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THE COURT OF APPEALS FOR THE FIFTH CIRCUIT 2004-2005 DISPOSITION OF INSURANCE DECISIONS: A SURVEY AND STATISTICAL REVIEW

by Willy E. Rice*

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I. INTRODUCTION

The Court of Appeals for the Fifth Circuit decided twenty-four insurance related cases between June 2004 and April 2005.¹ Those cases originated in

1. The Fifth Circuit delivered the following twenty-four insurance related decisions: *Ingalls Shipbuilding v. Federal Insurance Co.*, 410 F.3d 214 (5th Cir. May 2005); *Travlers Indemnity Co. of Illinois v. Western American Specialized Transportation Services, Inc.*, 409 F.3d 256 (5th Cir. May 2005); *Blakely v. State Farm Mutual Automobile Insurance Co.*, 406 F.3d 747 (5th Cir. Apr. 2005); *Liberty Mutual Insurance Co. v. Mid-Continent Insurance Co.*, 405 F.3d 296 (5th Cir. Mar. 2005); *Travelers Casualty & Surety Co. of America v. Wright Insurance Agency Inc.*, 404 F.3d 927 (5th Cir. Mar. 2005); *Johnson v. Seacor Marine Corp.*, 404 F.3d 871 (5th Cir. Mar. 2005); *Melder v. Allstate Corp.*, 404 F.3d 328 (5th Cir. Mar. 2005); *Finger Furniture Co. v. Commonwealth Insurance Co.*, 404 F.3d 312 (5th Cir. Mar. 2005); *Monumental Life Insurance Co. v. Hayes-Jenkins*, 403 F.3d 304 (5th Cir. Mar. 2005); *Lincoln General*

nine federal district courts. Unlike its 2002-2004 rulings, the court of appeals did not decide any exceptionally novel or complex substantive or procedural questions. In fact, the Fifth Circuit certified three intricate questions to the Texas Supreme Court² rather than engaging in the game of *Erie*-guessing, a highly questionable and often unnecessary exercise that this Author criticized in the 2003-2004 Survey.³

Even more surprising, a substantial number of this year's decisions concerned first-party claims⁴—whether insurers had a duty to defend or indemnify insureds after third-party victims sued insureds in underlying lawsuits for a variety of common-law and statutory violations.⁵ And because the overwhelming majority of the duty-to-defend and duty-to-indemnify actions originated in Texas, the Fifth Circuit simply applied Texas's "eight corners doctrine"⁶ and decided those familiar controversies efficiently and intelligibly. But only one case presented an interesting procedural question: whether the Employee Retirement Income Security Act (ERISA)⁷ prevents

Insurance Co. v. Reyna, 401 F.3d 347 (5th Cir. Feb. 2005); *Allstate Insurance Co. v. Disability Services of the Southwest Inc.*, 400 F.3d 260 (5th Cir. Feb. 2005); *Ridglea Estate Condominium Ass'n v. Lexington Insurance Co.*, 398 F.3d 332 (5th Cir. Jan. 2005); *Lamar Advertising Co. v. Continental Casualty Co.*, 396 F.3d 654 (5th Cir. Jan. 2005); *Fiess v. State Farm Lloyds*, 392 F.3d 802 (5th Cir. Dec. 2004); *Royal Insurance Co. of America v. Hartford Underwriters Insurance Co.*, 391 F.3d 639 (5th Cir. Nov. 2004); *Rainwater v. Lamar Life Insurance Co.*, 391 F.3d 636 (5th Cir. Nov. 2004); *Robinson v. Guarantee Trust Life Insurance Co.*, 389 F.3d 475 (5th Cir. Oct. 2004); *Bott v. J.F. Shea Co.*, 388 F.3d 530 (5th Cir. Oct. 2004); *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538 (5th Cir. Sept. 2004); *Primrose Operating Co. v. National American Insurance Co.*, 382 F.3d 546 (5th Cir. Aug. 2004); *Fairfield Insurance Co. v. Stephens Martin Paving, L.P.*, 381 F.3d 435 (5th Cir. Aug. 2004); *American Home Assurance Co. v. United Space Alliance, L.L.C.*, 378 F.3d 482 (5th Cir. July 2004); *Mayeaux v. Louisiana Health Service & Indemnity Co.*, 376 F.3d 420 (5th Cir. July 2004); *TIG Specialty Insurance Co. v. Pinkmonkey.com Inc.*, 375 F.3d 365 (5th Cir. July 2004).

2. See *Liberty Mut. Ins. Co. v. Mid-Continent Ins. Co.*, 405 F.3d 296, 310 (5th Cir. Mar. 2005) (certifying three intricate contribution and breach-of-covenant-of-good-faith-and-fair-dealing questions involving primary and excess insurers to the Texas Supreme Court); *Fiess v. State Farm Lloyds*, 392 F.3d 802, 811-12 (5th Cir. Dec. 2004) (certifying to the Texas Supreme Court the question: "[Whether an] ensuing loss provision contained in Section I-Exclusions, part 1(f) of the Homeowners Form B (HO-B) insurance policy as prescribed by the Texas Department of Insurance effective July 8, 1992 (Revised January 1, 1996) when read in conjunction with the remainder of the policy provide[s] coverage for mold contamination caused by water damage that is otherwise covered under the policy"); *Fairfield Ins. Co. v. Stephens Martin Paving, L.P.*, 381 F.3d 435, 437 (5th Cir. Aug. 2004) (certifying a question to the Texas Supreme Court to determine whether Texas's policy prohibits "a liability insurance provider from indemnifying an award for punitive damages").

3. See Willy E. Rice, *The Court of Appeals for the Fifth Circuit 2003-2004 Insurance Decisions: A Survey and An Empirical Analysis*, 37 TEX. TECH L. REV. 871, 921, 963, 1029 (2005) and accompanying notes.

4. See Table A, *infra* note 689.

5. See discussion *infra* Part III.

6. See *infra* notes 511-14 and accompanying text.

7. See Employee Retirement Income Security Act of 1974 (ERISA) § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2000).

HMO patients from litigating a common-law, mixed-claims action in a Louisiana court.⁸

In the majority of first-party lawsuits, litigants asked the Fifth Circuit to resolve the following substantive questions: (1) whether an insurance contract's "cost of repair and replacement" provision and Mississippi's law compel an insurer to compensate insureds for the "diminished value" of their automobiles;⁹ (2) whether Mississippi's novation doctrine and other contract principles permit aggrieved insurance agents to commence breach-of-contract actions against a reinsurer who assumed a primary insurer's medicare supplemental contract under an "assumption reinsurance agreement";¹⁰ (3) whether Texas's law and the terms of a mortgage-life insurance contract require an insurer to compensate a surviving spouse following the death of the named insured;¹¹ (4) whether Texas's law requires an insurer to compensate a company for business-interruption losses after a flood forced the company to close its stores;¹² (5) whether Texas's law requires a property insurer to compensate a condominium association for losses after hail damaged property owners' roofs;¹³ and (6) whether Texas's law requires a homeowners' insurer to compensate homeowners after flood- and nonflood-related mold contaminated the homeowners' property.¹⁴

To repeat, the Fifth Circuit's twenty-four opinions covered a narrow range of procedural and substantive questions. In fact, the Fifth Circuit issued four extremely short per curiam decisions.¹⁵ And in two other cases, the Fifth Circuit presented brief analyses and dispositions of statutes-of-limitation and exhaustion-of-administrative-remedies questions under Louisiana's law.¹⁶ None of those six truncated analyses are discussed in this Article. In addition, although the remaining eighteen cases present a diverse body of law and legal

8. See discussion *infra* Part II.B.

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

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

11. See discussion *infra* Part II.D.

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

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

14. See discussion *infra* Part II.G.

15. See *Liberty Mut. Ins. Co. v. Mid-Continent Ins. Co.*, 405 F.3d 296, 297 (5th Cir. Mar. 2005) (certifying "unresolved questions to the Supreme Court of Texas"); *Rainwater v. Lamar Life Ins. Co.*, 391 F.3d 636, 638 (5th Cir. Nov. 2004) (dismissing an interlocutory appeal and remanding the case "to the district court for further proceedings consistent with this opinion"); *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 544-46 (5th Cir. Sept. 2004) (determining whether the district court abused its discretion by allowing a fraudulent removal of the diversity action to federal court); *Fairfield Ins. Co. v. Stephens Martin Paving, L.P.*, 381 F.3d 435, 437 (5th Cir. Aug. 2004) (certifying a question to the Texas Supreme Court to determine whether Texas's policy prohibits "a liability insurance provider from indemnifying an award for punitive damages").

16. See *Travelers Cas. & Sur. Co. of Am. v. Wright Ins. Agency Inc.*, 404 F.3d 927, 929-30 (5th Cir. Mar. 2005) (concluding that "Travelers had one year from that date to file suit. Because the complaint was not filed until April 2003, the district court properly dismissed Travelers' complaint for being outside of that statutory window"); *Melder v. Allstate Corp.*, 404 F.3d 328, 332 (5th Cir. Mar. 2005) (finding that plaintiffs failed to exhaust administrative remedies under Louisiana's law).

issues, Parts II and III of this Article discuss only some of those cases. More specifically, this Article presents analyses of only the more novel and highly questionable Fifth Circuit insurance decisions of the 2004-2005 survey period.

Finally, to help the reader to gain a greater understanding of the factors that influenced the Fifth Circuit's rulings, the Author performed a limited content analysis of each decision.¹⁷ That methodology allowed the Author to generate interesting percentages and perform a limited empirical analysis of the findings.¹⁸ Part IV, therefore, 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. That Part also highlights and compares the dispositions of the cases among and between the various federal district courts and the Fifth Circuit Court of Appeals.

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

A. *Automobile Insurance: Whether an Automobile Insurance Contract's "Cost of Repair and Replacement" Provision and Mississippi's Law Compel an Insurer to Compensate Insureds for the "Diminished Value" of Their Automobiles*

The facts in *Blakely v. State Farm Mutual Automobile Insurance Co.*¹⁹ are quite sparse and simple. Charles Blakely and other insurance consumers in Mississippi purchased automobile insurance from State Farm.²⁰ The insurance contract's coverage provision defined a "loss" as "'each direct and accidental loss of or damage to: 1. *your* car; [and] 2. its equipment which is common to the use of *your car* as a vehicle.'"²¹ However, the "Limit of Liability" clause stated that State Farm's "'liability for *loss* to property or any part of it [would be] the lower of: 1. the actual cash value; or 2. the cost of repair or replacement.'"²²

Furthermore, the same provision expressly stated in pertinent part that "cost of repair or replacement" would be based upon one of the following:

1. the cost of repair or replacement agreed upon by *you* and [State Farm];
2. a competitive bid approved by [State Farm]; or
3. an estimate written based upon the prevailing competitive price. The prevailing competitive price means prices charged by a majority of the

17. See discussion *infra* Parts II-III.

18. See *infra* Part IV.

19. *Blakely v. State Farm Mut. Auto. Ins. Co.*, 406 F.3d 747 (5th Cir. Apr. 2005).

20. *Id.* at 749.

21. *Id.* (quoting appellant's insurance policy).

22. *Id.* (quoting appellant's insurance policy).

repair market in the area where the *car* is to be repaired as determined by a survey made by [State Farm]. If *you* ask, [State Farm] will identify some facilities that will perform the repairs at the prevailing competitive price. [State Farm] will include in the estimate parts sufficient to restore the vehicle to its pre-loss condition. *You* agree with [State Farm] that such parts may include either parts furnished by the vehicle's manufacturer or parts from other sources including non-original equipment manufacturers."²³

During the policy period, Blakely and similarly situated insured Mississippians submitted auto claims to State Farm.²⁴ The insureds' respective cars had been partially damaged in various accidents.²⁵ Acting in good faith, State Farm immediately made adjustments, paid for all repairs, and reimbursed the insureds for their physical losses.²⁶ But the insureds also asked State Farm to compensate insureds for the alleged "diminished value" of the partially destroyed vehicles.²⁷ From the insureds' point of view, State Farm had a contractual obligation to compensate policyholders for the difference between the fair market value of the vehicles just prior to the accidents and the fair market value of the vehicles after the repairs.²⁸

State Farm summarily refused to pay for the alleged diminished value of the repaired vehicles.²⁹ Therefore, the disgruntled insureds sued State Farm in a Mississippi state court.³⁰ The insureds' complaint listed several claims and causes of action: breach of contract, negligence for breaching the implied covenant of good faith and fair dealing, conspiracy, bad faith, and fraud.³¹ The complaint asked for both compensatory and punitive damages.³² Shortly thereafter, the court removed the case to the District Court for the Southern District of Mississippi, where the district judge granted State Farm's motion for summary relief.³³

23. *Id.* (quoting appellant's insurance policy) (alterations in original).

24. *Id.* at 750.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *See id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 750 n.2.

The district court treated the motion to dismiss filed by State Farm as a motion for summary judgment; we do likewise. *See Stewart v. Murphy*, 174 F.3d 530, 532-533 (5th Cir.1999) (citing Fed. R. Civ. P. 12(b) ("If, [on a 12(b)(6) motion to dismiss], matters outside the pleading are presented to and not excluded by the court, the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56.) (emphasis added)); *Baker v. Putnal*, 75 F.3d 190, 197 (5th Cir.1996) ("[W]here a district court grants a motion styled as a motion to dismiss but bases its ruling on facts developed outside the pleadings, we review the order as an order granting summary judgment").

Like Louisiana and Texas, Mississippi has embraced five recognized doctrines to interpret insurance contracts—the traditional rules of contract construction and interpretation,³⁴ the doctrine of plain meaning,³⁵ the adhesion doctrine,³⁶ the doctrine of ambiguity,³⁷ and the reasonable expectations doctrine.³⁸ The Supreme Court of Mississippi has stated consistently that the doctrine of plain meaning requires courts to construe and enforce insurance contracts as written if the language in the contract is clear or unambiguous.³⁹ More important, under Mississippi's law, the terms in an insurance contract are binding and cannot be modified to create an ambiguity where none exists.⁴⁰

Id. (alterations in original).

34. See, e.g., *Ledbetter v. Concord Gen. Corp.*, 95-0809 (La. 1/6/96); 665 So. 2d 1166, 1169 (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, 741 (Tex. 1998) (reiterating that insurance contracts are subject to the same rules of construction as other contracts).

35. See, e.g., *La. Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.*, 93-0911 (La. 1/8/94); 630 So. 2d 759, 763 (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.*, 98-CA-00380-SCT (¶ 7); 740 So.2d 295, 298 (Miss.1999) (holding that courts must give terms used in insurance policies their ordinary and popular definition); *Transp. Ins. Co. v. Standard Oil Co. of Tex.*, 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).

36. See, e.g., *Duncan v. Kansas City S. Ry. Co.*, 99-232 (La. App. 3 Cir. 11/3/99); 747 So. 2d 656, 674 (observing that “[i]t is well settled that . . . insurance policies are generally contracts of adhesion”); *J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co.*, 96-CA-00136-SCT (¶¶ 1-10); 723 So. 2d 550, 551-52 (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).

37. See, e.g., *Succession of Fannaly v. Lafayette Ins. Co.*, 2001-1335 (La. 1/15/02); 805 So. 2d 1132, 1138 (repeating that “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).

38. See, e.g., *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”); *Brown v. Blue Cross & Blue Shield of Miss., Inc.*, 427 So. 2d 139, 141 & n.2 (Miss. 1983) (adopting the principle that “[t]he 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”); *Kulubis v. Tex. Farm Bureau Underwriters Ins. Co.*, 706 S.W.2d 953, 955 (Tex. 1986) (“permit[ing] an innocent victim whose property ha[d] been destroyed to collect under an insurance [contract] for a loss reasonably expected to be covered”). *But see* *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 145 n.8 (Tex. 1994) (observing that Texas law does not recognize the doctrine of reasonable expectation as a basis to disregard unambiguous policy provisions).

