additional improvements and supporting structures were made on leased land along the waterfront.¹³³⁷ BCI issued, and Bear Stearns & Company underwrote, \$75 million in mortgage notes to finance the casinos.¹³³⁸

BCI and First Trust National Association (First Trust), the indenture trustee for note holders, issued the mortgage notes according to the terms of an indenture agreement.¹³³⁹ Additionally, BCI loaned the proceeds from the sale of the mortgage notes to its subsidiary, BCBI.¹³⁴⁰ In exchange, BCBI gave BCI a promissory note.¹³⁴¹ BCBI executed a leasehold deed of trust and

(5th Cir. Apr. 2004).

1330. *See id.*

1331. *See, e.g.,* *Rancher's Life Ins. Co. v. Banker's Fire & Marine Ins. Co.*, 190 So. 2d 897, 899 (Miss. 1966) (embracing the principle that "[a] title insurance contract . . . insures that the title to the property described . . . in the policy [has] a good title" and that a total loss of the property's value is the measure of damages); *Chicago Title Ins. Co. v. McDaniel*, 875 S.W.2d 310, 311 (Tex. 1994) (holding that "the only duty imposed by a title insurance policy is the duty to indemnify the insured against losses caused by defects in title"); *Crews v. Griffith*, 856 So. 2d 1229, 1232-33 (La. Ct. App.) (holding that requiring a title insurer to provide a legal defense "is not the purpose of title insurance").

1332. *In re Biloxi Casino*, 368 F.3d at 493.

1333. *Id.* (citing MISS. CODE ANN. §§ 19-3-79, 75-76-1, 87-1-5, 97-33-1 (2003)).

1334. *Id.*

1335. *Id.* at 495.

1336. *See id.* at 493.

1337. *See id.*

1338. *Id.*

1339. *Id.*

1340. *Id.*

1341. *Id.*

various other security instruments in favor of BCI to secure the loan.¹³⁴² The deed of trust “gave BCI security interests in most of the realty (including fixtures) and personalty associated with the casino project[s], including ‘ships’ and ‘boats.’”¹³⁴³

BCI assigned its interests in the deed of trust and other security instruments to First Trust to satisfy one of BCI’s obligations under the indenture agreement.¹³⁴⁴ After BCBI secured the loan from BCI, the subsidiary deposited the funds into two escrow accounts at First National Bank of Commerce.¹³⁴⁵ A Disbursement and Escrow Agreement identified BCI, BCBI, and First National Bank as the lender, borrower, and escrow agent, respectively.¹³⁴⁶ Under the terms of the Disbursement and Escrow Agreement, BCI had to assign its rights to the indenture trustee, First Trust.¹³⁴⁷

As noted earlier, the “[d]eed of [t]rust and other security instruments gave First Trust a security interest in almost all of the property, both real and personal, associated with the Biloxi casino project.”¹³⁴⁸ To protect First Trust’s interests and ultimately that of the mortgage-notes holders, the indenture agreement required First Trust to secure title insurance from First American Title Insurance Company (American Title).¹³⁴⁹ The title insurance contract covered some of the property interests that BCBI used to secure the loan to finance the project.¹³⁵⁰

The construction of the riverboat casinos proceeded according to plans, but the expenditures were exceeding the allocated revenues.¹³⁵¹ More troubling, White Construction “continued to receive payments from the [escrow] accounts at First National Bank despite the overruns.”¹³⁵² First Trust eventually terminated the payments and sued First National Bank, the disbursement and escrow agent, alleging that the agent negligently disbursed funds to the construction company.¹³⁵³

White Construction, however, had not received full compensation for its work.¹³⁵⁴ Therefore, the general contractor filed a Mississippi statutory watercraft lien in June of 1994 on *Biloxi Belle II*, which was yet to be completed.¹³⁵⁵ “One paragraph of White Construction’s watercraft-lien

1342. *Id.*

1343. *Id.*

1344. *Id.*

1345. *Id.*

1346. *Id.*

1347. *Id.*

1348. *Id.* at 494.

1349. *Id.* at 493.

1350. *See id.* at 493-94.

1351. *Id.* at 495.

1352. *Id.*

1353. *Id.*; *First Trust Nat’l Ass’n v. First Nat’l Bank of Commerce*, 220 F.3d 331 (5th Cir. 2000).

1354. *In re Biloxi Casino*, 368 F.3d at 495.

1355. *Id.*

complaint against BCI listed First Trust as a party [with] a potentially competing interest in the BILOXI BELLE II.”¹³⁵⁶ Shortly thereafter, White Construction brought suit to enforce its lien against BCI in a Mississippi state court, which subsequently caused both BCI and BCBI to file separate Chapter 11 bankruptcy petitions.¹³⁵⁷

First Trust sent a letter to American Title notifying the insurer of White Construction’s lawsuit in October 1994.¹³⁵⁸ American Title responded by acknowledging that it had received the letter and reporting that it understood that First Trust was not requesting American Title to provide a legal defense in November 1994.¹³⁵⁹ It took First Trust two years to respond.¹³⁶⁰ By then, the underlying White Construction litigation had been removed to federal court, and the case was later referred to bankruptcy court.¹³⁶¹ White Construction ultimately settled its disputes with BCI and BCBI for \$1.7 million.¹³⁶²

The indenture trustee asked American Title for a legal defense in December 1996.¹³⁶³ American Title agreed to defend First Trust in the underlying lawsuit, but the insurer sent a reservation-of-rights letter to the indenture trustee.¹³⁶⁴ First Trust then rejected American Title’s proffered counsel, asserting that the insurer’s reservation of rights created a conflict of interest.¹³⁶⁵ Put simply, First Trust wanted to retain its own legal representation, but the indenture trustee wanted American Title to pay for that representation.¹³⁶⁶