39. See *Blackledge*, 740 So. 2d at 298 (embracing the position that “policy [terms] should be understood in their plain, ordinary, and popular sense rather than in a philosophical or scientific sense”).

40. See *Farmland Mut. Ins. Co. v. Scruggs*, No. 2003-CA-00874-SCT (¶¶ 10-11); 886 So. 2d 714, 717 (Miss. 2004); *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, No. 1999-CA-01685-

In light of those settled principles, the federal district court decided that the limit-of-liability provision in State Farm's automobile policy was unambiguous.⁴¹ It provided no coverage for the alleged diminished value of the insureds' repaired vehicles.⁴² The disgruntled and unsuccessful consumers timely appealed to the Fifth Circuit.⁴³ After reading the insurance contract, the court of appeals adopted the federal district court's findings.⁴⁴ The Fifth Circuit observed that the insurance contract clearly defined a "loss," explained the limit of liability, and explicitly outlined the insurer's obligation for repairing or replacing insureds' vehicles.⁴⁵ And of course, the appellate court ultimately found that the contract did not require State Farm to compensate the insureds for their cars' diminished values.⁴⁶

B. Health Insurance Plans: Whether ERISA Preempts Insureds' Commencing a Mixed-Claims State Court Action Against an HMO Under Louisiana's Law

The Fifth Circuit's decision in *Mayeaux v. Louisiana Health Service and Indemnity Co.*⁴⁷ continues rather than settles the following question in the Fifth Circuit: whether ERISA prevents HMO participants from litigating tort-based and breach-of-contract actions against health insurers, HMOs, and health plan managers in state courts. To be sure, as discussed below, a recent string of less-than-stellar decisions from the Supreme Court about the scope of ERISA's preemption doctrine—as that doctrine relates to insurers—continues to contribute to this confusion.

But first, consider the fairly uncomplicated facts in *Mayeaux*. In 1982, Cheryl Mayeaux began working for Coleman E. Adler & Sons (Adler).⁴⁸ At that time, Adler did not insure its employees under a health plan.⁴⁹ Still, in 1983, Mayeaux visited Dr. Edward Hyman, complaining about a medical

SCT (¶ 15); 797 So. 2d 981, 985-86 (Miss. 2001).

41. *Blakely v. State Farm Mut. Auto. Ins. Co.*, 406 F.3d 747, 750 (5th Cir. Apr. 2005).

42. *Id.*

43. *Id.* at 751 ("Appellants primarily argue that Mississippi law requires that the term 'cost of repair or replacement' necessarily includes the concept of diminished value[;] [therefore, the district court erroneously declared that] . . . the terms of the policy excluded diminished value recovery.").

44. *Id.* at 753 ("Thus, based on our plain reading of the distinct, unambiguous policy language . . . that expressly defined the limited alternatives of the 'cost of repair or replacement,' and adhering to the traditional contract principle . . . , we conclude this policy did not provide for additional recovery [for the] diminished value [of insureds'] vehicles.") (citing *Royer Homes of Miss., Inc. v. Chandeaur Homes, Inc.*, No. 2001-CA-01574-SCT (¶ 10); 857 So. 2d 748, 752 (Miss. 2003) (adopting the traditional rule of contract interpretation, which states that a court must read a contract as a whole and give effect to each clause in the contract)).

45. *Id.*

46. *Id.*

47. *Mayeaux v. La. Health Serv. & Indem. Co.*, 376 F.3d 420 (5th Cir. July 2004).

48. *Id.* at 423.

49. *Id.*

problem.⁵⁰ Dr. Hyman discovered that Mayeaux had “a connective tissue illness . . . he call[ed] ‘systemic coccal disease’ (‘SCD’).”⁵¹ To halt or treat Mayeaux’s condition, Dr. Hyman administered “a so-called ‘High Dose Antibiotic Treatment’ (‘HDAT’).”⁵²

Ten years after Mayeaux began working for Adler and nine years after her HDAT began, Adler contacted Louisiana Health Services and Indemnity Company, doing business as Blue Cross and Blue Shield of Louisiana (BCBS), and purchased a comprehensive group benefit plan from BCBS on behalf of Adler’s employees (Adler Plan).⁵³ The reported facts indicate that BCBS immediately refused to pay for Mayeaux’s treatment, concluding that the Adler Plan excluded or did not cover Dr. Hyman’s services.⁵⁴ With the assistance of a medical advisory panel,⁵⁵ the insurer determined that HDAT was at best “experimental or investigational.”⁵⁶

It is important to note that the health insurer’s decision “was not based on *any determination regarding the medical appropriateness* of Dr. Hyman’s procedures.”⁵⁷ Because BCBS remained unpersuaded,⁵⁸ Cheryl Mayeaux and Dr. Hyman commenced multiple tort- and contract-based causes of action against the insurer in a Louisiana state court.⁵⁹ BCBS removed the case to the District Court for the Eastern District of Louisiana, asserting that ERISA preempted the state court from weighing the plaintiffs’ multiple claims and

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 423 n.1. “BCBS’s Physician Advisory Council, a ten-physician board . . . examined Dr. Hyman’s office notes, the claim form [that he submitted], and his description of the prescribed therapy.”

Id. BCBS based its decision to deny coverage on that utilization review. *Id.*

56. *Id.* at 423.

The Adler Plan expressly exclude[d] benefits for “[s]ervices or supplies which are Investigational in nature” and define[d] “Investigational” as “the use of any treatment, procedure, facility, equipment, drug device or supply not accepted, as determined by [BCBS], as standard medical treatment of the condition being tested, or any such items requiring federal or other governmental agency approval not granted at the time services were rendered.”

Id. (quoting insurance plan) (first and third alterations in original).

57. *Id.* (emphasis added).

58. *Id.* at 423-24.

In April 1995, Mayeaux asked BCBS to reconsider its coverage decision, but BCBS refused. . . . At one point . . . , counsel for BCBS invited Mayeaux to obtain a second medical opinion in support of the HDAT therapy. Mayeaux submitted an opinion from Dr. Quentin Deming that concurred with Dr. Hyman’s prescribed treatment, but BCBS continued to deny coverage.

Id.

59. *Id.* at 424. The plaintiffs sought breach-of-contract damages that allegedly stemmed from BCBS’s failure to pay for Mayeaux’s HDAT, as well as damages for bad faith and fraud. *Id.* Also, “[t]he district court allowed the [p]laintiffs to amend their complaint to seek a declaratory judgment of Mayeaux’s right to receive future benefits under the Adler Plan.” *Id.* And “over BCBS’s objection, the district court permitted the [p]laintiffs to . . . amend their complaint a second time to add state law causes of action for unfair trade practices, intentional interference with contract, and defamation.” *Id.*

deciding the multiple actions.⁶⁰ Later, BCBS filed three summary judgment motions to counter the plaintiffs' state and federal causes of action.⁶¹

Put simply, ERISA preempts "any and all State laws [if the latter] relate to any employee benefit plan."⁶² Although the term "relate to" is intended to be broad, "[p]reemption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability."⁶³ Furthermore, if the facts underlying a state-law claim bear *some* relationship to an employee benefit plan, courts must evaluate the nexus between ERISA and state law according to ERISA's statutory objectives.⁶⁴ Two relevant statutory objectives include (1) putting in place uniform national safeguards for the "establishment, operation, and administration of . . . [employee benefit] plans," and (2) "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans."⁶⁵

Thus, ERISA preempts a state-law action if a district court can satisfy a two-prong test: (1) The state-law claim must concern an area of exclusive federal jurisdiction, such as an employee's right to receive benefits under an ERISA plan; and (2) The employee's claim must directly affect the relationships among traditional ERISA entities—the employer, the plan and its fiduciaries, the participants, and the beneficiaries.⁶⁶ Applying this standard, the District Court for the Eastern District of Louisiana ruled that ERISA governed Mayeaux's denial-of-benefits claim and that there was no genuine issue of material fact regarding whether BCBS abused its discretion in denying coverage.⁶⁷ The district court granted summary judgment in favor of BCBS and dismissed Mayeaux's state-law actions.⁶⁸ The plaintiffs timely filed an appeal.⁶⁹

Before examining whether the Fifth Circuit reached the correct conclusion in this case, a brief review of two recent Supreme Court's ERISA decisions is warranted. But first, consider the following: Under the traditional fee-for-service model, a patient's physician arguably makes good-faith and reasonable *treatment* decisions based exclusively on the physician's medical judgment about the patient's appropriate medical needs. On the other hand, a

60. *Id.*

61. *Id.*

62. 29 U.S.C. § 1144(a) (2000).

63. *See* N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 661 (1995) (quoting District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 130 n.1 (1992)) (citation omitted).

64. *See* Travelers, 514 U.S. at 656.

65. 29 U.S.C. § 1001(a)-(b) (2000).

66. *See* Smith v. Tex. Children's Hosp., 84 F.3d 152, 155 (5th Cir. 1996); *see also* Hubbard v. Blue Cross & Blue Shield Ass'n, 42 F.3d 942, 945 (5th Cir. 1995).

67. Mayeaux v. La. Health Serv. & Indem. Co., 376 F.3d 420, 423 (5th Cir. July 2004).

68. *Id.* at 423-24.

69. *Id.* at 425.

health insurer makes *eligibility* decisions “based on the policy’s coverage for a particular condition or medical procedure.”⁷⁰

However, when an HMO allows a physician to make a *benefits* decision, the traditional fee-for-service model changes.⁷¹ The altered model allows some *treatment* decisions to converge with *eligibility* decisions.⁷² Consequently, when the convergence occurs, the physician’s decision becomes a “mixed decision.”⁷³ Put simply, the HMO decision is mixed because one cannot easily disentangle the *eligibility determination* from the physician’s judgments about reasonable *medical treatment*.⁷⁴

Under ERISA’s § 502(a)(2),⁷⁵ an HMO participant may sue a plan fiduciary for breaching “any of the responsibilities, obligations, or duties imposed upon fiduciaries.”⁷⁶ But a fiduciary’s breach of duties can involve “mixed” violations—those involving treatment and eligibility decisions.⁷⁷ In 2000, the Supreme Court decided *Pegram v. Herdrich*.⁷⁸ Stated briefly, “*Pegram* carved out a narrow class of state law claims from ERISA conflict preemption.”⁷⁹ In *Pegram*, the Supreme Court declared that when an HMO, acting through its physicians, makes “mixed eligibility and treatment” decisions, those determinations are not fiduciary acts under § 502(a)(2).⁸⁰ Therefore, ERISA does not prevent participants from commencing “mixed eligibility and treatment” actions in state courts.⁸¹

Fours years after deciding *Pegram*, the Supreme Court decided *Aetna Health Inc. v. Davila*.⁸² In that case, participants in and beneficiaries under different employee benefit plans filed separate lawsuits in state court and sued

70. *Id.* at 430.

71. *Id.*

72. *Id.*

73. *Id.* at 431.

74. *Id.* at 430.

75. 29 U.S.C. § 1132(a)(2) (2000). This section outlines the persons who are empowered to bring a civil action under the civil enforcement provision, which states in relevant part: “A civil action may be brought . . . by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title.” *Id.*

76. *Id.* § 1109(a). This section outlines the scope of liability for breaching a fiduciary duty:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

Id.

77. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 219 (2004).

78. *Pegram v. Herdrich*, 530 U.S. 211 (2000).

79. *Mayeaux*, 376 F.3d at 431.

80. *Pegram*, 530 U.S. at 229-37.

81. *Id.*

82. *Davila*, 542 U.S. at 200.

their respective plan administrators under the Texas Health Care Liability Act (THCLA).⁸³ The pertinent section of the THCLA reads:

A health insurance carrier, health maintenance organization, or other managed care entity for a health care plan has the duty to exercise ordinary care when making health care *treatment decisions* and is liable for damages for harm to an insured or enrollee proximately caused by its failure to exercise such ordinary care.⁸⁴

In their state-court complaint, the aggrieved parties alleged that plan administrators ignored the physicians' recommendations and negligently refused to pay for the patients' treatments.⁸⁵ The insurers removed the cases to federal district courts, arguing that ERISA § 502(a) completely preempted the participants' and beneficiaries' respective causes of action.⁸⁶ The respective district courts agreed and declined to remand the cases to state court.⁸⁷ The district courts dismissed the plaintiffs' complaints with prejudice when they refused to amend their complaints and file "explicit ERISA claims."⁸⁸

Davila complainants appealed the district courts' refusals to remand to the United States Court of Appeals for the Fifth Circuit, where the latter court consolidated the respective cases with others that raised similar issues.⁸⁹ After

83. *Id.* at 200-01; see TEX. CIV. PRAC. & REM. CODE ANN. §§ 88.001-.003 (Vernon 2005).

84. TEX. CIV. PRAC. & REM. CODE ANN. § 88.002(a) (emphasis added).

85. *Davila*, 542 U.S. at 204. The complaint stated:

Respondent Juan Davila is a participant, and respondent Ruby Calad is a beneficiary, in ERISA-regulated employee benefit plans. Their respective plan sponsors . . . entered into agreements with petitioners, Aetna Health Inc. and CIGNA Healthcare of Texas, Inc., to administer the plans. Under Davila's plan . . . Aetna reviews requests for coverage and pays providers, such as doctors, hospitals, and nursing homes, which perform covered services for members; under Calad's plan sponsor's agreement, CIGNA is responsible for plan benefits and coverage decisions. Respondents both suffered injuries allegedly arising from Aetna's and CIGNA's decisions not to provide coverage for certain treatment and services recommended by respondents' treating physicians. Davila's treating physician prescribed Vioxx to remedy Davila's arthritis pain, but Aetna refused to pay for it.

Id. at 204-05.

86. *Id.* at 205.

87. *Id.*

88. *Id.*

89. See *Roark v. Humana, Inc.*, 307 F.3d 298, 302 (5th Cir. 2002). The court outlined the procedural history as follows:

This suit consolidates multiple district court actions and appeals for consideration of common issues. Ruby Calad, Walter Thorn, Juan Davila, and Gwen Roark sued their respective health maintenance organizations (HMO's) for negligence under Texas state law: They alleged that although their doctors recommended treatment, the HMO's negligently refused to cover it. The HMO's removed to federal court, arguing that because each plaintiff received HMO coverage through his employer's ERISA plan, the claims arose under ERISA. The plaintiffs moved to remand.

Id.

examining the causes of action available under ERISA § 502(a), the Fifth Circuit determined that the complainants' causes could proceed only under two subsections—§ 502(a)(1)(B)⁹⁰ and § 502(a)(2).⁹¹ The former allows a complainant to file a breach-of-contract or a breach-of-promise action against the insurer for wrongful denial of benefits.⁹² The latter subsection permits participants to commence a tort-based action against a plan's fiduciary for allegedly breaching a fiduciary duty.⁹³

Therefore, in *Davila*, the Fifth Circuit first analyzed the facts in light of ERISA's wrongful-denial-of-benefits and fiduciary-duty sections.⁹⁴ The court of appeals found that ERISA's § 502(a)(2) did not control the disposition of the cases because the complainants' suit did not involve any "mixed eligibility and treatment decisions."⁹⁵ Next, the Fifth Circuit found that the THCLA actions did not fall within the scope of § 502(a)(1)(B) because the complainants did not claim that the insurers wrongfully denied benefits.⁹⁶ The court of appeals noted that the complainants asserted tort claims, while ERISA § 502(a)(1)(B) only "creates a cause of action for breach of contract."⁹⁷

The Fifth Circuit declared, however, that ERISA did not preempt litigation of the THCLA action in state court.⁹⁸ Evidence suggested that the insurers "controlled, influenced, participated in and made decisions which affected the quality of the [complainants'] diagnosis, care, and treatment."⁹⁹ In addition, evidence supported the assertion that the *Davila* insurers violated the duty of ordinary care outlined in the THCLA.¹⁰⁰

90. 29 U.S.C. § 1132(a)(1)(B) (2000). This section outlines the persons who are empowered to bring a civil action and it reads in relevant part: "A civil action may be brought . . . by a participant or beneficiary . . . 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." *Id.*

91. *Roark*, 307 F.3d at 306-12.

92. *Davila*, 542 U.S. at 210. The Court stated:

ERISA § 502(a)(1)(B) . . . is relatively straightforward. If a participant or beneficiary believes that benefits *promised to him under the terms of the plan* are not provided, he can bring suit seeking provision of those benefits. A participant or beneficiary can also bring suit generically to "enforce his rights" under the plan, or to clarify any of his rights to future benefits.

Id. (emphasis added).

93. *Compare* *Turner v. PV Int'l Corp.*, 765 S.W.2d 455, 461 (Tex. App.—Dallas 1988, writ denied) ("The statute of frauds is not a defense to any action for damages based on fraud or breach of fiduciary duty, both being tort actions."), *with* *Resolution Trust Corp. v. Gaudet*, 192 F.3d 485, 487 (5th Cir. 1999) ("The FDIC sued the Gaudet defendants on two causes of action—gross negligence and breach of fiduciary duty. Both of these theories sound in tort."), *and* *FDIC v. Abraham*, 137 F.3d 264, 266-67, 269-70 (5th Cir. 1998) (holding that the FDIC's claim against corporate directors for violation of fiduciary duty sounded in tort as a violation of the duty of care).

94. *Davila*, 542 U.S. at 206.

95. *Roark*, 307 F.3d at 307-08.

96. *Id.* at 308-09.

97. *Id.* at 309.

98. *Id.* at 313.

99. *Davila*, 542 U.S. at 212.

100. *Id.*

More important, the Fifth Circuit found that the insurers' duty of ordinary care under THCLA was "an independent legal duty."¹⁰¹ Stated another way, the duty of ordinary care under the Texas statute arises independently of any ERISA- or plan-imposed duty.¹⁰² Therefore, any civil action to enforce a statutory duty under the THCLA is beyond the scope of ERISA's civil enforcement mechanism.¹⁰³ The Supreme Court in *Davila*, however, strongly disagreed.¹⁰⁴ Writing for the majority, Justice Clarence Thomas asserted that the plans' participants and beneficiaries sued the insurers

only to rectify a wrongful denial of benefits promised under ERISA-regulated plans, and d[id] not attempt to remedy any violation of a legal duty independent of ERISA. We hold that [complainants'] state causes of action fall "within the scope of" ERISA § 502(a)(1)(B) and are therefore completely pre-empted by ERISA and removable to federal district court.¹⁰⁵

Although *Davila* is replete with dicta about *Pegram*,¹⁰⁶ the Supreme Court

101. *Id.*

[The participants and beneficiaries] . . . contend . . . that the complained-of actions violate legal duties that arise independently of ERISA or the terms of the employee benefit plans at issue in these cases. Both respondents brought suit specifically under the THCLA, alleging that petitioners "controlled, influenced, participated in and made decisions which affected the quality of the diagnosis, care, and treatment provided" in a manner that violated "the duty of ordinary care set forth in §§ 88.001 and 88.002." [The complainants] contend that this duty of ordinary care is an independent legal duty.

Id. (citations omitted) (quoting petition for certiorari).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 215.

106. *See id.* at 218-21.

[Complainants], their *amici*, and some Courts of Appeals have relied heavily upon *Pegram* . . . , in arguing that ERISA does not pre-empt or completely pre-empt state suits such as [complainants']. They contend that *Pegram* makes it clear that causes of action such as [complainants'] do not "relate to [an] employee benefit plan," ERISA § 514(a), 29 U.S.C. § 1144(a), and hence are not pre-empted.

Pegram cannot be read so broadly. In *Pegram*, . . . [w]e reasoned that the physician's "eligibility decision and the treatment decision were inextricably mixed." We concluded that "Congress did not intend [the defendant HMO] or any other HMO to be treated as a fiduciary to the extent that it makes mixed eligibility decisions acting through its physicians."

A benefit determination under ERISA, though, is generally a fiduciary act. . . . Hence, a benefit determination is part and parcel of the ordinary fiduciary responsibilities connected to the administration of a plan. The fact that a benefits determination is infused with medical judgments does not alter this result.

Pegram itself recognized this principle. . . . Here, however, [the insurers] are neither [the complainants'] treating physicians nor the employers of [complainants'] treating physicians. [The insurers'] coverage decisions, then, are pure eligibility decisions, and *Pegram* is not implicated. [Therefore, w]e hold that [complainants'] causes of action, brought to remedy only the denial of benefits under ERISA-regulated benefit plans, fall within the scope of, and are completely pre-empted by, ERISA § 502(a)(1)(B), and thus removable to federal district court. The judgment of the Court of Appeals is reversed, and the cases are remanded for further

neither cited nor applied *Pegram*'s § 502(a)(2) analysis or holding to resolve the preemption controversy in *Davila*.¹⁰⁷

In *Mayeaux*, the court of appeals cited both *Pegram* and *Davila* to reach a very questionable conclusion.¹⁰⁸ In addition, the Fifth Circuit presented a less than stellar analysis in *Mayeaux*. Put simply, the Fifth Circuit focused exclusively on *Pegram*'s § 502(a)(2) breach-of-fiduciary-duty analysis and on dicta in *Davila*, rather than on the Supreme Court's breach-of-contract analysis in *Davila*.¹⁰⁹

In *Mayeaux*, the Fifth Circuit reported the plaintiffs' claims as follows: "Mayeaux and Germain contend that the district court erred [by summarily] dismissing their tort claims for pain and suffering, irreparable connective tissue damage, depression, loss of consortium, loss of earning capacity, lost wages, mental anguish, and attorney's fees."¹¹⁰ The plaintiffs insisted that the Supreme Court's ERISA decision in *Pegram* did not preempt "these state law tort claims."¹¹¹ The Fifth Circuit, however, dismissed that crucial observation and instead agreed with the district court's holding that ERISA preempted the claims because *Davila* "expressly rejects any effort to extend *Pegram*'s mixed-decision principle to cover traditional indemnity insurers like BCBS."¹¹²

The *Mayeaux* complainants were correct. The Fifth Circuit completely avoided any discussion of the poorly analyzed question in *Davila*: whether ERISA always preempts participants from commencing entirely independent tort-based causes of action in state courts—if those actions are completely divorced from ERISA's breach-of-contract and breach-of-fiduciary-duty provisions—§ 502(a)(1)(B) and § 502(a)(2), respectively.¹¹³

Very likely, the Fifth Circuit as well as the Supreme Court will have to address this question more carefully and intelligently in the near future. The reason is not complicated: Under common law, an implied covenant of good faith and fair dealing is associated with every health-care plan and insurance contract.¹¹⁴ And when an insurer breaches an implied covenant of good faith

proceedings consistent with this opinion.

Id. (emphasis added) (citations omitted) (fourth and sixth alterations in original) (quoting 29 U.S.C. § 1144(a); *Pegram v. Herdrich*, 530 U.S. 211, 229 (2000)).

107. *Id.* at 206 n.1. "In this Court, [the insurers] do not claim or argue that [the participants or beneficiaries'] causes of action fall under ERISA § 502(a)(2). Because [the insurers] do not argue this point, and since we can resolve these cases entirely by reference to ERISA § 502(a)(1)(B), we do not address ERISA § 502(a)(2)." *Id.* (emphasis added).

108. See *Mayeaux v. La. Health Serv. & Indem. Co.*, 376 F.3d 420, 430-31 (5th Cir. July 2004).

109. See *id.* at 430-32.

110. *Id.* at 431.

111. *Id.*

112. *Id.*

113. See *id.*

114. See *Union Nat'l Life Ins. Co. v. Crosby*, No. 2002-IA-01751-SCT (¶ 25); 870 So. 2d 1175, 1182 (Miss. 2004) (holding that a breach of 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 both). See generally *Wooten v. Cent. Mut. Ins. Co.*, 166 So. 2d 747, 750 (La. Ct. App. 1964) (embracing the view

and fair dealing, the plaintiff has an election: The grievant may file a cause of action that sounds either in tort, in contract, or under both theories.¹¹⁵

Clearly, tort and contract actions are *independent from each other*. In fact, complainants in *Mayeaux* advanced this issue and tried to get the Fifth Circuit and the federal district court to remand the case to state court.¹¹⁶ But, they were unsuccessful.¹¹⁷ The Fifth Circuit cavalierly dismissed this concern without presenting a thoughtful analysis. Instead, the court of appeals simply concluded that ERISA's § 514 completely preempted complainants commencing independent tort-based causes in a Louisiana state court.¹¹⁸

C. Health Insurance—Medicare Supplemental Contracts: Whether a Reinsurer Who Assumed an Insurer's Medicare Supplemental Contracts Is Liable Under Mississippi's Doctrine of Novation and General Contract Principles for Allegedly Breaching an "Assumption Reinsurance Agreement"

On a yearly basis, cases involving conflicts over insurers', reinsurers', and insurance agents' contractual rights under a Treaty of Reinsurance arise frequently.¹¹⁹ In addition, disputes about the scope of third-party beneficiaries'

in *Comunale* that an implied covenant of good faith and fair dealing exist in insurance contracts, and that neither party will do anything that will injure the other party's right to receive the benefits of the agreement). Furthermore, where there is breach, the subsequent action "sounds both in contract and tort" and "the plaintiff will ordinarily have freedom of election between an action of tort and one of contract." *Id.* (quoting *Comunale v. Traders & Gen. Ins. Co.*, 328 P.2d 198, 200, 203 (Cal. 1958)).

115. See *Union Nat'l Life Ins. Co.*, 870 So.2d at 1182.

116. *Mayeaux*, 376 F.3d at 424.

In [a] proposed amendment, the Plaintiffs alleged that Dr. Gengelbach (1) breached his duty of care under Louisiana state law, (2) conspired to retaliate against Dr. Hyman, (3) committed unethical practices, and (4) intentionally caused *Mayeaux* injury. The Plaintiffs further alleged that BCBS (1) was liable for Dr. Gengelbach's actions under the theory of respondeat superior, (2) breached an implied warranty, and (3) *breached its duty of good faith and fair dealing*. . . .

The magistrate judge denied leave to amend; and, on review of the magistrate judge's order, the district court affirmed.

Id. (emphasis added).

117. *Id.*

118. *Id.* at 432.

The Plaintiffs also appeal the district court's summary judgment dismissal of the Hymans' state law claims, which were grounded in *negligence, unfair trade practices, defamation, and intentional interference with contracts*. We affirm the district court's dismissal of these causes of action via a grant of summary judgment, however, because these remaining claims are indisputably preempted by ordinary conflict preemption under § 514 of ERISA.

Id. (emphasis added).

119. See *Haynsworth v. The Corp.*, 121 F.3d 956, 958-59 (5th Cir. 1997).

[F]oreign reinsurers are Underwriters and Underwriting Syndicates at Lloyd's of London, and foreign companies subscribing to reinsurance

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

rights under standardized insurance contracts and similar disagreements about the extent of those rights under an express novation also occur.¹²⁰ But, in *Robinson v. Guarantee Trust Life Insurance Co.*, one finds litigants asking the Fifth Circuit to resolve disputes about third-party beneficiaries' contractual rights under both an "Assumption Reinsurance Agreement" and an alleged implied novation.¹²¹ For these reasons, the controversy is somewhat unique and interesting.

The reported facts in *Robinson* were undisputed.¹²² Plaintiffs in the case were soliciting agents for Commonwealth National Life Insurance Company (Commonwealth).¹²³ Commonwealth offered a range of insurance products, including Medicare supplement policies.¹²⁴ Each agent had authority to sell all categories of products.¹²⁵ The agents earned commissions directly when consumers paid premiums to keep the various contracts active; and, they earned commissions indirectly when "subagents" sold insurance contracts.¹²⁶ However, in early January 1996, Commonwealth entered into an Assumption Reinsurance Agreement (Reinsurance Agreement) with Guarantee Trust Life Insurance Company (GTL).¹²⁷

In a reinsurance arrangement, an insurance company transfers all or some of its underwritten risks to another insurance company.¹²⁸ The company that purchases the reinsurance is called the initial insurer, the reinsured, or the ceding company.¹²⁹ The reinsurer, or the reinsuring company, is the company that acquires the risk.¹³⁰ The two broad categories of reinsurance contracts are "indemnity reinsurance" and "assumption reinsurance."¹³¹ To appreciate the

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.

N. River Ins. Co. v. Phila. Reinsurance Corp., 63 F.3d 160, 162 (2d Cir. 1995); *see also Ace Check Cashing, Inc. v. Aetna Cas. & Sur. Co. (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.").

120. *See* discussion *infra* Part III.

121. *Robinson v. Guarantee Trust Life Ins. Co.*, 389 F.3d 475 (5th Cir. Oct. 2004).

122. *Id.* at 477 ("[Commonwealth] appointed [each plaintiff] as a selling agent . . . at different times, from the late 1980's [sic] to the early 1990's [sic].").

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 477-78.

127. *Id.* at 477.

128. *Colonial Am. Life Ins. Co. v. Comm'r*, 843 F.2d 201, 201-02 (5th Cir. 1988).

129. *Id.* at 202.

130. *See id.*

An insurance company may want to reinsure its risks for a number of reasons including the diversification of its business, the acquisition of another insurance company indirectly through the acquisition of its business, the avoidance of a concentration of risk in one geographic area or line of business, and relief from the surplus drain that may occur as a result of the heavy expenses and the necessity of establishing reserves connected with newly written policies.

Id. at 201 n.2.

131. *Id.* at 202.

critical distinction between the two, consider the Fifth Circuit's excellent and expansive discussion of these contracts:

[Under an assumption reinsurance agreement], the reinsuring company takes over for the initial insurer and becomes *directly liable to the policyholders*. *The [agreement relieves the] initial insurer . . . of all liability, including the maintenance of the required reserves*. The reinsuring company has the duty of establishing and maintaining the required reserves. In addition, the reinsuring company is entitled to all premiums paid and must pay all future claims and expenses with respect to the policies. . . . [Under] an indemnity reinsurance contract the initial insurer and the reinsuring company *share the benefits and obligations arising out of the reinsured policy or contract*. Furthermore, the initial insurer will transfer to the reinsuring company all or part of its liability on the policies being reinsured. *The initial insurer remains directly liable to the policyholders and continues to collect premiums and to pay claims and expenses*. The reinsuring company will then reimburse the initial insurer for the claims and expenses attributable to the risks it has reinsured.¹³²

The *Robinson* controversy concerns whether the reinsurer breached its legal duties under an assumption reinsurance contract.¹³³ To repeat, this controversy is somewhat uncommon because insurance agents rather than insureds are the complainants.¹³⁴ Agents allege that GTL "assumed all of Commonwealth's medicare supplement policies in Mississippi and Commonwealth's obligation to pay continuing commissions on existing policies to the qualifying selling agents."¹³⁵ Of course, GTL claimed that it

132. *Id.* (emphasis added). Furthermore, there are two types of indemnity reinsurance contracts: conventional coinsurance and modified coinsurance. *Id.*

In conventional and modified coinsurance two exchanges take place: (1) the initial insurer pays the reinsuring company full consideration for the reserve liability assumed, and (2) the reinsuring company pays the initial insurer a "ceding commission" or an "initial allowance" for the business acquired. Insurance companies typically net these transactions, with only the excess amount changing hands. Thus, the reinsuring company has income equal to the reserve liability actually assumed even though such liability exceeds the consideration actually received.

Id.