Therefore, in March 1997, American Title filed a declaratory-judgment action in the bankruptcy court, petitioning the court to declare that American Title had no duty to defend First Trust in, and no duty to indemnify the indenture trustee for expenditures associated with, the White Construction lawsuit.¹³⁶⁷ First Trust filed a counterclaim asking the court to declare that the title insurer had a duty to reimburse the trustee for retaining independent legal representation.¹³⁶⁸ In addition, the indenture trustee asked the bankruptcy court to declare that American Title had a duty to reimburse First Trust for

1356. *Id.*

1357. *Id.* BCI, BCBI, First Trust, White Construction, and various principals commenced a number of lawsuits among themselves in the years following, naming one or the other as defendant. *Id.*

1358. *Id.*

1359. *Id.*

1360. *Id.*

1361. *Id.*

1362. *Id.* (“Most of the litigation stemming from the failed casino projects came to a close in July 1997 with . . . the bankruptcy court’s approval of the BCI/BCBI Amended Joint Liquidating Plan Under the Plan, White Construction received \$1.7 million for its claims.”).

1363. *Id.*

1364. *Id.*

1365. *Id.*

1366. *Id.*

1367. *Id.*

1368. *Id.*

any losses if White Construction's lien primed,¹³⁶⁹ or took priority over, the security interest First Trust had in the *Biloxi Belle II*.¹³⁷⁰

The bankruptcy court granted American Title's motion for partial summary judgment in August 1999.¹³⁷¹ This ruling absolved the title insurer of any liability for First Trust's pre-December 1996 litigation expenses.¹³⁷² In March 2000, both parties moved for summary judgment concerning American Title's "liability for First Trust's post-December 1996 defense expenses and the \$1.7 million [that BCI/BCBI] paid to White Construction, money that otherwise would have gone to First Trust's noteholders."¹³⁷³ After denying American Title's motion and granting First Trust's motion, the bankruptcy court awarded First Trust over \$1.4 million.¹³⁷⁴ American Title appealed the bankruptcy court's decision to the United States District Court for the Southern District of Mississippi.¹³⁷⁵ The district court found the bankruptcy court's decision was correct in all respects.¹³⁷⁶ American Title appealed the district court's holding.¹³⁷⁷

The Fifth Circuit Court of Appeals asserted jurisdiction over the controversy.¹³⁷⁸ The central question on review was whether the title

1369. *Id.* Compare *Abemethy v. Savage*, 141 So. 329, 330 (Miss. 1932) (finding:

The law in this state has long been settled that an attorney has a prime and paramount lien on the funds which his services as an attorney has produced for his client, and that this lien applies alike to exempt as well as nonexempt funds. This lien applies so long as the attorney has the funds in his possession and is superior to any other claim.), with *Ball, Brown & Co. v. Sledge*, 35 So. 447, 449 (Miss. 1903) (finding: It is well settled that the landlord has a prime lien on all the agricultural products raised on the leased premises, to secure his rent and supplies for the current year; and this lien may be successfully asserted, not only on the products themselves, but against the purchaser thereof . . . , whether with or without notice of the existence of the lien.).

1370. *In re Biloxi Casino*, 368 F.3d at 495.

1371. *Id.*

1372. *Id.* at 495-96.

1373. *Id.* at 496.

1374. *Id.* "This amount [comprised] the \$1.7 million that White Construction received under the Plan, plus interest of approximately \$300,000, plus \$222,000 in post-December 1996 litigation expenses, [and] less \$800,000 that First Trust received from Chicago Title Insurance Company for certain claims related to the Tunica project." *Id.* at 496 n.3.

1375. *Id.* at 496.

1376. *Id.*

1377. *Id.*

1378. *Id.* at 496 n.4.

Bankruptcy jurisdiction exists under 28 U.S.C. § 1334(b) in this case because White Construction settled its lien priority litigation against First Trust in exchange for First Trust's assignment of any recovery in this case to the BCI/BCBI liquidating trust (of which First Trust is liquidating trustee) for the benefit of unsecured creditors. See *Citizens Bank & Trust Co. v. Case (In re Case)*, 937 F.2d 1014, 1016-20 (5th Cir. 1991) (upholding bankruptcy jurisdiction over a suit on a note that the debtor executed as part of the bankruptcy plan's settlement of existing debts). The suit thus "pertain[s] to the implementation or execution of the plan," *Bank of La. v. Craig's Stores of Tex., Inc. (In re Craig's Stores of Tex., Inc.)*, 266 F.3d 388, 390 (5th Cir. 2001). Jurisdiction does not exist merely by virtue of the fact that an asset of the bankruptcy estate (namely the BILOXI BELLE II) is the subject of this insurance coverage dispute.

insurance contract covered First Trust's security interest in the realty component of the casino projects, as well as its security interest in the *Biloxi Belle II*, while White Construction Company was constructing that riverboat casino.¹³⁷⁹ First Trust maintained that the policy's seventh insuring clause covered its security interests.¹³⁸⁰ The relevant section of the title insurance contract stated:

First American Title Insurance Company . . . insures . . . against loss or damage . . . incurred by reason of:

...