133. *Robinson v. Guarantee Trust Life Ins. Co.*, 389 F.3d 475, 477 (5th Cir. Oct. 2004).

134. *See id.*

135. *Id.*

They [asserted that GTL did not pay] commissions . . . after the Reinsurance Agreement in accordance with their agency contracts with Commonwealth and further that they did not receive commission increases commensurate with the premium increases on Commonwealth policies which remained in force.

Plaintiff[']s [agents] also contend[ed] that GTL began increasing premiums on the assumed Commonwealth policies in order to induce policyholders to replace them and began conspiring with [anonymous agents who continued] to contact and persuade Commonwealth policyholders to replace their old Commonwealth policies with new GTL policies. [Furthermore, the disgruntled agents asserted] that GTL . . . artificially deflated GTL premiums to induce the policyholders to convert to GTL policies while at the same time inflating the premiums on the

continued to pay commissions to Commonwealth's agents according to Commonwealth's original compensation schedule.¹³⁶ But the agents disagreed and filed lawsuits in a Mississippi state court, citing multiple statutory, tort- and contract-based actions and claims.¹³⁷

GTL removed the ten state court cases to the Federal District Court for the Northern District of Mississippi.¹³⁸ The district court consolidated the cases for trial.¹³⁹ Later, GTL petitioned the court for summary relief.¹⁴⁰ After examining the relevant section of the Reinsurance Agreement, the district court granted GTL's motion for summary judgment.¹⁴¹ The district court found that the Reinsurance Agreement was not a new contract, and it did not outline the mutual intent and contractual obligations among all parties.¹⁴² Stated slightly differently, "the Reinsurance Agreement [was not] a novation of the original agency contracts between [the agents] and Commonwealth."¹⁴³ After the district court denied the motion for reconsideration, the agents appealed the adverse summary judgment to the Fifth Circuit.¹⁴⁴

The central question before the Fifth Circuit was whether the Reinsurance Agreement created a novation of the agency contracts between Commonwealth and its agents, creating a new agency relationship between GTL and the agents.¹⁴⁵ To address this question, the court of appeals reviewed Mississippi's law of contracts, which recognizes both express and implied novations.¹⁴⁶ An express novation immediately discharges an existing contractual obligation

Commonwealth policies

Id. at 478-79.

136. *Id.* at 477.

137. *Id.*

[The agents filed] a multi-count complaint asserting at least eighteen causes of action including entitlement to an accounting, torts arising out of contract, breach of contract, wilful breach of contract, breach of covenants of good faith and fair dealing, slander of business and commercial disparagement, conversion or civil theft, tortuous or fraudulent conspiracy, common law fraud, fraud of concealment, intentional infliction of emotional distress, twisting, tortuous interference with contractual relations, tortuous interference with prospective business advantage, misappropriation of trade secrets, violation of Mississippi's consumer protection laws/unfair and deceptive trade practices, violation of the Mississippi Uniform Trade Secrets Act and negligence.

Id.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 478 (finding no evidence that "GTL was obligated to pay plaintiffs [sic] commissions on inactive or replaced Commonwealth policies or on replacement policies or . . . that GTL was contractually restricted from offering replacement coverage to its insureds").

142. *Id.* at 479 ("The court ruled that there was no genuine issue of material fact on the question of whether all three of the parties agreed that GTL would replace Commonwealth [under any] agency agreements entered into between Commonwealth and plaintiff[']s [agents].").

143. *Id.* (holding that there was no novation as a matter of law).

144. *Id.* at 477.

145. *Id.* at 479.

146. *Id.* at 480 (stressing that under Mississippi's law, "all of the requirements of a contract must be present for a novation to be effective").

and creates a new one by imposing an obligation on a new obligor who was not previously obligated.¹⁴⁷ Alternatively, Mississippi courts may find an implied novation where “facts and circumstances demonstrate that all parties intended to substitute one party for another.”¹⁴⁸ In fact, before a Mississippi court can find an express or an implied novation, the moving party must present substantial evidence.¹⁴⁹ This evidence must prove that all parties accept and have a mutual understanding of their contractual responsibilities under the new agreement.¹⁵⁰

After reviewing the Reinsurance Agreement and all probative evidence, the court of appeals affirmed the district court’s decision to award GTL summary relief.¹⁵¹ There was no evidence of an express novation because the agents failed to prove that (1) they “were . . . parties to the Reinsurance Agreement between Commonwealth and GTL,” (2) GTL assumed the agency contracts between Commonwealth and its agents, and (3) GTL expressly agreed to be bound by those agency contracts.¹⁵² Also, like the district court, the Fifth Circuit found no evidence to support the existence of an implied novation.¹⁵³

147. See *Miss. Motor Fin., Inc. v. Enis*, 181 So. 2d 903, 904 (Miss. 1966).

148. *Id.* at 905; *First Am. Nat’l Bank of Iuka v. Alcorn, Inc.*, 361 So. 2d 481, 487-88 (Miss. 1978) (declaring that an implied novation requires a factual determination of “substantial proof that the creditor impliedly accepted the new debtor in the place of the old and it must not appear that the creditor intended to hold both the new and old debtor for the obligation”); see also RESTATEMENT (SECOND) OF CONTRACTS §§ 423-30 (1979) (proposing that a novation substitutes a new party and discharges one of the original parties to a contract by agreement of all three parties).

149. See *Geisenberger v. John Hancock Distribs., Inc.*, 774 F. Supp. 1045, 1052 (S.D. Miss. 1991) (concluding that under Mississippi’s law, an individual “seeking relief for breach of a written contract must prove the existence of the contract and [a] right to relief”).

150. See *Ainsworth v. Lee*, 67 So. 2d 905, 907 (Miss. 1953) (noting that a novation “‘is generally defined as a mutual agreement among all parties concerned for the discharge of a valid existing obligation by the substitution of a new valid obligation’” (quoting 39 AM. JUR. *Novation* § 2 (1942))).

151. *Robinson*, 389 F.3d at 483.

152. *Id.* at 480.

There is no language in the Reinsurance Agreement nor evidence [to] . . . support a finding that GTL assumed the agency contracts . . . or agreed to be bound by the terms [of those contracts] Indeed, as GTL points out, [the agents] did not even produce the [agency] contract between themselves and Commonwealth that was allegedly assumed by GTL by way of novation.

Id.

153. *Id.* at 480-81.

The district court, by granting summary judgment, found no genuine issue of material fact [to support] a conclusion that a novation had occurred and, thus, impliedly found no genuine factual dispute surrounding the issue of an implied novation. Our review of the record supports this conclusion. . . . Additionally, [the agents] do not present much of an argument for an implied novation [I]t was incumbent upon [the agents] to produce substantial evidence from which the district court could make a determination that an implied novation had occurred. [The agents] produced absolutely no evidence that by executing the Reinsurance Agreement with Commonwealth, GTL intended [an agency between GTL and the agents]. In fact, the evidence is to the contrary. . . . We conclude that the district court correctly found that no novation had occurred, either implied or express.

Id.

Unlike the United States District Court for the Northern District of Mississippi, however, the Fifth Circuit refused to decide this controversy using only the theory of novation.¹⁵⁴ And the reason is not complicated. After carefully reviewing the Reinsurance Agreement, the court of appeals found that “GTL clearly promised to pay . . . the appropriate agents’ . . . commissions” after GTL assumed control over Commonwealth’s outstanding Medicare supplemental insurance policies.¹⁵⁵ The district court, however, intentionally ignored or carelessly failed to appreciate the significance of this finding.¹⁵⁶

Therefore, after the district court failed to find an express or an implied novation—a separate contractual obligation—between GTL and the agents, the lower court simply concluded that the agents did not have anything else “to complain about.”¹⁵⁷ But the Fifth Circuit declared that the district court’s conclusion was reversible error because the court failed to address two interrelated questions before awarding GTL’s motion for summary judgment: whether the agents were third-party beneficiaries under the Reinsurance Agreement and, if so, whether GTL breached any third-party obligations.¹⁵⁸

Therefore, concluding that these questions generated additional genuine issues of material fact, the Fifth Circuit affirmed the district court’s summary judgment ruling in favor of GTL regarding the novation issue, reversed the summary judgment ruling in favor of GTL regarding the third-party-beneficiary issue, and remanded the case for further proceedings.¹⁵⁹

154. See *id.* at 481.

155. *Id.* at 482. “The only reference in the contract [about the agents was GTL’s agreeing] to be responsible for paying the commissions due under Commonwealth policies.” *Id.* at 480.

156. See *id.* at 482.

[The agents cited] testimony that creat[ed] a factual dispute [over] whether GTL was properly calculating commissions due under the policies [under which the agents] were entitled to receive commissions. . . . GTL suggests that it is undisputed that it has properly paid all commissions . . . under the Commonwealth policies. That is a conclusory statement which is hotly contested. The court found simply that GTL had paid commissions on the Commonwealth policies and continued to do so. The trial court did not address that this was a hotly disputed issue [which created] genuine issues of material fact.

Id.

157. *Id.*

158. *Id.* (The testimony of various credible agents established “that GTL was improperly calculating [the agents’] commissions and was not paying [the commissions] in accordance with GTL’s agreement with Commonwealth. This factual dispute goes to the heart of the issue as to whether there was a breach of the third party obligations of GTL undertaken in the Reinsurance Agreement.”).

159. *Id.* at 482-83 (“Since [the agents] are entitled to go forward with their third party beneficiary claims under the Reinsurance Agreement, the derivative claims such as breach of contract, fraud, negligence, and perhaps others . . . survive summary judgment.”).

D. Mortgage Life Insurance: Whether Texas's Law and the Terms of a Mortgage-Life Insurance Contract Require an Insurer to Compensate a Surviving Spouse Following the Death of the Named-Insured Spouse

The legal conflicts and questions appearing in *Monumental Life Insurance Co. v. Hayes-Jenkins*¹⁶⁰ are not new. More important, the remedies reported in the decision are not novel. Yet, cases like *Monumental* arguably continue to generate unnecessary litigation and interest. Nearly a half century ago, the Texas Supreme Court clearly outlined the scope of an insurance applicant's contractual rights under a conditional receipt—*after* an applicant completes an application for insurance and pays the first premium, but *before* the insurer processes the application and delivers the insurance contract to the applicant.¹⁶¹

Although the facts in *Monumental* are fairly extensive, they are clear and undisputed.¹⁶² In November 2000, Alvin and Sondra Jenkins (the Jenkinses) purchased a house in Frisco, Texas.¹⁶³ To pay for the property, the Jenkinses secured a mortgage loan from NovaStar Mortgage, a residential mortgage lender.¹⁶⁴ At the loan's closing, the Jenkinses consummated several agreements, including an escrow agreement.¹⁶⁵ The latter agreement authorized NovaStar to collect \$2,808.70 from the Jenkinses each month and to place those funds in an escrow account.¹⁶⁶ The escrow agreement also gave NovaStar the authority to pay—*on behalf of the Jenkinses*—a variety of expenses associated with homeownership and the property, including taxes, assessments, and premiums to purchase flood and fire insurance.¹⁶⁷

Of course, the escrow agreement did not mention “mortgage insurance.”¹⁶⁸ But NovaStar decided to pitch that insurance product to the Jenkinses.¹⁶⁹ At all times pertinent to this case, Monumental Life Insurance Company (MLIC) and NovaStar were parties to a Mortgage Insurance

160. *Monumental Life Ins. Co. v. Hayes-Jenkins*, 403 F.3d 304, 310-21 (5th Cir. Mar. 2005).

161. *See S. Coast Life Ins. Co. v. Robertson*, 483 S.W.2d 388, 390-91 (Tex. Civ. App.—Tyler 1972, writ ref'd n.r.e.).

[The applicant paid] the first month's premium [and] received a numbered receipt. . . . [O]ur Supreme Court [has held] that “conditional receipts” such as the one presently before us provide for temporary life insurance. Under the terms of the “conditional receipt” . . . the temporary insurance will become effective on . . . “[t]he date of the application” . . . and when the applicant pays “the first full premium for any policy or rider applied for.”

Id. (quoting insurance policy) (citations omitted).

162. *Monumental*, 403 F.3d at 307.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 307-08.

Agreement (MIA).¹⁷⁰ Under the MIA contract, NovaStar agreed to distribute MLIC's brochures and other promotional materials to NovaStar's borrowers.¹⁷¹ In fact, MLIC could only pitch its brochures and promotional materials to NovaStar's borrowers with NovaStar's express written consent.¹⁷² In addition, NovaStar promised to include the cost of the insurance in its borrowers' monthly invoices and promised to collect the mortgage insurance premiums directly from its borrowers.¹⁷³ In consideration for NovaStar's promises, MLIC promised to return a percentage of the insurance premiums to NovaStar.¹⁷⁴

In January 2001, conforming to the terms and expectations under the MIA, NovaStar mailed an unsolicited MLIC application for Mortgage Life and Disability Insurance to the Jenkinses.¹⁷⁵ More significant, NovaStar mailed MLIC's application to the Jenkinses along with an MLIC brochure describing MLIC's policy and a cover letter that had been written on NovaStar's letterhead.¹⁷⁶ The cover letter stated that the mortgage life insurance policy would pay the Jenkinses' entire mortgage balance "up to \$300,000" if either spouse died.¹⁷⁷ Additionally, NovaStar's cover letter stated that the Jenkinses could "examine the policy without cost or obligation" for thirty days, commencing the day the couple received their certificate of insurance.¹⁷⁸

Even more significant, MLIC's brochure emphasized that the Jenkinses did not have to mail a separate insurance-premium check to either MLIC or NovaStar.¹⁷⁹ Instead, the brochure emphasized that the Jenkinses' "insurance premium [would be] conveniently added to [their] monthly mortgage payments."¹⁸⁰ Furthermore, the application stated that the Jenkinses' NovaStar "account [would] be credited in full," and the mortgage life

170. *Id.*

171. *Id.*

172. *Id.* at 308.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* (quoting the MLIC brochure).

178. *Id.* NovaStar's cover letter stated in pertinent part:

"This insurance is yours to try risk free. We're confident that you'll agree that [the insurance] provides essential protection. Examine the Certificate of Insurance for 30 days at no cost or obligation. If you decide you don't want the coverage, for any reason, just return the Certificate to Monumental Life Insurance Company and you'll . . . owe nothing."

Id. (quoting the MLIC brochure) (alteration in original).

179. *Id.*

180. *Id.* (quoting the MLIC brochure) (alteration in original). Furthermore, the MLIC brochure touted the advantages of the thirty-day "risk free" period, stating in bold print:

"Examine at No Risk for 30 Days. When your certificate/policy arrives, look it over. If you don't agree that this is sensible and affordable mortgage protection, simply return it within 30 days of receiving it . . . and you won't . . . owe a cent. No questions asked. In the meantime, you'll . . . be fully covered while you make your decision."

Id. (quoting the MLIC brochure) (first omission in original).

insurance contract would fully cover the Jenkinses “during the thirty-day period while they examined the policy.”¹⁸¹

After reading the brochures and other materials, the Jenkinses promptly filled out the application.¹⁸² Relying on MLIC’s promise that “no check would be required and that their premiums would be added to and included in their monthly invoices,” the Jenkinses mailed the application to MLIC.¹⁸³ The mortgage insurer received it on January 17, 2001.¹⁸⁴ Of course, when the Jenkinses mailed the application, they neglected to enclose a check for the first insurance premium and failed to include the first premium when they submitted their monthly mortgage payments to NovaStar.¹⁸⁵

On March 14, 2001, MLIC mailed a letter to the Jenkinses informing them that the insurer had approved their application and that their “‘Certificate of Mortgage Life Insurance should arrive shortly.’”¹⁸⁶ But the notice of approval arrived “after NovaStar had mailed [the] March 10th invoice to the Jenkinses and before [the Jenkinses] mailed their March 25th payment . . . to NovaStar.”¹⁸⁷ More relevant, the notice of approval did not mention “the first-premium requirement,” and MLIC did not inform NovaStar that MLIC had approved the Jenkinses’ application for mortgage life insurance.¹⁸⁸

On April 4, 2001, Alvin died unexpectedly.¹⁸⁹ And on April 5, 2001, Sondra received MLIC’s insurance policy in the mail.¹⁹⁰ The mortgage-life-insurance contract clearly stated that “the insurance was effective April 1, 2001, three days prior to Alvin’s death.”¹⁹¹ But the insurance contract also stated unambiguously that MLIC would provide coverage only if the Jenkinses had submitted an application and paid the first premium.¹⁹²

“[E]ight days after the policy’s effective date, four days after the MLIC policy was mailed to Sondra, and five days after Alvin’s death,” MLIC informed NovaStar that the Jenkinses’ application had been approved.¹⁹³ In May 2001, Sondra timely filed a claim with MLIC for death benefits.¹⁹⁴ MLIC immediately denied the claim, asserting that Alvin was not insured under an MLIC insurance contract when he died.¹⁹⁵ More specifically, the insurer

181. *Id.* (quoting the MLIC brochure).

182. *Id.* at 309.

183. *Id.*

184. *Id.*

185. *Id.* “As they had done each month since taking out their loan, the Jenkinses mailed their check [to NovaStar] . . . in the standard invoiced amount of \$2,808.70.” *Id.*

186. *Id.* (quoting the MLIC brochure).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 310.

insisted that it had no contractual duty to pay any proceeds because the Jenkinsons did not pay the first premium before the effective date of the policy or before Alvin's death.¹⁹⁶

Anticipating Sondra's filing a lawsuit and following a fairly customary practice, MLIC filed a declaratory-judgment action in the United States District Court for the Eastern District of Texas.¹⁹⁷ The insurer asked the district court to declare that the mortgage life insurance contract did not cover the Jenkinsons when Alvin died and that MLIC had no duty to compensate Sondra.¹⁹⁸ Sondra responded by filing a lawsuit against MLIC, raising several causes of action: (1) breach of contract, (2) negligence, (3) negligent misrepresentation, and (4) statutory breach of Texas's Deceptive Trade Practices Act (DTPA).¹⁹⁹ Shortly thereafter, MLIC filed a motion for summary judgment.²⁰⁰ The district court granted the motion, holding that Sondra had no contractual right to receive any death benefits.²⁰¹ Sondra timely filed a notice of appeal.²⁰²

There were two questions before the Fifth Circuit: (1) whether MLIC waived its right under the insurance policy to demand the first premium as a condition precedent to coverage, and (2) whether MLIC's words and conduct²⁰³ estopped the insurer from asserting lack of a binding contract as an affirmative defense.²⁰⁴ On appeal, MLIC argued that the Jenkinsons' failure to pay the first premium before the effective date of the policy or before Alvin's death conclusively established the absence of a binding contract.²⁰⁵ Therefore, absent a valid agreement, a breach of contract was a legal impossibility.²⁰⁶

196. *Id.* "MLIC pointed out that the application contained a statement (in fine print in the paragraph immediately above the applicant's signature line) that specified: '[N]o insurance is in effect unless the application is approved by the Insurance Company, and the first premium is paid.'" *Id.* (quoting the MLIC application) (alteration in original).

197. *Id.*

198. *Id.*

199. TEX. INS. CODE ANN. art. 21.21, §§ 4(10)(ii), (16)(a) (Vernon Supp. 2004), *repealed by* Act of Apr. 1, 2003, 78th Leg., R.S., ch. 1274, § 26(a)(1), 2003 Tex. Gen. Laws 3000, 4138 (allowing complainants to commence a private right of action and secure remedies under Texas's Deceptive Trade Practices Act).

200. *Monumental*, 403 F.3d at 310.

201. *Id.*

202. *Id.*

203. *See id.* at 308-09. To reiterate, the cover letter, brochure, application, and letter of approval contained certain representations (words) upon which the Jenkinsons relied. *Id.* In addition, the insurer delivered an insurance contract to the Jenkinsons and gave the applicants thirty days to examine the policy. *Id.* at 309. This latter conduct also generated reliance. *See id.*

204. *Id.* at 310.

205. *Id.*

206. *Cf. Hutson v. Wenatchee Fed. Sav. & Loan Ass'n*, 588 P.2d 1192, 1196 (Wash. Ct. App. 1978). "Since plaintiff does not claim that an insurance contract actually was formed, the instructions spelling out the statutory requirements are much more likely to cause the jury to conclude that plaintiff's theory presents a legal impossibility." *Id.*

To resolve this conflict, the Fifth Circuit carefully researched Texas's principals of waiver and equitable estoppel.²⁰⁷ First, under Texas's law, "waiver is a voluntary, intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right."²⁰⁸ In addition, a party who raises a waiver defense must show that the opposing party (1) possessed "an existing right, benefit, or advantage," (2) had actual or constructive knowledge of the right, and (3) actually intended to relinquish the right.²⁰⁹

On the other hand, an aggrieved party who invokes the doctrine of equitable estoppel must prove several different elements.²¹⁰ Specifically, the aggrieved party must establish that an opposing party (1) misrepresented or concealed material facts, (2) had actual or constructive knowledge of those facts, (3) intended for the aggrieved party to act on those material facts, and (4) knew the aggrieved party had no way to secure actual knowledge of the material facts.²¹¹ In addition, the aggrieved party must establish that he or she detrimentally relied on the misrepresented or concealed material facts.²¹²

Applying the doctrine of waiver, the Court of Appeals for the Fifth Circuit concluded:

[Examining the gravamen of Sondra's waiver argument, it becomes apparent] that MLIC *might* . . . have waived its right to insist on prepayment of the first premium as a condition precedent to coverage MLIC might have done so when it unconditionally approved the Jenkinses' application on March 14, 2001, . . . *prior to receiving* the Jenkinses' first premium payment directly, *and in the full knowledge* that—under its arrangement with NovaStar—the Jenkinses could not possibly have [received an invoice from] NovaStar . . . until sometime after [the mortgage lender learned that MLIC had approved the Jenkinses' application].²¹³

207. *Monumental*, 403 F.3d at 310-11.

208. See *First Interstate Bank of Ariz., N.A. v. Interfund Corp.*, 924 F.2d 588, 595 (5th Cir. 1991) (citing *Edwin M. Jones Oil Co. v. Pend Oreille Oil & Gas Co.*, 794 S.W.2d 442, 447 (Tex. App.—Corpus Christi 1990, writ denied)).

209. See *First Interstate*, 924 F.2d at 595 (citing *Mo.-Kan.-Tex. R.R. v. Heritage Cablevision of Dallas, Inc.*, 783 S.W.2d 273, 280 (Tex. App.—Dallas 1989, no writ)).

210. See *Robinson v. Robinson*, 961 S.W.2d 292, 301 (Tex. App.—Houston [1st Dist.] 1997, no writ).

211. *Id.*

212. See *Braugh v. Phillips*, 557 S.W.2d 155, 158 (Tex. App.—Corpus Christi 1977, writ ref'd n.r.e.) (observing that equitable estoppel involves determining whether a defendant's conduct causes a plaintiff to materially alter plaintiff's position after plaintiff relied on defendant's conduct).

213. *Monumental*, 403 F.3d at 314-15.

Simply put, because MLIC chose to adopt notification procedures that would not permit the Jenkinses (or anyone similarly situated) to comply with the policy's requirement that the first premium be paid prior to the date selected by MLIC as the effective date of coverage, MLIC might well be held to have waived the right to assert that commencement of coverage was barred by the Jenkinses' failure to pay the first premium before (1) the effective date (which was not communicated to them until April 5, 2001) or (2) Alvin's death (on April 4, 2001).

The Fifth Circuit also found *prima facie* evidence to support the view that the Jenkinses “might have relied—reasonably and to their detriment—on MLIC’s earlier representations in the brochure, the application, and the approval letter, [as well as on] NovaStar’s representations in the cover letter.”²¹⁴ The court of appeals observed,

MLIC’s March 14, 2001 letter, which formally notified the Jenkinses that their application had been approved, is devoid of any admonition that coverage is conditioned on their prior payment of the first premium. Like the application itself, this notice’s terse congratulatory statement, which informed the Jenkinses that their Certificate of Insurance/Policy would “arrive shortly,” could have implied to the Jenkinses that, by completing and mailing their application to MLIC months earlier, they had successfully completed all acts required on their part to bring coverage into effect.²¹⁵

But, MLIC argued and correctly observed that Texas’s law precludes using the doctrines of waiver and equitable estoppel to create or extend insurance coverage.²¹⁶ Like many common-law jurisdictions, Texas embraces the view that waiver and estoppel (1) cannot enlarge the risks insured against or coverage under an existing insurance contract and (2) cannot create a new or different insurance contract, comprising different risks insured against.²¹⁷ However, the Fifth Circuit stated that MLIC mischaracterized Sondra’s waiver and equitable estoppel arguments.²¹⁸

As the court of appeals correctly noted, Texas’s law is fairly clear: An insured may establish that an insurer has a duty to pay proceeds under a new, putative insurance contract, provided the insured proves that the insurer waived or forfeited its right to use a condition precedent as an affirmative

Id. at 315.

214. *Id.* at 311.

Of particular importance are the representations [about] the 30-day “no risk” examination period. These representations, contained not only in the cover letter and brochure but also highlighted in bold print at the top of the application, state affirmatively that the Jenkinses will be “fully covered” for 30 days while they “look over” their policy yet omit any reference to the fact on which MLIC now relies—that coverage will become effective only on MLIC’s receipt of the first premium payment.

Id.

215. *Id.* at 312.

216. *Id.* at 314.

217. See *Minn. Mut. Life Ins. Co. v. Morse*, 487 S.W.2d 317, 320 (Tex. 1972) (citing *Great Am. Reserve Ins. Co. v. Mitchell*, 335 S.W.2d 707, 708 (Tex. Civ. App.—San Antonio 1960, writ ref’d)).

Waiver and estoppel may operate to avoid a forfeiture of a policy, but they have consistently been denied operative force to change, re-write and enlarge the risks covered by a policy. In other words, waiver and estoppel can not create a new and different contract with respect to risks covered by the policy.

Mitchell, 335 S.W.2d at 708.

218. *Monumental*, 403 F.3d at 314.

defense.²¹⁹ In the present case, the Fifth Circuit found that Sondra employed neither waiver nor estoppel to enlarge covered risks or to create new ones under the mortgage insurance contract.²²⁰ Instead, the opposite was true; the debate was over a specific risk that MLIC had already agreed to cover under the mortgage insurance contract, insuring the life of a mortgagor-insured and promising to pay an appropriate amount of money to cover a mortgage balance up to \$300,000 upon the death of the mortgagor-insured.²²¹

Therefore, the Fifth Circuit reversed the district court's summary judgment in favor of MLIC and remanded the case so the trial court could proceed with a full blown declaratory-judgment trial on the merits.²²² But immediately, the Fifth Circuit realized that deciding in favor of Sondra presented a slew of troublesome and awkward procedural problems for several important reasons.²²³ First, during the declaratory-judgment hearing, "Sondra did not move for summary judgment on the waiver or estoppel issues in the district court."²²⁴ Instead, she filed a countersuit against MLIC alleging an assortment of tort- and contract-based causes of action.²²⁵

Second, MLIC was "surprised on appeal."²²⁶ The mortgage insurer did not have "an opportunity—even at the summary judgment stage—to develop the evidentiary record or to brief [the waiver and estoppel] issues fully."²²⁷ Third, two clearly undisputed facts appeared in the record: (1) MLIC issued and delivered a mortgage insurance contract to the Jenkinsons; and (2) MLIC only asked the district court for declaratory relief.²²⁸ But, to address the declaratory-judgment issue, the district court only had to (1) read the contract, (2) employ one of five doctrines of contract interpretation that Texas has

219. *Id.* at 314 n.18; *see also* *Kennedy v. McMullen*, 39 S.W.2d 168, 174 (Tex. Civ. App.—Beaumont 1931, writ ref'd) (concluding that "conditions precedent may be waived" (quoting 10 TEX. JUR. *Contracts* § 270 (1930))); *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987) (concluding that "the waiver of a condition precedent may be inferred from a party's conduct" (citing *Ames v. Great S. Bank*, 672 S.W.2d 447, 449 (Tex. 1984))).

220. *Monumental*, 403 F.3d at 314.

221. *Id.*

222. *Id.* at 315.

223. *See id.* at 315 n.21.

224. *Id.*

225. *Id.* at 310.

226. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976). "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Id.* The *Hormel* Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *see Coggin v. Longview Indep. Sch. Dist.*, 337 F.3d 459, 470 (5th Cir. 2003) (embracing the *Hormel* and *Singleton* rule that to give litigants the opportunity to offer all relevant evidence and to eliminate surprises on appeal, federal appellate courts should not consider issues that the parties failed to raise in the district courts).

227. *Monumental*, 403 F.3d at 315 n.21.

228. *Id.* at 304, 307-09.

embraced,²²⁹ and (3) declare that MLIC had no contractual duty to pay proceeds under the contract.²³⁰

Instead, the United States District Court for the Eastern District of Texas engaged in a highly questionable but sanctioned practice that occurs all too often and unnecessarily in state and federal declaratory-judgment trials. The court simply granted the insurer's summary-judgment motion, which typically concerns only questions of fact. However, the lower court should have conducted a full blown declaratory-judgment proceeding.²³¹ The latter arguably would have been more appropriate and efficient since it allows a trial judge to consider questions of fact as well as questions of law.²³² Besides, in its opinion, the Fifth Circuit even recognized and embraced this view: "Although waiver is ordinarily a question of fact, when *the facts and circumstances are admitted or clearly established*, the question becomes one of law."²³³

229. See *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998) (reiterating that insurance contracts are subject to the same traditional rules of construction as other contracts); *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); *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); *Kulubis v. Tex. Farm Bureau Underwriters Ins. Co.*, 706 S.W.2d 953, 955 (Tex. 1986) (permitting an innocent victim, who has an insurance contract that allows for loss reasonably expected, to collect when the victim's property has been destroyed); *Transp. Ins. Co. v. Standard Oil Co. of Tex.*, 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). *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 expectation as a basis to disregard unambiguous policy provisions).

230. See *Monumental*, 403 F.3d at 315.

231. See Willy E. Rice, *Questionable Summary Judgments, Appearances of Judicial Bias, and Insurance Defense in Texas Declaratory-Judgment Trials: A Proposal and Arguments for Revising Texas Rules of Civil Procedure 166a(a), 166a(b), and 166a(i)*, 36 ST. MARY'S L.J. 535, 638-39 & nn.487-88 (2005).

Texas's trial judges participate in another unsettling practice. Instead of conducting full-blown declaratory-judgment trials, trial judges regularly grant or deny summary-judgment motions without giving intelligible, meticulous, or studious explanations of their rulings. As a consequence, Texas's appellate courts must spend an enormous amount of time and limited judicial resources exploring various plausible theories to determine whether an unexplained summary-judgment ruling was sound or erroneous. Texas's courts of appeals must engage in such costly, wasteful, and unnecessary conduct whenever a party challenges any unfavorable summary-judgment ruling because the Texas Supreme Court has been consistently clear regarding one particular summary-judgment issue: When a trial court does not specify the ground for a summary judgment, the appealing party may proffer multiple theories to establish that the judgment was erroneous. In other words, to generate more costs and ensure that appellate courts consume even more judicial resources, an appellant may present an assortment of reasons to explain why a summary judgment was unwarranted.

Id. at 638-39.

232. See *id.* at 607-13 (establishing conclusively that trial courts have the power to decide both questions of fact and law in declaratory judgment trials).