7. Lack of priority of the lien of *the insured mortgage* over any statutory lien for services, labor or material . . . arising from an improvement or work *related to the land* . . .¹³⁸¹

The title insurance contract contained a customized, bargained-for Schedule A.¹³⁸² Part 4 of that schedule stated in pertinent part: "The instruments creating the [insured] *estate* or the interest in *real estate*" are the executed Leasehold Deed of Trust between BCI and BCBI, which First Trust received under an assignment contract, and several financing statements, which gave First Trust a security interest in various BCBI's properties, including the *Biloxi Belle II* and the Biloxi parcels of land.¹³⁸³

The major point of contention in this case concerned whether White Construction Company's lien against the *Biloxi Belle II* arose from improvements or work "related to the land."¹³⁸⁴ First Trust argued that construction of the riverboat casino, which the company planned to moor indefinitely next to land in Biloxi, was related to the land.¹³⁸⁵ From First Trust's perspective, "the Leasehold Deed of Trust [gave the indenture trustee] a security interest in the casino boat . . . as well as in the land."¹³⁸⁶ But American Title strongly asserted that the unfinished riverboat casino never left Gulfport, Mississippi.¹³⁸⁷ Moreover, the insurer argued that the owners of the *Biloxi Belle II* never intended for the boat to be a fixture; therefore, it was not related to the land.¹³⁸⁸

Id. (alteration in original).

1379. *See id.* at 497.

1380. *Id.*

1381. *Id.* (alterations in original).

1382. *Id.*

1383. *Id.* (emphasis added).

1384. *Id.*

1385. *Id.*

1386. *Id.* at 498.

1387. *Id.* at 497.

1388. *Id.* "First American Title argues that First Trust's security interest in the casino boat . . . is not an interest in land [and] is not covered under either version of the policy." *Id.* at 498.

To resolve this conflict, the Fifth Circuit correctly and thoroughly examined Mississippi's settled legal principles for interpreting insurance contracts.¹³⁸⁹ Under Mississippi's law, courts must enforce the plain and ordinary meaning of the terms in an insurance contract as written and according to the parties' intention.¹³⁹⁰ If the terms are ambiguous, however, courts must resolve all ambiguities against the insurer and in favor of the insured.¹³⁹¹ A policy is ambiguous if it lends itself to two or more reasonable interpretations.¹³⁹²

Without doubt, the Fifth Circuit's analysis in *Biloxi Casino* is an excellent illustration of the types of opinions we should expect from that esteemed tribunal. After carefully and intelligently applying Mississippi's law, the Fifth Circuit declared that the relevant language in the title insurance policy was unambiguous.¹³⁹³ Therefore, American Title had no duty to reimburse the indenture trustee for any of the funds that the trustee paid to settle the underlying lawsuit.¹³⁹⁴

More specifically, the appellate court found that Schedule A in the insurance contract only covered real estate or real property, along with attached improvements to real estate.¹³⁹⁵ Put simply, the riverboat was "beyond the bounds of the area described in Schedule A."¹³⁹⁶ Consequently, the title insurance contract did not cover First Trust's security interest in the *Biloxi Belle II* while White Construction was building it in Gulfport.¹³⁹⁷

1389. *See id.* at 496-500.

1390. *Id.* at 496 (citing *Lewis v. Allstate Ins. Co.*, 730 So. 2d 65, 68 (Miss. 1998) (reaffirming that "when the words of an insurance policy are plain and unambiguous, the court will afford them their plain, ordinary meaning and will apply them as written")).

1391. *Id.* (citing *J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co.*, 723 So. 2d 550, 552 (Miss. 1998) (reaffirming "the general rule that provisions of an insurance contract [must] be construed strongly against the drafter")).

1392. *Id.* at 496-97; *see also* *State Farm Mut. Auto. Ins. Co. v. Scitzs*, 394 So. 2d 1371, 1372 (Miss. 1981) (reaffirming that courts must allow an insured to recover on a claim when the language in an insurance contract permits more than one reasonable interpretation).

1393. *In re Biloxi Casino*, 368 F.3d at 497.

1394. *Id.* at 498.

1395. *Id.* at 498-99.

1396. *Id.* at 497.

1397. *Id.* at 498-99.

First Trust's security interest in the boat . . . cannot be the "insured mortgage" that the title insurance policy protects. . . . Item 4 on Schedule A . . . [refers to the] "instruments creating the estate or the interest in real estate which is hereby insured." This language poses two serious problems for First Trust's attempt to . . . bring the boat within the policy.

First, the language refers to "the estate or the interest *in real estate*." The *BILOXI BELLE II*, under construction on a barge in Gulfport, was not real estate. . . . [T]he more natural reading is that "in real estate" modifies both "estate" and "interest." The language thus embraces fee estates, leasehold estates, security interests, and so on, as long as those property interests are in real estate. . . . From the insuring clauses to the exclusions to Schedule A, the policy is replete with references to "land" and "real property." But those same provisions contain no references to "chattels," "goods," "movables," "personalty," or "personal property." The only impression an objective reader of the policy can come away with is that the document is firmly tied to *terra*

VI. A BRIEF STATISTICAL REVIEW OF THE FIFTH CIRCUIT'S
DISPOSITION OF INSURANCE-CONTRACT CONTROVERSIES
DURING 2003-2004

Elsewhere, the author and other commentators have written extensively about the intrinsic worth of using statistics to help jurists gain an intelligible understanding of questionable and conflicting rulings that a traditional legal analysis cannot explain.¹³⁹⁸ To illustrate, after taking a random sample of reported cases, employing powerful statistical procedures, and analyzing the findings, legal empiricists have learned that federal judges often deliberately or inadvertently permit their biases to influence the disposition of cases.¹³⁹⁹ Statistically, courts are exceedingly more likely to decide in favor of defendants than plaintiffs, even when one eliminates or controls for the influence of other legal and extralegal variables.¹⁴⁰⁰ Furthermore, research has revealed that judicial bias often explains an ever increasing number of highly contradictory, unduly intricate, and arguably unjust rulings.¹⁴⁰¹

Certainly, this Part will not present an extensive statistical analysis of the Fifth Circuit's 2003-2004 insurance decisions for one very important reason: The Court of Appeals for the Fifth Circuit decided just twenty-four cases.¹⁴⁰² That number is simply too small to perform an elaborate statistical analysis that would measure and more conclusively reveal the "causal" connection between the insureds and insurers' win-loss ratio and various legal and extralegal variables.