233. *Monumental*, 403 F.3d at 313 (quoting *Motor Vehicle Bd. of the Tex. Dep't of Transp. v. El Paso Indep. Auto. Dealers Ass'n, Inc.*, 1 S.W.3d 108, 111 (Tex. 1999) (emphasis added)).

Instead, the Fifth Circuit addressed the bothersome procedural problems outlined above this way:

We deem it prudent to *remand these issues to the district court*, which may require full briefing on the issues or receive additional evidence, if any, into the record—or both. At such a time, the district court may decide that (1) summary judgment is proper if there still exists no genuine issue of material fact, or (2) the case should proceed to a trial on the merits.²³⁴

But, as this Author has argued elsewhere, completely removing summary-judgment practice from declaratory-judgment trials will eliminate such pointless and tortuous procedural issues as those appearing in *Monumental*.²³⁵ The evidence is fairly conclusive. Summary-judgment practice in a declaratory-judgment trial is highly inferior to a full-blown declaratory-judgment hearing and ruling on the merits.²³⁶ In such hearings, the district judge must decide questions of fact, if there are any, questions of law, and issue a final judgment, which would be the only reason for an appeal.²³⁷ Even more important, barring litigants from filing summary-judgment motions in declaratory-judgment proceedings will ensure more efficient and less costly hearings that arguably would reduce the need for remands.²³⁸

E. Property Insurance—Business Interruption: Whether Texas’s Law Requires an Insurer to Compensate an Insured for Lost Profits Where the Insured Allegedly Experienced Business Interruptions

Perhaps the facts and rulings in *Finger Furniture Co. v. Commonwealth Insurance Co.*²³⁹ present one of the clearest illustrations to justify eliminating summary-judgment practice in federal and state declaratory-judgment trials. Finger Furniture Company owns seven stores in Houston, Texas.²⁴⁰ Tropical Storm Allison arrived in the greater Houston metropolitan area in June 2001 and caused heavy rains and severe flooding.²⁴¹ As a result, the flooding prevented Finger’s employees from accessing the company’s central computer located in one of Finger’s stores.²⁴² Because Finger could not access its central computer, the company could not operate any of its Houston stores or make any sales on Saturday, June 9, 2001.²⁴³ However, Finger opened all of its

234. *Id.* (emphasis added).

235. *See Rice, supra* note 231, at 648-55.

236. *Id.* at 649.

237. *Id.*

238. *See id.* at 648-55.

239. *Finger Furniture Co. v. Commonwealth Ins. Co.*, 404 F.3d 312 (5th Cir. Mar. 2005).

240. *Id.* at 313.

241. *Id.*

242. *Id.*

243. *Id.*

stores at various hours the next day, Sunday, June 10, 2001.²⁴⁴ The company also slashed prices the following weekend, June 16-17, 2001.²⁴⁵ Consequently, customers purchased furniture at discounted prices and “sales soared.”²⁴⁶

Commonwealth Insurance Company insured Finger under a property-insurance contract.²⁴⁷ More relevant, Finger paid an additional premium to secure business-interruption coverage.²⁴⁸ Stated briefly, the purpose of the insurance was “to indemnify the insured” for financial losses or lost profits, where a “peril insured against” (e.g., terrorism,²⁴⁹ an explosion, a fire, a storm, or “business interruption”) causes a business to lose money or reduce profits.²⁵⁰ Therefore, after assessing its June 9-10, 2001 losses, the furniture company filed a loss-of-sales claim, citing the business-interruption endorsement and seeking indemnification for lost profits.²⁵¹

The insurer refused to indemnify and commenced a declaratory-judgment action in the United States District Court for the Southern District of Texas.²⁵² Like many insurers, Commonwealth filed the equitable action ostensibly for four specific purposes.²⁵³ The insurer wanted the district court (1) to conduct a full-blown declaratory-judgment trial on the merits, (2) to carefully read the express, written contract, particularly the business-interruption endorsement, (3) to interpret disputed words and phrases in the endorsement, and (4) to issue a formal and final declaration that Commonwealth had no duty to indemnify Finger.²⁵⁴ Certainly, these types of reasons explain, in part, Congress’s and the Texas Legislature’s decision to adopt the Federal Declaratory Judgments Act

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *See id.* at 313-14; *see also* *Bogley v. Middleton Tavern, Inc.*, 421 A.2d 571, 574 (Md. 1980) (finding no evidence that “the full business interruption claim . . . involved a specifically prohibited risk” and ruling against the insurer because Aetna did not show “that an additional premium would have been payable because of a greater exposure”).

249. *See, e.g.*, *N.Y. Career Inst. v. Hanover Ins. Co.*, 791 N.Y.S.2d 338, 341-44 (N.Y. App. Div. 2005) (describing a court’s denial of summary relief to an insured who sued its business-interruption insurer to recover reimbursements for loss of business income following the terrorist attacks of September 11, 2001).

250. *See, e.g.*, *Quality Oilfield Prods., Inc. v. Mich. Mut. Ins. Co.*, 971 S.W.2d 635, 638 (Tex. App.—Houston [14th Dist.] 1998, no pet.). “This type of insurance is called use and occupancy insurance and is defined as indemnification for any loss sustained by the insured because of his inability to continue to use the premises or his inability to keep the premises occupied by a tenant.” *Id.* (citing 1 GEORGE J. COUCH, COUCH ON INSURANCE 2d § 1:113 (2d ed. 1984)).

251. *Finger*, 404 F.3d at 313.

252. *Id.*

253. *See id.*

254. *See* Brief for Appellant at 4-22, *Finger* (No. 04-20359), available at 2004 WL 3525831.

of 1934²⁵⁵ and the Uniform Declaratory Judgments Act of 1922,²⁵⁶ respectively.

To make the federal district judge's task easier, Finger and Commonwealth stipulated that Finger lost \$325,402.86 on June 9-10, 2001.²⁵⁷ The parties used Finger's sales receipts for the same period during the prior year—June 10-11, 2000—to compute that figure.²⁵⁸ Furthermore, the record shows conclusively that the insurer and insured raised no question about any material facts that would justify either party's filing a motion for summary judgment.²⁵⁹ Yet, both parties moved for summary relief.²⁶⁰

Once more, the outcome was quite predictable. The district court granted Finger's motion for summary relief,²⁶¹ thereby circumventing a full-blown

255. Federal Declaratory Judgment Act, 28 U.S.C. § 2201 (2000).

In a case of actual controversy within its jurisdiction . . . any court in the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Id.; see also 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, 1144 & n.66 (1998).

[J]udges must weigh several important factors before granting or denying declaratory relief . . . [such as] (1) whether declaratory judgment would settle the controversy, (2) whether declaratory action would clarify legal relations, (3) whether the use of a declaratory action would increase friction between federal and state courts, and (4) whether an alternative, more effective legal remedy exists.

Id. at 1144.

256. UNIF. DECLARATORY JUDGMENTS ACT §2, 12A U.L.A. 1, 3 (1996) (giving any interested person the power to ask courts to construe their "rights, status, or other legal relations" arising under a written instrument); see also Rice, *supra* note 255, at 1142-43 & nn.56-62.

The purpose of the Act was: (1) to afford state "[c]ourts . . . the power to declare rights, status, and other legal relations"; (2) to harmonize state laws with the laws of the various states regarding insurers' liability; and (3) to harmonize, as far as possible, "[state laws] with federal laws and regulations on the subject of declaratory judgments." Therefore, the hope was that any question of construction or validity arising under a contract of any insured could be determined and the rights, status, or other legal relation of any insured definitively established. At this time, nearly all states have adopted the Act and two states have enacted substantially equivalent versions.

Under the Uniform Declaratory Judgments Act, the trial judge has complete discretion to grant or deny declaratory relief under a liability insurance contract. In addition, a state appellate court may not review a trial judge's declaratory judgment unless evidence establishes that the lower court abused its discretion.

Id. at 1142-43 (alterations in original) (footnotes omitted) (quoting UNIF. DECLARATORY JUDGMENTS ACT §1, 15 U.L.A. 313, 586 (1996)).

257. *Finger*, 404 F.3d at 313.

258. *Id.* at 313 n.1.

259. See *id.* at 313.

260. *Id.*

261. *Id.*

[A] magistrate judge recommended that the district court enter summary judgment in favor of Finger for \$342,029.32. The district court adopted the magistrate judge's recommendation and entered judgment in favor of Finger. Finger then asked for attorney's fees. The magistrate judge [encouraged] the district court [to] grant Finger's request, with some exceptions. The district

bench trial on the merits—one in which the judge should have done the following: (1) carefully considered and intelligibly applied at least one of Texas's doctrines of contract interpretation, (2) thoroughly researched Texas's business-interruption rules, and (3) thoughtfully applied those common-law rules to help reach a fair declaratory judgment. Instead, the district court simply granted summary relief, without providing a full analysis of the legal question and without providing an intelligible explanation of or justification for its summary relief.²⁶²

Of course, the trial judge's conduct in *Finger* only mirrors the highly sanctioned practice of arguably awarding unfair and questionable summary judgments in federal and state courts. Without doubt, the cavalier manner in which the district court granted summary relief only contributes to a widespread and bothersome perception: All too often summary-judgment practice is highly unwarranted, unfair, unlawful, and dangerous. This view originated among learned jurists in mid-Eighteenth Century England²⁶³ and it

court entered an award of \$79,201.00 for attorney's fees.

Id. (emphasis added).

262. *Id.*; see also Rice, *supra* note 231, at 550-56 & nn.53-74.

Many Texans believe adamantly that the Texas Supreme Court and lower courts are particularly biased against powerless plaintiffs. In addition, consumers believe Texas's judges systematically ignore consumers' concerns and deliver biased pro-business decisions. More specifically, insurance consumers think the Texas Supreme Court's decisions are generally biased in favor of powerful insurance companies, because insureds are significantly less likely to receive favorable rulings. Furthermore, a significant number of Texans believe the Texas Supreme Court and appellate courts generate unduly tortuous and complex analyses to justify arguably extremely biased, highly questionable, and wildly unwarranted decisions.

Undeniably, these perceptions are exceedingly unsettling and potentially dangerous, for they could seriously erode the public's confidence in judges and respect for judicial decisions. . . . Certainly, Texas's courts have awarded summary relief to large classes of plaintiffs. But all too often judges do not explain their summary rulings or why they blocked trials by jury. *Yet efforts to force courts to state explicitly and intelligibly their reasons for granting or denying summary relief have been ineffective.* Arguably, this omission—more than any other reason—explains why there is so much anger and frustration among a wide spectrum of Texans and why so many Texans have negative attitudes toward judges and summary-judgment practice.

Id. at 550-56 (emphasis added) (footnotes omitted).

263. See Rice, *supra* note 231, at 542-44 & nn.32-36.

In *Ex parte Greenhouse*, a group of interested persons filed a summary-judgment motion under the Charities Procedure Act. . . . The court awarded summary relief.

Sir Romilly supported the lower court's award of summary relief and observed, "[Neither the court] nor the Master acting as its organ, has any authority to proceed otherwise than as directed by the act. . . ." Lord Hart thought differently and asserted: . . . "[This is a] dangerous . . . innovation in the rules of evidence." Lord Redesdale was even more cynical and emphatic about the pitfalls of summary-judgment practice. He argued: "[T]his Act ought to be construed . . . merely . . . for the purpose of saving either time or expense. Unquestionably, [the Charities Procedure Act is] loosely and incorrectly worded. . . . It was not intended to alter the law I conceive that the [intent] of this Act . . . was simply . . . to substitute a summary proceeding [for] a more regular proceeding. [Still,] I have an objection, a fixed and rooted objection, to any rash alterations of established laws, because I am thoroughly persuaded that, generally speaking, such alterations lead to mischief."

Id. at 542-44 (footnotes omitted) (second alteration in original) (quoting *Ex parte Greenhouse*, 36 Eng. Rep.

continues today among similar jurists and commentators in Texas.²⁶⁴

Commonwealth appealed²⁶⁵ the district court's highly questionable and adverse summary-judgment ruling to the Fifth Circuit. And the appellate court correctly recognized that the district court's summary-judgment award in favor of Finger was suspect and that the lower court did not perform a proper analysis to determine whether the insurer should have received a declaratory judgment.²⁶⁶ To correct the district court's deficiencies, the Fifth Circuit performed an unduly short and less than stellar *de novo* review of the lower court's summary-judgment decision.²⁶⁷

The Fifth Circuit stated: "This court reviews the 'legal *determinations in a district court's decision* to grant summary judgment *de novo*, applying the same standards as the district court to determine whether summary judgment was appropriate.'"²⁶⁸ Of course, a full-blown and thoughtful declaratory-judgment analysis would have been more fitting. The reason is not terribly complicated: The District Court for the Southern District of Texas did not apply any legal standard to reach its summary-judgment ruling.²⁶⁹ In fact, the federal district court did not explain or even attempt to explain its ruling.²⁷⁰ Instead, the lower court simply adopted a magistrate's recommendation and granted Finger's motion for summary relief.²⁷¹

Even more disturbing, the Fifth Circuit—wittingly or unwittingly—mischaracterized the essence of Commonwealth's legal question.²⁷² To repeat, the insurer asked the district court to examine the business-interruption endorsement and determine whether Commonwealth had a contractual duty to indemnify Finger.²⁷³ The court of appeals, however, improperly restyled the question, stating, "[the first issue on] appeal is how to calculate a loss under

297 (ch. 1818); Corp. Of Ludlow v. Greenhouse, 4 Eng. Rep. 780 (H.L. 1827)).

264. See *id.* at 545 & nn.38-39.

Early on, Texas jurists and commentators voiced similar alarms [like jurists in England] about the real and potential dangers associated with summary-judgment motions. For example, three years after the Texas Supreme Court approved summary proceedings, Roy McDonald—the renowned commentator on Texas Civil Procedure—warned: "[S]ummary judgment practice is not without its dangers." To prove his point, he cited trial judges' comments, rulings, and experiences.

Id. at 545 (footnotes omitted) (quoting Roy W. McDonald, *Summary Judgments*, 30 TEX. L. REV. 285, 287 (1952)).

265. See *Finger*, 404 F.3d at 312.

266. See *id.*

267. See *id.* at 314.

268. *Id.* (quoting *Gonzales v. Denning*, 394 F.3d 388, 391 (5th Cir. Dec. 2004)) (emphasis added).

269. See *id.* at 312.

270. See *id.*

271. *Id.* at 313.

272. See *id.*

273. *Id.*

the business-interruption provision of [the insurance contract]. Commonwealth contends the district court should have offset Finger's losses on June 9-10, 2001 with Finger's post-storm profits on June 16-17, 2001."²⁷⁴

As reported earlier, Commonwealth and Finger stipulated the amount of the loss.²⁷⁵ Therefore, a factual dispute about offsetting did not exist.²⁷⁶ Again, Commonwealth wanted the district court to declare that Commonwealth had no duty to indemnify Finger *for any financial loss* under the terms of the endorsement, which stated in pertinent part:

"[Commonwealth] shall be *liable for the ACTUAL LOSS SUSTAINED* by [the] insured *resulting directly from such interruption of business*, but not exceeding the reduction in gross earnings less charges and expenses which do not necessarily continue during the interruption of business.

...

In determining the amount of gross earnings . . . for the purposes of ascertaining the amount of loss sustained, *due consideration shall be given to the experience of the business before the date of the damage or destruction and to the probable experience thereafter had no loss occurred.*²⁷⁷

Like most states, Texas has adopted five doctrines to interpret language in insurance contracts as well as parties' rights and obligations under such agreements.²⁷⁸ Generally, when Texas or other state courts apply the doctrines of adhesion, ambiguity, or reasonable expectation, insureds are more likely to prevail in "true" declaratory-judgment hearings.²⁷⁹ Conversely, insurers are more likely to prevail when courts apply the plain-meaning doctrine and the "four corners" doctrine—the traditional rules of contract construction and interpretation.²⁸⁰

In *Finger*, the Fifth Circuit applied Texas's four corners doctrine, concluding that "if a policy . . . can be given only one reasonable construction, the court must enforce the policy as written."²⁸¹ Then the court of appeals

274. *Id.*

275. *See id.*

276. *See id.* If a factual dispute about offsetting actually appeared in the district court, the reported facts are incomplete, thereby suggesting even further that the analysis in *Finger* is less than intelligible and complete. Compare *id.* ("Commonwealth and Finger stipulated that Finger incurred a gross-earnings loss of \$325,402.86 on June 9-10, 2001."), with *id.* at 314 ("Commonwealth claims that Finger did not sustain an actual loss under [the endorsement] because Finger [recouped the sales on June 16-17, 2001] that it did not make on June 9-10, 2001.").

277. *Id.* at 314 (quoting business-interruption provision) (emphasis added) (first alteration in original).

278. *See Rice*, *supra* note 231, at 549-55.

279. *See generally Rice*, *supra* note 255, at 1162-65 & nn.164-82 (listing the various doctrines and illustrating how state and federal courts apply them to interpret rights and obligations under insurance contracts).

280. *See id.*

281. *Finger*, 404 F.3d at 314.

concluded a bit too hastily that “the business-interruption provision has only one reasonable interpretation.”²⁸² What was the reasonable conclusion? The Fifth Circuit stated: “The policy language indicates that a business-interruption loss [would] be based on historical sales figures. . . . [Consequently, t]he district court did not err in calculating Finger’s loss.”²⁸³

Without doubt, the court of appeals failed to focus its attention on the critical sentence in the endorsement that generated the conflict between Commonwealth and Finger. That sentence stated: “[Commonwealth] shall be liable for the [insured’s] ACTUAL LOSS . . . resulting directly from [the] interruption of business.”²⁸⁴ Although “Commonwealth and Finger stipulated that Finger incurred a gross-earnings loss of \$325,402.86 on June 9-10, 2001,” Commonwealth adamantly insisted that “business-interruption” did not produce the gross loss.²⁸⁵ Or, stated another way, the insurer claimed that business-interruption—the true peril insured against—was not the efficient proximate cause of the loss.²⁸⁶

Therefore, from the very outset, the court of appeals and the district court should have asked the following: What is the meaning of the term “business interruption” under Commonwealth’s insurance endorsement? And if the

282. *Id.*

283. *Id.* at 314-15.

284. *Id.* at 314 (quoting business-interruption provision) (emphasis added).

285. *Id.* at 313-14. (“Commonwealth claims that Finger did not sustain an actual loss under this provision . . .”). Furthermore, in *Finger*, it should be reasonably clear that “business interruption”—rather than Tropical Storm Allison or the flood—was the “covered peril” or the “peril insured against.” *See id.* Therefore, the former rather than the latter perils must produce or cause the gross loss. However, under other property-insurance contracts, insurers promise to indemnify the insured if a different covered peril—a fire, a flood, or a storm—causes a “necessary interruption of business.” *See, e.g.,* Bagelman’s Best, Inc. v. Nationwide Mut. Ins. Co., No. COA03-1413, 2004 WL 2793214, at *2 (N.C. Ct. App. Dec. 7, 2004) (observing that the insurance contract stated, “We will pay your loss and expense resulting from the necessary interruption of business caused by an ‘accident’ to any equipment”); U.S. Airways, Inc. v. Commonwealth Ins. Co., No. 03-587, 2004 WL 1094684, at *1 n.2 (Va. Cir. Ct. May 14, 2004) (observing that the insurance contract stated, “Coverage under the policy includes damage to real and personal property [and] business interruption . . . caused by damage to records of accounts receivable”). In *Finger*, it appears that the Fifth Circuit viewed business interruption as an effect, a result, or a consequence of a cause—Tropical Storm Allison or the flooding—rather than determining whether business interruption was the cause of an effect, namely the cause of the gross loss. From a property insurer’s perspective and under law, the distinction between these two perceptions is significant.

286. *See, e.g.,* Stroburg v. Ins. Co. of N. Am., 464 S.W.2d 827, 831 (Tex. 1971).

[W]e have held that “‘proximate cause’ as applied in insurance cases has essentially the same meaning as that applied by our own courts in negligence cases, except that in the former the element of foreseeableness or anticipation of the injury as a probable result of the peril insured against is not required.” By this rule, a remote cause of a cause would not be a proximate cause. *Id.* (quoting Fed. Life Ins. Co. v. Raley, 109 S.W.2d 972, 974 (Tex. 1937)) (citation omitted).

[I]n cases where the insurance policy does not in express terms so provide, . . . the insurer [does not become] liable for a loss unless the loss is proximately caused by the peril insured against Moreover, . . . the term “proximate cause” as applied in insurance cases has essentially the same meaning as that applied by our own courts in negligence cases, except that in the former the element of foreseeableness or anticipation of the injury as a probable result of the peril insured against is not required.

Raley, 109 S.W.2d at 974 (emphasis added).

contract did not define that phrase, the Fifth Circuit should have carefully researched and applied Texas's law. To be sure, the court of appeals did not. Without citing or discussing a single Texas court decision, the Fifth Circuit apparently embraced a layperson's definition of the term and simply concluded, incorrectly, that Finger experienced business interruption on both days—Saturday and Sunday, June 9th and 10th, respectively.²⁸⁷

But Texas's law compels courts to ask the following: Does business interruption mean a *total* cessation or shutdown of all business operations? Or, does it mean a slow down or a reduction in major operations, leaving the insured with the ability to continue minor business activities? The prevailing rule in Texas is clear: Before a court forces an insurer to indemnify an insured for "a loss caused by business interruption,"²⁸⁸ probative evidence must establish that the insured ceased or suspended all business operations.²⁸⁹ In Texas, as in the majority of jurisdictions, establishing only lost earnings or profits—without also proving a complete cessation of operations—is insufficient.²⁹⁰

In the present case, one fact is incontrovertible: "Finger could not operate any of its Houston stores on Saturday, June 9, 2001, and no sales were made on that date. [However,] [a]ll of Finger's stores opened at various times on Sunday, June 10, 2001."²⁹¹ Yet, the company insisted that (1) business interruptions occurred on both days, and (2) Commonwealth should pay "a

287. See, e.g., *Finger*, 404 F.3d at 314 (stating that "[t]he strongest and most reliable evidence of what a business would have done had the catastrophe not occurred is what it had been doing in *the period just before the interruption*" (emphasis added)).

288. *St. Paul Fire & Marine Ins. Co. v. Murray Guard, Inc.*, 37 S.W.3d 180, 181 (Ark. 2001) ("St. Paul asserted that the Wright Law Firm was covered under an 'errors and omissions' policy . . . for loss caused by business interruption."); *Cleland Simpson Co. v. Firemen's Ins. Co. of Newark*, 140 A.2d 41, 42 (Pa. 1958) ("The action is assumpsit on policies of insurance covering the plaintiff against losses caused by business interruption under circumstances insured against.")

289. See *Quality Oilfield Prods., Inc. v. Mich. Mut. Ins. Co.*, 971 S.W.2d 635, 639 (Tex. App.—Houston [14th Dist.] 1998, no pet.) ("considering the policy as a whole, [examining] persuasive authority from other jurisdictions [and concluding] that 'interruption of business' is an unambiguous term meaning 'cessation or suspension of business'"); *Royal Indem. Ins. Co. v. Mikob Props., Inc.*, 940 F. Supp. 155, 159 (S.D. Tex. 1996) (holding that under Texas's law, the insurer had no duty to indemnify the insured for loss of income when the peril insured against a fire caused damage to adjacent buildings because the insured never suspended operations on the adjacent buildings). *But see* *Lexington Ins. Co. v. Island Recreational Dev. Corp.*, 706 S.W.2d 754, 756 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.) (declaring that the insurer had a duty to indemnify the insured when a covered peril, a storm, caused business losses, even though the insured's restaurant remained open for business).

290. See, e.g., *Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co. of Am.*, 835 F.2d 812, 814 (11th Cir. 1988) (holding that an insured could not recover under the business-interruption clause for decline in occupancy of a hotel that remained open following a fire in the restaurant); *Nat'l Children's Expositions Corp. v. Anchor Ins. Co.*, 279 F.2d 428, 431 (2d Cir. 1960) (concluding that the insured could not recover for partial business-interruption loss because the insured's building was open during the entire period when an unprecedented snow storm reduced attendance at an exposition); *Keetch v. Mut. of Enumclaw Ins. Co.*, 831 P.2d 784, 787 (Wash. Ct. App. 1992) (holding that the insured could not recover under business-interruption insurance contract when volcanic ash caused damage to the insured's motel, thereby reducing the quality of service to customers, but allowing the insured to continue to operate the motel).

291. *Finger*, 404 F.3d at 313.

gross-earnings loss of \$325,402.86 [for] June 9-10, 2001.”²⁹² Clearly, Texas’s law does not require Commonwealth to pay that total amount. But it is equally clear that the Fifth Circuit’s failure to apply Texas’s business-interruption rule caused the court to deliver a poorly reasoned, highly questionable, and, arguably, unfair ruling.²⁹³

F. Property Insurance—Condominiums: Whether a Property Insurer Has a Contractual Duty to Compensate a Condominium Association Under Texas’s Law After Hail Damaged the Condominium Owners’ Property

The general substantive debate in *Ridglea Estate Condominium Ass’n v. Lexington Insurance Co.* concerned whether a property insurer had a contractual duty to indemnify an insured after the insured filed a notice-of-loss claim and requested a reimbursement for property losses.²⁹⁴ The specific procedural conflict in *Ridglea* involved whether the insurer could advance a breach-of-notice affirmative defense and prevail.²⁹⁵ Unlike its analysis in *Finger*, the Fifth Circuit presented a very lucid and coherent analysis in *Ridglea*. And the competing explanation for the latter performance is clear: The court of appeals thoroughly researched and applied Texas’s law to reach a fair conclusion.

Ridglea Estate Condominium Association (Ridglea) operated on behalf of condominium owners in Fort Worth, Texas.²⁹⁶ In July 2001, a roofing inspector informed Ridglea that hail had severely damaged the roofs of the condominiums.²⁹⁷ When the association discovered the damage, Chubb Custom Insurance (Chubb) insured the property.²⁹⁸ Therefore, four months later, in November 2001, Ridglea submitted a claim to Chubb.²⁹⁹ Chubb inspected the roofs and concluded that a hail storm probably caused the damage.³⁰⁰

There was, however, a slight wrinkle. The only hail storm in greater Fort Worth had occurred six years earlier on May 5, 1995.³⁰¹ Therefore, Chubb instructed Ridglea to submit a notice-of-loss claim to Lexington Insurance Company (Lexington), the insurer who insured the property from February

292. *Id.*

293. *Id.* at 316 (“*Finger* is entitled to judgment in the amount of its stipulated loss, and the district court did not err Consequently, the court affirms the district court’s judgment”).

294. *See* *Ridglea Estate Condo. Ass’n v. Lexington Ins. Co.*, 398 F.3d 332 (5th Cir. Jan. 2005).

295. *Id.* at 334.

296. *Id.* at 333.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. Jennifer Miller, *Fort Worth Hailstorm of 6 May 1995*, Apr. 26, 1996, available at <http://www.ems.psu.edu/~diercks/miller.html> (last visited Feb. 10, 2006).

1995 to February 1996.³⁰² Ridglea immediately submitted a claim to Lexington.³⁰³ Lexington's claims adjuster inspected the damaged roofs.³⁰⁴ Lexington concluded that the financial loss did not exceed Ridglea's deductible under Lexington's property-insurance contract.³⁰⁵ Lexington also failed to find evidence to prove conclusively that the loss occurred during the policy period.³⁰⁶ Consequently, Lexington denied Ridglea's claim on December 19, 2001—six years, seven months, and fourteen days from the purported loss on May 5, 1995.³⁰⁷

After a year of intense negotiations and Ridglea's final demand for \$449,198.63 and attorney's fees, Lexington denied the claim again.³⁰⁸ Then, the insurer commenced a declaratory-judgment action in the United States District Court for the Northern District of Texas.³⁰⁹ Lexington petitioned the federal district court to declare that Lexington had no contractual duty to indemnify Ridglea for the hail damage.³¹⁰ The district court dismissed the declaratory-judgment suit, realigned the litigants, and made Ridglea the plaintiff in a direct-action suit against Lexington.³¹¹

Although the report did not clearly state Ridglea's cause of action against Lexington, a fair reading suggests that Ridglea sued Lexington for a breach of contract.³¹² Both parties filed summary-judgment motions.³¹³ The district court granted Lexington's motion, holding that Ridglea's failure to comply with the policy's notice requirement barred the direct-action suit.³¹⁴ The district court found that Ridglea had a contractual obligation to give "prompt notice of the loss or damage" before filing the lawsuit.³¹⁵ The lower court also concluded that Ridglea did not satisfy another condition precedent before commencing the lawsuit: The aggrieved insured had a duty to contact Lexington and provide, "'as soon as possible[,] a description of how, when and where the loss or damage occurred.'"³¹⁶

Again, the purported property loss occurred in May 1995, but Ridglea did not send a notice-of-loss claim to Lexington until November 2001.³¹⁷ Therefore, from the district court's perspective, the passing of over six years

302. *Ridglea*, 398 F.3d at 333.

303. *Id.*

304. *Id.* at 334.

305. *Id.* at 333.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 333-34.

312. *Id.* at 334 ("Ridglea [sued] Lexington . . . for damages on the insurance policy.").

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* (quoting Ridglea's insurance policy) (alteration in original).

317. *Id.* at 333.

prejudiced Lexington, thereby preventing a rational trier of facts to conclude that Ridglea reported the hail damage and financial loss "within a reasonable time."³¹⁸ Ridglea appealed the district court's adverse summary-judgment ruling.³¹⁹

Before the Fifth Circuit, Ridglea argued that the District Court for the Northern District of Texas committed reversible error in four instances: (1) by concluding that Lexington did not waive its right to advance the affirmative defense—"breach of notice," (2) by failing to conclude that the notice requirement was void "as a matter of public policy," (3) by failing to find an ambiguous notice provision that would have allowed the court to construe the notice clause against Lexington and in favor of Ridglea, and (4) by concluding that Lexington did not have to show prejudice, thereby allowing the insurer to proffer breach of notice as an affirmative defense.³²⁰

The Fifth Circuit addressed and quickly decided the waiver, public-policy, and ambiguity issues.³²¹ First, Ridglea cited *Farmers Insurance Exchange v. Nelson*³²² and argued that under Texas's law, an insurer waives the notice requirement—before an insured commences a lawsuit—when the "insurer denies a claim for reasons unrelated to" the insured's notice of loss.³²³ According to Ridglea, the insurer violated this rule.³²⁴ Lexington cited *United States Fidelity & Guaranty Co. v. Bimco Iron & Metal Co.*³²⁵ and argued that the Supreme Court of Texas created an exception to the general rule appearing in *Farmers Insurance Exchange*.³²⁶

In *Bimco*, the Texas Supreme Court held that an insurer's total denial of liability—on any grounds after the insured's deadline for filing a proof of loss had expired—would not constitute a waiver of the breach-of-notice defense.³²⁷

318. *Id.* at 334.

319. *Id.*

320. *Id.*

321. *Id.* at 334-37.

322. *Farmers Ins. Exch. v. Nelson*, 479 S.W.2d 717, 721-22 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.).

323. *Ridglea*, 398 F.3d at 334.

324. *Id.* at 334.