On the other hand, gathering and closely examining simple statistics, in conjunction with a case-by-case legal analysis of judicial rulings, can help jurists obtain a better understanding of questionable summary and declaratory judgments.¹⁴⁰³ Additionally, a careful inspection of frequencies and percentages can often reveal significant or unexpected patterns in judicial

firma.

Id. at 498 (citations omitted).

1398. See Willy E. Rice, *Insurance Decisions—A Survey and An Empirical Analysis*, 35 TEX. TECH. L. REV. 947, 1026 (2004).

1399. See, e.g., Rice, *supra* note 1232, at 1169-94, 1202-18 (chronicling intrajurisdictional conflicts and arguably biased rulings and reporting that defendants are more likely to prevail in federal and state declaratory-judgment actions).

1400. See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128, 133-34 (2000) (finding that when controlling for the possibility of other influences or predictor variables, federal courts are still significantly more likely to decide in favor of defendants).

1401. See generally Willy E. Rice, *Insurance Contracts and Judicial Decisions Over Whether Insurers Must Defend Insureds That Violate Constitutional and Civil Rights: An Historical and Empirical Review of Federal and State Court Declaratory Judgments 1900-2000*, 35 TORT & INS. L.J. 995, 1040-72, 1074-95 (2000) (chronicling inconsistent and biased rulings and reporting that defendants are more likely to prevail in federal and state declaratory-judgment actions).

1402. See cases cited *supra* note 1.

1403. See Rice, *supra* note 1398, at 1027-35.

opinions. In light of these positive benefits of empirical research, the author decided to perform a content analysis of the twenty-four cases and report a series of simple, descriptive statistics in four tables.¹⁴⁰⁴

First, Table A presents frequencies and percentages for some selected demographic characteristics of insurers and insureds that petitioned the Fifth Circuit Court of Appeals for relief in 2003-2004.¹⁴⁰⁵ Nearly 46% of the cases originated in Texas; litigants filed the remaining suits in Mississippi and Louisiana—16.6% and 37.5%, respectively.¹⁴⁰⁶ Almost 75% of the various actions, however, began in just four federal district courts—the Eastern District Court of Louisiana (29.1%), the Southern District Court of Mississippi (12.5%), the Northern District Court of Texas (12.5%), and the Southern District Court of Texas (20.8%).¹⁴⁰⁷

1404. See *infra* Tables A-D, *infra* notes 1408, 1416, 1437, 1463.

1405. See Table A, *infra* note 1408.

1406. *Id.*

1407. *Id.*

Table A. Some Selected Demographic Characteristics of Insurance Law Litigants Who Petitioned the Fifth Circuit Court of Appeals for Review — 2003-2004¹⁴⁰⁸

Demographic Characteristics	Frequencies (N = 24)	Percentages (100.0)
States Where Cases Originated:		
Louisiana	9	37.5
Mississippi	4	16.6
Texas	11	45.8
Federal Districts Where Cases Originated:		
Louisiana-Eastern District	7	29.1
Louisiana-Middle District	1	4.2
Louisiana-Western District	1	4.2
Mississippi-Northern District	1	4.2
Mississippi-Southern District	3	12.5
Texas-Eastern District	1	4.2
Texas-Northern District	3	12.5
Texas-Southern District	5	20.8
Texas-Western District	2	8.3
Types of Plaintiffs:		
Insured Individuals	15	62.5
Primary Insurers	4	16.6
Excess Insurers	1	4.2
Insured Corporations	1	4.2
Creditors	1	4.2
Estates	1	4.2
Trustees	1	4.2
Types of Insurance Contracts		
Comprehensive General Liability	8	33.3
Life	5	20.8
Property	4	16.6
Automobile	2	8.3
Health/HMO	2	8.3

1408. Willy E. Rice, *Table A. Some Selected Demographic Characteristics of Insurance Law Litigants Who Petitioned the Fifth Circuit Court of Appeals for Review — 2003-2004* (2004) [hereinafter Table A].

Marine	1	4.2
Officers & Directors	1	4.2
Title	1	4.2
Types of Insurance Complaints:		
First-Party Complaints	12	50.0
Third-Party Complaints	12	50.0

While a variety of persons petitioned the Fifth Circuit for appellate relief, the overwhelming majority were insured individuals (62.5%) and primary insurers (16.6%).¹⁴⁰⁹ Furthermore, the percentage of petitioners filing first-party complaints versus those filing third-party complaints was evenly divided, with 50% of the total claims falling into each respective category.¹⁴¹⁰

Among cases involving first-party actions, the insureds clashed with their insurers over whether the insurers had a duty to pay various claims or to indemnify insureds under several types of “personal insurance” contracts—life (20.8%), property (16.6%), health/HMO (8.3%), and marine (4.2%) insurance contracts.¹⁴¹¹ Conversely, among cases involving third-party actions against the insureds, serious conflicts evolved over whether insurers had a duty to defend, settle, or indemnify insureds under several types of liability insurance contracts—comprehensive general liability (33.3%), automobile (8.3%), officers & directors (4.2%), and title (4.2%) insurance contracts.¹⁴¹²

Table B presents frequencies and percentages for several attention-grabbing and pertinent variables.¹⁴¹³ First, when comparing the 2002-2003 session with the 2003-2004 session, the Fifth Circuit agreed to decide significantly more cases during the latter session, in which the underlying cases involved class-action suits.¹⁴¹⁴ For the 2003-2004 session, 75% of the cases were individual actions, while 25% involved class-action suits.¹⁴¹⁵

1409. *Id.*

1410. *Id.*

1411. *Id.*

1412. *Id.*

1413. *See* Table B, *infra* note 1416.

1414. *Compare* Rice, *supra* note 1398, at 1029-30 (providing statistics for the 2002-2003 session), with Table B, *infra* note 1416 (providing statistics for the 2003-2004 session).

1415. *See* Table B, *infra* note 1416.

Table B. Theories of Recovery, Remedies, and the Disposition of Insurance Law Actions in United States District Courts and in the Fifth Circuit Court of Appeals — 2003-2004¹⁴¹⁶

Theories of Recovery, Remedies & Outcomes	Frequencies (N = 24)	Percentages (100.0)
Types of Actions:		
Individual Actions	18	75.0
Class Actions	6	25.0
†Petitioners' Legal Theories (Causes):		
Declaratory Judgment	11	45.8
Breach of Contract	5	20.8
Intentional Torts	5	20.8
Unfair Business Practices	4	16.6
Equitable Subrogation	3	12.5
Negligence/Bad-Faith	3	12.5
Fraud/RICO	3	12.5
Breach Implied Covenants	2	8.3
†Remedies Sought:		
Declaratory Relief	11	45.8
Actual & Punitive Damages	10	41.6
Indemnification/Defense	8	33.3
Attorney Fees	1	4.2
Disposition of Cases in Federal District Courts:		
Plaintiffs/Insureds Won	11	45.8
Defendants/Insurers Won	13	54.2
Disposition of Cases in the Fifth Circuit Court:		
Plaintiffs/Insureds Won	9	37.5
Defendants/Insurers Won	15	62.5

1416. Willy E. Rice, *Table B. Theories of Recovery, Remedies, and the Disposition of Insurance Law Actions in Federal District Courts and in the Fifth Circuit Court of Appeals — 2003-2004* (2004) [hereinafter Table B].

Litigants' Success-Failure

Rate Before the Fifth Circuit:

Affirmed for Defendants/Insurers	7	
29.2		
Affirmed for Plaintiffs/Insureds	5	20.8
Reversed Against Plaintiffs/ Insureds	5	20.8
Reversed Against Defendants/ Insurers	2	8.3
Affirmed & Reversed in Part	5	20.8

† Multiple causes of action appeared in several cases; therefore, the reported percentages can exceed one hundred percent.

Second, the litigants raised and sought relief under an assortment of legal theories.¹⁴¹⁷ In nearly 46% of the cases, insurers and insureds commenced declaratory-judgment actions, asking the courts for declaratory relief under a variety of insurance contracts.¹⁴¹⁸ An equal number of plaintiffs-insureds filed breach-of-contract and intentional tort actions against the insurers—21%, respectively.¹⁴¹⁹ Furthermore, an equal number of complainants filed equitable subrogation, common-law bad-faith, and fraud actions against insurers—12.5%, respectively.¹⁴²⁰ Finally, nearly 17% of the insureds filed “deceptive trade practices,” statutory actions against their insurance companies.¹⁴²¹

The types of remedies that litigants asked the Fifth Circuit to award varied.¹⁴²² Again, about 46% of the plaintiffs asked the court of appeals for declaratory relief.¹⁴²³ Approximately 33% wanted the Fifth Circuit to declare that insurers had a duty to defend and indemnify insureds.¹⁴²⁴ And in nearly 42% of the cases, the aggrieved parties asked the appellate court to award both actual and punitive damages.¹⁴²⁵

What were plaintiffs-insureds' and defendants-insurers' win-loss ratios in the district courts and in the Fifth Circuit Court of Appeals? The results indicate that the federal courts displayed very little sympathy for the plaintiff-insureds' plights or legal arguments.¹⁴²⁶ The federal district courts decided in

1417. *Id.*

1418. *Id.*

1419. *Id.*

1420. *Id.*

1421. *Id.*

1422. *Id.*

1423. *Id.*

1424. *Id.*

1425. *Id.*

1426. *See id.*

favor of the defendants-insurers 54% of the time.¹⁴²⁷ But even more amazing and revealing, on appeal the insurers' likelihood of winning was substantially greater: The Fifth Circuit decided in favor of the defendants-insurers nearly 63% of the time.¹⁴²⁸ These 2003-2004 percentages and outcomes are similar to the 2002-2003 reported findings.¹⁴²⁹

The last displayed percentages in Table B represent the litigants' success-failure ratio before the Court of Appeals for the Fifth Circuit.¹⁴³⁰ Those numbers provide some additional insight into the plaintiffs-insureds' and defendants-insurers' likelihood of prevailing on appeal.¹⁴³¹ First, the Fifth Circuit affirmed 29% of the federal district courts' decisions in favor of the insurers and reversed in favor of the insurers nearly 21% of the district courts' proinsureds decisions.¹⁴³² On the other hand, the Court of Appeals for the Fifth Circuit affirmed nearly 21% of the district courts' proinsured decisions, while reversing just 8% of the district courts' proinsurer decisions.¹⁴³³ Unmistakably, these findings support what other judicial studies have revealed: Federal courts of appeals are significantly more likely to decide in favor of defendants than plaintiffs.

As previously stated, the small number of cases in this study prevent one from employing more powerful and sophisticated statistical procedures to analyze the data. Consequently, this brief investigation cannot answer a highly relevant question: What explains the Fifth Circuit's and district courts' substantially greater propensity to rule consistently in favor of defendants-insurers? The percentages reported in Table C, however, disclose some rather interesting "patterns" that could provide a partial explanation.¹⁴³⁴

Table C illustrates the dispositions of the insurance cases among only federal district courts and in the Fifth Circuit Court of Appeals.¹⁴³⁵ The reported percentages show the relationships between a few selected background variables and the litigants' likelihood of success.¹⁴³⁶

1427. *Id.*

1428. *Id.*

1429. *See Rice, supra* note 1398, at 1029-30.

1430. Table B, *supra* note 1416.

1431. *Id.*

1432. *Id.*

1433. *Id.*

1434. *See* Table C, *infra* note 1437.

1435. *Id.*

1436. *Id.*

TABLE C. THE DISPOSITION OF INSURANCE-RELATED ACTIONS BY SELECTED DEMOGRAPHIC VARIABLES, IN THE FIFTH-CIRCUIT DISTRICT COURTS AND IN THE COURT OF APPEALS FOR THE FIFTH CIRCUIT — 2003-2004¹⁴³⁷

Selected Demographic Variables	Disposition in the District Courts (N= 24)			Disposition in the Court of Appeals (N= 24)		
	Insureds Won	Insurers Won	Percent (100.0)	Insureds Won	Insurers Won	Percent (100.0)
Types of Insurance Complaints:						
First-Party Complaints	41.7	58.3	(N=12)	50.0	50.0	(N=12)
Third-Party Complaints	50.0	50.0	(N=12)	25.0	75.0	(N=12)
Litigants' Domicile (States):						
Louisiana	33.3	66.7	(N=9)	33.3	66.7	(N=9)
Mississippi	25.0	75.0	(N=4)	25.0	75.0	(N=4)
Texas	63.6	36.4	(N=11)	45.5	54.5	(N=11)
Federal Districts Where Cases Originated:						
Louisiana-Eastern District	57.1	42.9	(N=7)	42.9	57.1	(N=7)
Louisiana-Middle District	-0-	100.0	(N=1)	-0-	100.0	(N=1)
Louisiana-Western District	-0-	100.0	(N=1)	-0-	100.0	(N=1)
Mississippi-Northern District	-0-	100.0	(N=1)	-0-	100.0	(N=1)
Mississippi-Southern District	25.0	75.0	(N=3)	25.0	75.0	(N=3)
Texas-Eastern District	100.0	-0-	(N=1)	-0-	100.0	(N=1)
Texas-Northern District	33.3	66.7	(N=3)	66.7	33.3	(N=3)
Texas-Southern District	60.0	40.0	(N=5)	40.0	60.0	(N=5)
Texas-Western District	100.0	-0-	(N=2)	50.0	50.0	(N=2)

1437 Willy E. Rice, *Table C. The Disposition of Insurance-Related Actions by Selected Demographic Variables, in the Fifth-Circuit Courts and in the Court of Appeals for the Fifth Circuit — 2003-2004* (2004) [hereinafter Table C].

First, the type of insurance complaint influenced whether the insureds or the insurers prevailed.¹⁴³⁸ Among the district court cases, insurers won 58% of the time if the underlying lawsuit involved a first-party claim.¹⁴³⁹ But insurers and insureds won an equal number of cases in the district courts—50%, respectively—if the underlying lawsuit concerned whether insurers had a duty to settle or defend insureds against third-party claims.¹⁴⁴⁰

The percentages changed dramatically once the Fifth Circuit reviewed the district courts' rulings.¹⁴⁴¹ On appeal, insurers won 75% of the cases if the underlying lawsuit involved a third-party claim.¹⁴⁴² But insurers and insureds won an equal number of cases in the court of appeals—50%, respectively—if the underlying lawsuit concerned whether insurers had a duty to pay or settle a first-party claim.¹⁴⁴³

Second, among the disputes decided in the federal district courts, insureds had a greater probability of winning only if they (1) resided in Texas (63.6%), or (2) filed their complaints in either the Eastern District Court of Louisiana (57.1%) or the Southern District Court of Texas (60.0%).¹⁴⁴⁴ Under all other circumstances, insurance companies had the greater likelihood of prevailing in the federal district courts.¹⁴⁴⁵ Insurers most definitely experienced this rate of success if their principle place of business was located in either Louisiana or Mississippi; the reported percentages are 66% and 75%, respectively.¹⁴⁴⁶

An examination of litigants' probability of winning before the Fifth Circuit reveals some dramatic reversals.¹⁴⁴⁷ First, as reported above, insureds that lived in Texas won an impressive 64% of the cases in the federal district courts.¹⁴⁴⁸ But before the Fifth Circuit, insured Texans won only 45% of the cases.¹⁴⁴⁹ Viewed another way, defendants-insurers had a greater likelihood of prevailing before the Fifth Circuit, regardless of whether their principal places of business were located in Louisiana, Mississippi, or Texas; the reported percentages are 67%, 75%, and 54%, respectively.¹⁴⁵⁰

Also, the plaintiffs-insureds experienced substantially less success before the appellate court depending on the location of the district court in which

1438. *Id.*
1439. *Id.*
1440. *Id.*
1441. *Id.*
1442. *Id.*
1443. *Id.*
1444. *Id.*
1445. *Id.*
1446. *Id.*
1447. *Id.*
1448. *Id.*
1449. *Id.*
1450. *Id.*

they initiated their actions.¹⁴⁵¹ As discussed earlier, insureds who filed their complaints in the Eastern District Court of Louisiana won 57% of the cases in that court.¹⁴⁵² But before the Fifth Circuit, they lost 57% of the time.¹⁴⁵³ Similarly, insureds who filed their complaints in the Southern District Court of Texas won 60% of the disputes in that court.¹⁴⁵⁴ Those same insureds lost 60% of the cases before the Fifth Circuit.¹⁴⁵⁵

Actually, there was only one instance where the plaintiffs-insureds' success rate exceeded that of the defendants-insurers.¹⁴⁵⁶ Insureds who filed their complaints in the Northern District Court of Texas lost nearly 67% of the cases in that court.¹⁴⁵⁷ After appealing to the Fifth Circuit, however, those same insureds prevailed 67% of the time.¹⁴⁵⁸ Still, the general trend is incontrovertible: Under all other circumstances, the defendants-insurers had a significantly larger likelihood of prevailing in the federal district courts and in the Fifth Circuit Court of Appeals.¹⁴⁵⁹ These findings appeared whether the insureds filed first-party or third-party complaints against the insureds and whether the courts applied settled legal principles under Louisiana, Mississippi, or Texas laws.¹⁴⁶⁰

Finally, Table D presents a comparison of the insurers' and insureds' relative outcomes in the federal district courts and on appellate review before the Fifth Circuit.¹⁴⁶¹ After closely examining the percentages in Table D, one finds several intriguing and bewildering revelations.¹⁴⁶²

1451. *Id.*

1452. *Id.*

1453. *Id.*

1454. *Id.*

1455. *Id.*

1456. *Id.*

1457. *Id.*

1458. *Id.*

1459. *Id.*

1460. *Id.*

1461. See Table D, *infra* note 1463.

1462. See *id.*

TABLE D. A COMPARISON OF INSURERS' AND INSUREDS' OUTCOMES IN FEDERAL DISTRICT COURTS AND ON APPELLATE REVIEW IN THE COURT OF APPEALS FOR THE FIFTH CIRCUIT — 2003-2004 (N = 24)¹⁴⁶³

Litigants' Outcomes	Outcomes in the Federal District Courts								
	Eastern District of Louisiana (N = 7)	Middle District of Louisiana (N = 1)	Western District of Louisiana (N = 1)	Northern District of Mississippi (N = 1)	Southern District of Mississippi (N = 3)	Eastern District of Texas (N = 1)	Northern District of Texas (N = 3)	Southern District of Texas (N = 5)	Western District of Texas (N = 2)
Plaintiffs/ Insureds Won	42.9	- 0 -	- 0 -	- 0 -	25.0	100.0	33.3	60.0	100.0
Defendants/ Insureds Won	57.1	100.0	100.0	100.0	75.0	- 0 -	66.7	40.0	- 0 -
TOTAL	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Outcomes on Appellate Review in the Fifth Circuit Court of Appeals									
Plaintiffs/ Insureds Won	42.9	- 0 -	- 0 -	- 0 -	25.0	- 0 -	67.7	40.0	50.0
Defendants/ Insureds Won	57.1	100.0	100.0	100.0	75.0	100.0	33.3	60.0	50.0
TOTAL	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

¹⁴⁶³Willy E. Rice, Table D. A Comparison of Insurers' and Insureds' Outcomes in Federal District Courts and on Appellate Review in the Court of Appeals for the Fifth Circuit — 2003-2004 (2004) [hereinafter Table D].

The Fifth Circuit Court of Appeals affirmed in their entirety the findings and conclusions of the following federal district courts: the Eastern, Middle, and Western District Courts of Louisiana, and the Northern and Southern District Courts of Mississippi.¹⁴⁶⁴ Stated another way, when comparing the insureds' and insurers' win-loss ratio in the federal district courts of Louisiana and Mississippi to the litigants' win-loss ratio before the Fifth Circuit, one finds identical percentages.¹⁴⁶⁵

On the other hand, when comparing the litigants' win-loss ratio before the Fifth Circuit with their win-loss in the Eastern, Northern, Southern, and Western District Courts of Texas, major divergences appear.¹⁴⁶⁶ For example, the results show that the Northern District Court of Texas ruled 67% of the time in favor of the insurers, but the Fifth Circuit reversed and decided 67% of the time in favor of the insureds.¹⁴⁶⁷ Also, the Southern District Court of Texas ruled 60% of the time in favor of the insureds, but the Fifth Circuit reversed and decided 60% of the time in favor of the insurance companies.¹⁴⁶⁸

Furthermore, the Western District Court of Texas decided two cases, and the insureds prevailed in both instances—achieving a 100% success rate in that court.¹⁴⁶⁹ On appeal before the Fifth Circuit, however, the insured prevailed in one case and the insurer prevailed in the other—producing a 50-50 split.¹⁴⁷⁰ Finally, the Eastern District Court of Texas decided only one case, in which the insured won.¹⁴⁷¹ But again on appeal, the Fifth Circuit reversed the district court's proinsured decision and decided the controversy in favor of the insurer.¹⁴⁷²

These revelations are intriguing. However, this study certainly cannot explain why the federal district courts in Texas and the Fifth Circuit view and resolve certain insurance disputes so differently. Without knowing more, the author will not try to advance plausible explanations or engage in guesswork. On the other hand, this arguable disharmony between the Fifth Circuit and the federal district courts in Texas certainly begs for a more comprehensive study.

Debatably, determining whether the findings reported here are simply a fluke or evidence of a systemic split between the court of appeals and the lower federal courts in Texas would be a worthwhile activity. After all, federal district courts and the Fifth Circuit consult the same body of Texas law to resolve disputes between insurance consumers and the companies engaged in

1464. *Id.*

1465. *Id.*

1466. *Id.*

1467. *Id.*

1468. *Id.*

1469. *Id.*

1470. *Id.*

1471. *Id.*

1472. *Id.*

the business of insurance in Texas. Therefore, such gross disparities and inconsistencies should not appear.

VII. CONCLUSION

The quality of the Fifth Circuit's research, writing, application of legal principles, and general analysis in the twenty-four insurance law decisions was extremely mixed during the 2003-2004 session. On the one hand, several of the Fifth Circuit's opinions were thoughtful, and the conclusions were fair. Throughout this review, the author has acknowledged and celebrated those positive points when they were warranted. Therefore, the author will not outline and repeat those positive features here.

On the other hand, the court of appeals did not thoroughly research and apply the pertinent rules in many instances. Additionally, in an objectionable number of cases, the Fifth Circuit did not present clearly written or well-reasoned opinions, even after the appellate court applied Louisiana's, Mississippi's, and Texas's law. Given that twenty justices sit on the Court of Appeals for the Fifth Circuit¹⁴⁷³ and a panel of three justices typically hear and decide each case, it is unreasonable to expect that every opinion will be stellar, enlightening, and thoroughly researched. Actually, aging and retired justices sat by designation on a few panels. And those justices may or may not have had the necessary tools to perform at a higher level.

But still, those restrictions do not or should not explain the Fifth Circuit's (1) frequent propensity to insert nearly undecipherable writing into some opinions, (2) increasing inclination to ignore settled insurance-law principles to achieve obtuse proinsurers and proinsureds decisions, and (3) frequent propensity to perform an *Erie* guess when a state supreme court has already resolved or addressed a question of law. Very likely, there would be no need for an *Erie* guess if the Fifth Circuit adopts the practice of thoroughly researching state-court decisions that predate possibly the 1930s or 1940s.

Finally, Louisiana, Mississippi, and Texas have embraced five recognized doctrines to interpret insurance contracts—the traditional rules of contract construction and interpretation,¹⁴⁷⁴ the doctrine of plain meaning,¹⁴⁷⁵

1473. See FEDERAL JUDICIAL CENTER: FIFTH CIRCUIT LIBRARY SYSTEM, at <http://www.lb5.uscourts.gov/judgebio/FifthCircuit/> (last visited Feb. 27, 2005).

1474. See, e.g., *Ledbetter v. Concord Gen. Corp.*, 665 So. 2d 1166, 1169 (La. 1996) (holding that “[a]n insurance policy is an agreement between the parties and should be interpreted by using ordinary contract principles”); *Sessoms v. Allstate Ins. Co.*, 634 So. 2d 516, 519 (Miss. 1993) (embracing the position that “insurance policies which are clear and unambiguous are to be enforced according to their terms as written [like all other contracts]”); *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 740-41 (Tex. 1998) (reiterating that “insurance contracts are subject to the same rules of construction as other contracts”).

1475. See, e.g., *La. Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.*, 630 So. 2d 759, 763 (La. 1994) (holding that “[the parties’ intent must] be determined in accordance with the general, ordinary, plain and popular meaning of the words used in the policy”); *Blackledge v. Omega Ins. Co.*, 740 So. 2d 295, 298

the adhesion doctrine,¹⁴⁷⁶ the doctrine of ambiguity,¹⁴⁷⁷ and the doctrine of reasonable expectations.¹⁴⁷⁸ On a few occasions, the Fifth Circuit employed the doctrine of ambiguity to interpret insurance contracts and resolve disputes between insurers and their insureds. But the appellate court rarely mentioned or applied the other four doctrines, even when the facts warranted such applications.

Very likely, if the Court of Appeals for the Fifth Circuit were to embrace and consistently apply these doctrines to resolve insurance-law disputes, their rulings would be more intelligible and predictable. But more important, the legal community and commentators would be less inclined to question whether the Fifth Circuit's rulings are sound and fair.

(Miss. 1999) (holding that courts must give terms used in insurance policies their ordinary and popular definition); *Transp. Ins. Co. v. Standard Oil Co.*, 337 S.W.2d 284, 288 (Tex. 1960) (reiterating that courts must give words appearing in insurance contracts their plain meaning when there is no ambiguity).

1476. See, e.g., *Duncan v. Kan. City S. Ry. Co.*, 747 So. 2d 656, 674 (La. Ct. App. 1999) (observing that "[i]t is well settled that . . . insurance policies are generally contracts of adhesion"), *rev'd on other grounds*, 773 So. 2d 670 (La. 2000); *J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co.*, 723 So. 2d 550, 552 (Miss. 1998) (concluding that insurance policies are contracts of adhesion and as such ambiguities are to be construed liberally in favor of the insured and against the insurer); *Arnold v. Nat'l County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) (concluding without deciding definitively that insurance contracts are adhesion contracts because they "arise[] out of the parties' unequal bargaining power" and they "allow unscrupulous insurers to take advantage of their insureds' misfortunes" during the bargaining process).

1477. See, e.g., *Succession of Fannaly v. Lafayette Ins. Co.*, 805 So. 2d 1134, 1138 (La. 2002) (repeating that an "ambiguous contractual provision is construed against the insurer who furnished the contract's text and in favor of the insured"); *Nationwide Mut. Ins. Co. v. Garriga*, 636 So. 2d 658, 662 (Miss. 1994) (embracing "the general rule that [ambiguous] provisions of an insurance contract are to be construed strongly against the [insurance company]"); *Nat'l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991) (reaffirming that ambiguous language in an insurance contract must be construed in favor of the insured).

1478. See, e.g., *Interstate Fire & Cas.*, 630 So. 2d at 764 (holding that a court should construe an insurance contract "'to fulfill the reasonable expectations of the parties in the light of the customs and usages of the industry'") (citation omitted); *Brown v. Blue Cross & Blue Shield of Miss., Inc.*, 427 So. 2d 139, 141 n.2 (Miss. 1983) (adopting the principle that the "'objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations'") (citation omitted); *Kulubis v. Tex. Farm Bureau Underwriters Ins. Co.*, 706 S.W.2d 953, 955 (Tex. 1986) (permitting an innocent victim whose property had been destroyed to collect under an insurance contract for loss "reasonably expected" to be covered). *But see* *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 140 n.8 (Tex. 1994) (observing that Texas law does not recognize the doctrine of reasonable expectations as a basis to disregard unambiguous policy provisions).