[Ridglea maintained that Lexington] waived any defense it might have under the policy's prompt notice provision because [the insurer] originally denied the claim [solely because] the damage did not occur during the coverage period. . . . [But] Ridglea note[d] that Lexington's claims adjuster originally gave only one reason [for denying Ridglea's claim]—a lack of evidence that the hail damage occurred during the coverage period. . . . [Thus, according to Ridglea, as a result of the insurer's failure to identify breach of notice] as an independent reason for [denying] the claim, Lexington waived its late notice defense.

Id.

325. *U.S. Fid. & Guar. Co. v. Bimco Iron & Metal Corp.*, 464 S.W.2d 353, 357 (Tex. 1971).

326. *Ridglea*, 398 F.3d at 334.

327. *Bimco Iron & Metal Corp.*, 464 S.W.2d at 357; *see also* *Stonewall Ins. Co. v. Modern Exploration, Inc.*, 757 S.W.2d 432, 436 (Tex. App.—Dallas 1988, no writ) (embracing *Bimco* and holding that "waiver of [a] notice requirement occurs when the insurer denies liability *within* the time limited for giving notice," but also concluding that "a total denial of liability on any grounds *after* the time limited for

To reach a proper conclusion, the Fifth Circuit decided to determine whether *Bimco*'s exception to the waiver rule applied in this case.³²⁸ After completing that analysis, the court of appeals declared that Lexington did not waive the notice of loss requirement.³²⁹

Second, Ridglea argued, in part, that the notice-of-loss provision was void and unenforceable as a matter of public policy because the clause violated Texas Civil Practice and Remedies Code section 16.071.³³⁰ That statute provides in pertinent part that "a contract stipulation [requiring] a claimant to give notice of a claim for damages as a condition precedent to the right to sue on the contract is not valid unless the stipulation is reasonable. A stipulation that requires notification within less than [ninety] days is void."³³¹ Ridglea also cited *Western Indemnity Co. v. Free and Accepted Masons of Texas* for the proposition that a notice-of-loss provision violates section 16.071, because notification within less than ninety days lends itself to an imprecise interpretation.³³² Lastly, the condominium association argued that because "prompt is a synonym for immediate," the "prompt notice" requirement in Lexington's insurance contract was unenforceable under section 16.071.³³³

Addressing the insured's argument, the appellate court observed that section 16.071 "outlawed stipulations requiring notice of claims for damages within [ninety] days."³³⁴ But the notice-of-loss clause in Ridglea's insurance contract "requir[ed] notice of an 'event of loss or damage' to insured property."³³⁵ After examining Texas's law,³³⁶ the Fifth Circuit declared that

giving notice would not constitute a waiver of the defense of unreasonably late notice").

328. *Ridglea*, 398 F.3d at 335.

Our task, then, is to determine whether the exception to the waiver rule set forth in *Bimco* and *Stonewall Insurance* applies in the case before us. In order to do so, we must determine whether Lexington's December 19, 2001 denial of liability was made within the policy's time limit for giving notice, or after it had expired. Because Lexington's denial of liability was made shortly after Ridglea's November 2001 notice of damage, the district court's conclusions as to the timeliness of notice provide a useful benchmark for the waiver inquiry.

Id.

329. *Id.* at 335-36. "In sum, because Ridglea gave its notice of damage after the period for prompt notice had expired, Lexington's subsequent general denial of liability likewise came 'after the time limited for giving notice' and thus did not constitute a waiver of the defense of late notice." *Id.*

330. *Id.* at 337.

331. TEX. CIV. PRAC. & REM. CODE ANN. § 16.071 (Vernon 2005).

332. *Ridglea*, 398 F.3d at 339 (citing *W. Indem. Co. v. Free & Accepted Masons of Tex.*, 268 S.W. 728, 728-29 (Tex. Comm'n App. 1925, holding approved)); see also *Round Rock Indep. Sch. Dist. v. First Nat'l Ins. Co. of Am.*, 324 F.2d 280, 284 (5th Cir. 1963) (holding that provisions calling for immediate notice are capable of being read as requiring notice in less than ninety days and thus unenforceable).

333. *Ridglea*, 398 F.3d at 337.

334. *Id.*

335. *Id.*

336. See, e.g., *Commercial Standard Ins. Co. v. Harper*, 129 Tex. 249, 103 S.W.2d 143 (Tex. Comm'n App. 1937, no writ) (reviewing Vernon Civil Statutes article 5546—a nearly identical predecessor to section 16.071—and concluding that a stipulation requiring notice of an event of loss or damage was enforceable under article 5546 because a "[n]otice that an automobile had been stolen" was not the same as "notice of a claim for damages" (quoting Cooley's Brief on Insurance)); *Cmty. Bank & Trust v. Fleck*,

the distinction between the two notice requirements was significant and concluded that Ridglea's public-policy argument was unsound.³³⁷

Third, citing Texas's doctrine of ambiguity,³³⁸ Ridglea argued that the notice-of-loss provision was ambiguous.³³⁹ More specifically, Ridglea claimed that "prompt" was an ambiguous term; therefore, the prompt notice period could not have begun to run until Ridglea actually discovered the damaged roofs, "no matter how objectively unreasonable its failure to discover the damage may have been."³⁴⁰ But the Fifth Circuit dismissed this argument, citing a prevailing rule under Texas's common law: When an insurance contract does not define "prompt," courts must construe the term to mean that "notice must be given within a reasonable time after [an] occurrence."³⁴¹ And to repeat, the Fifth Circuit accepted the district court's conclusion that Ridglea's giving notice to Lexington six-plus years after the hail allegedly damaged the roof was simply unreasonable.³⁴²

The Fifth Circuit, however, refused to dismiss Ridglea's fourth argument so quickly. Again, the insured argued that reversible error occurred when the district court concluded that Lexington had no duty to show prejudice when Ridglea breached the notice-of-loss provision.³⁴³ Below, the district court embraced Lexington's argument that the prejudice requirement applies only to disputes involving liability insurance contracts.³⁴⁴ On the other hand, Ridglea stressed that Texas's law requires an insurer to show prejudice—regardless of the type of policy—if an insurer intends to use breach-of-notice as an affirmative defense.³⁴⁵

107 S.W.3d 541, 542 (Tex. 2002) (affirming *Harper*); see also *Am. Airlines Employees Fed. Credit Union v. Martin*, 29 S.W.3d 86, 97 (Tex. 2000) (declaring that "section 16.071 . . . does not apply here, when the notice to be given is not notice of a claim for damages, but rather notice of unauthorized transactions. The purpose of this notice requirement . . . is to prevent further unauthorized transactions.").

337. *Ridglea*, 398 F.3d at 336-37.

338. See *St. Paul Mercury Ins. Co. v. Tri-State Cattle Feeders, Inc.*, 628 S.W.2d 844, 846 (Tex. App.—Amarillo 1982, writ ref'd n.r.e.) (stating, in dicta, that "[a]n ambiguous clause in an insurance policy [must] be strictly construed in favor of the insured").

339. *Ridglea*, 398 F.3d at 337.

340. *Id.*

341. See *Stonewall Ins. Co. v. Modern Exploration, Inc.*, 757 S.W.2d 432, 435 (Tex. App.—Dallas 1988, no writ) (citing *Nat'l Sur. Corp. v. Diggs*, 272 S.W.2d 604, 697 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.)).

342. *Ridglea*, 398 F.3d at 337.

343. *Id.*

344. *Id.*; see *Hanson Prod. Co. v. Am. Ins. Co.*, 108 F.3d 627, 629 (5th Cir. 1997).

[T]he Texas Department of Insurance [has] issued orders requiring a mandatory endorsement in general liability and general automobile [insurance] policies stating that . . . "unless the company is prejudiced by the insured's failure to comply with the requirement, any provision of this policy requiring the insured to give notice of . . . occurrence or loss . . . shall not bar liability under this policy."

Hanson Prod. Co., 108 F.3d at 629 (quoting an order issued by the Texas State Board of Insurance).

345. *Ridglea*, 398 F.3d at 337.

The Fifth Circuit agreed.³⁴⁶ First, the court of appeals reviewed the Texas Supreme Court's decision in *Hernandez v. Gulf Group Lloyds*.³⁴⁷ In *Hernandez*, the supreme court held that a violation of a condition precedent in an insurance contract cannot bar an insured's right to recover insurance proceeds unless the insurer establishes that the violation materially prejudiced³⁴⁸ the insurer's rights under the contract violation.³⁴⁹

Therefore, embracing the Texas Supreme Court's reasoning and the general principle underlying that reasoning, the Fifth Circuit declared that in Texas, if insurers—all insurers—intend to use an insured's breach of a condition precedent or notice-of-loss effectively as an affirmative defense, insurers must prove that the breach materially prejudiced the insurers' rights.³⁵⁰ Applying this principle to the facts in *Ridglea*, the court of appeals held that the district court committed reversible error as a matter of law.³⁵¹ The lower federal court should have forced Lexington to show that Ridglea materially prejudiced the insurer's rights when Ridglea breached the prompt-notice provision. The Fifth Circuit remanded the case and instructed the district court to determine whether Ridglea raised questions of material fact as to whether Ridglea's breach of notice materially prejudiced Lexington.³⁵²

346. *Id.*

347. *Id.* at 337-38 (discussing *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691 (Tex. 1994)).

348. See *Jack v. State*, 694 S.W.2d 391, 398-99 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (embracing a fundamental principle of contract law that states that when one party to a contract commits a material breach of that contract, the other party has no contractual obligation to perform) (citing *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 689 (Tex. 1981)).

349. *Hernandez*, 875 S.W.2d at 693.

Courts [must] consider, among other things, the extent to which the nonbreaching party will [lose] the benefit that [the party] could have reasonably anticipated from full performance [when determining the materiality of a breach] The less the non-breaching party [loses] the expected benefit, the less material the breach [and prejudice]. . . . We conclude, therefore, that an insurer who is not prejudiced . . . may not deny coverage

Id. (citing RESTATEMENT (SECOND) OF CONTRACTS § 241(a) (1981)); see also *Hanson Prod. Co.*, 108 F.3d at 630-31 (holding that the Texas Supreme Court's reasoning in *Hernandez* was straightforward; all insurance policies are contracts; all contracts require material breach to excuse non-performance; and, for a breach to be material, it must prejudice the non-breaching party in some way) (citing *Hernandez*, 875 S.W.2d at 692).

350. *Ridglea*, 398 F.3d at 338.

351. *Id.*

Because the district court erred as a matter of law in failing to require a showing of prejudice, we need not address whether questions of material fact exist with regard to the prejudicial effect of late notice. Where a trial court grants summary judgment [and] fails to consider an element of a cause of action or defense, it has erred . . . because it has failed to determine that no genuine issue of material fact exists with respect to the omitted element.

Id. (citing *Trevino v. Celanese Corp.*, 701 F.2d 397, 407 (5th Cir. 1983)).

352. *Id.* at 339.

G. Property Insurance—Homeowners: Whether Under Texas’s Law a Property Insurer Must Compensate Homeowners for “Covered” and “Non-Covered” Losses After Mold Contaminated the Homeowners’ Property

According to the Centers for Disease Control and Prevention (CDC), “mold is everywhere”³⁵³ and it “has been here forever.”³⁵⁴ Even a superficial swipe of one’s hand through the air causes one to come into contact with mold spores.³⁵⁵ In addition, the CDC estimates that about 100,000 mold species populate the globe and about 1,000 are common to the United States.³⁵⁶ Even more interesting, while most mold species are nontoxic, others are extremely hazardous and have the potential to contaminate and wreak havoc in both residential and commercial structures.³⁵⁷ Further, exposure to certain types of mold can cause severe health problems.³⁵⁸

Therefore, in light of the contamination and severe unwanted consequences associated with certain mold, one can easily understand why homeowners try to eradicate such contamination immediately. But the cost of removing hazardous mold is expensive.³⁵⁹ So, it is equally understandable why residential owners readily ask their homeowners’ insurers to pay for mold-abatement expenses or for reimbursements after the latter use out-of-pocket funds to remove the contamination. Consequently, mold-related insurance claims have soared substantially in recent years.³⁶⁰

353. Gregory J. Wilcox, *Mold Emerging as Major Issue for Homeowners, Insurance Industry*, L.A. DAILY NEWS, Mar. 17, 2002, at B1 (quoting Jerry Carnahan, president of the personal insurance line for the Farmers Group of Companies); see Center for Disease Control and Prevention, <http://www.cdc.gov> (last visited Feb. 10, 2006).

354. Wilcox, *supra* note 353, at B1 (quoting Jerry Carnahan, president of the personal insurance line for the Farmers Group of Companies).

355. *Id.*

356. *Id.*

357. See Sylvia Peña-Alfaro, Comment, *The Toxic Mold Terrifying Texas: Mold’s Hold on the Insurance Industry*, 34 ST. MARY’S L.J. 541, 542 & nn.4-5 (2003) (presenting an excellent overview and discussion of mold, mold contamination, and the legal conflicts between insureds and insurers surrounding whether the latter have a contractual duty to indemnify).

358. *Id.* at 542 & nn.7-8.

359. See, e.g., Evan Pondel, *Growing Problem—Insurance Companies Smarting Under Rising Mold Claims; New Policy Requests Rejected*, L.A. DAILY NEWS, June 16, 2002, at B1.

[A]ccording to Brian Sullivan, the editor of Dana Point-based Property Insurance Report[,] . . . [t]he problem is not mold per se; it’s the threat of mold that has dramatically increased the cost of repairing water damage The cost of ridding a home of mold and the construction that ensues could run as high as \$80,000, depending on how serious the problem is, according to Gil Caspi, owner of Unique Restoration.

Id.

360. See, e.g., *Moldering/Hysteria Should Not Drive Debate on Mold Insurance*, HOUS. CHRON., Sept. 19, 2001, at 38A (reporting that Texas policyholders filed increasing numbers of toxic black-mold claims within the past eighteen months); Terrence Stutz, *Insurer to Stop Selling Policies: State Farm Cites Mold Losses in Ending New Sales to Homeowners*, DALLAS MORNING NEWS, Sept. 19, 2001, at 31A, available at 2001 WLNR 10083541 (reporting that 9,000 mold-related claims occurred in the first half of 2001 as compared to only 2,600 claims occurring in the first half of 2000); Terrence Stutz, *Rush Put on Mold Coverage Findings: Insurance Official Orders Quick Homeowner Recommendations—Water*

But all too often, substantial numbers of homeowners discover that mold and its eradication are not “covered perils” or “perils insured against” under their property insurance contracts. Consequently, and quite frequently, property insurers refuse to pay for mold-related losses and mold abatement.³⁶¹ In fact, citing an unacceptable rise in mold claims,³⁶² lost profits generally,³⁶³ and “lack luster performance in the financial markets”³⁶⁴ specifically, many property insurers increased homeowners’ premiums³⁶⁵ and stopped underwriting mold coverage altogether.³⁶⁶

Damages Losses Expected to Soar, DALLAS MORNING NEWS, Sept. 13, 2001, at 41A, available at 2001 WLNR 10082030 (reporting the steady rise in mold-related claims in Texas); Terrence Stutz, *State Mold Plan Criticized: Consumers, Insurers Say Compromise Does Little to Deal with Problem*, DALLAS MORNING NEWS, Oct. 17, 2001, at 25A, available at 2001 WLNR 10084664 (reporting that insurers’ mold-related claims for the first half of 2001 increased five times as compared to the first half of the prior year); see also Sandra Fleishman, *Home Insurance Rates Up Sharply; Industry Blames Stock Losses, Storm Damage and Mold Claims*, WASH. POST, Jun. 8, 2002, at E1 (“[In Texas, California, Louisiana and Florida, the] number of claims from people who say mold is ruining their homes and sickening their families has increased sharply”); Pondel, *supra* note 359, at B1 (“A recent survey by the Insurance Information Network of California showed that 32 percent of the property insurance claims filed in 2001 involved water damage, which includes mold. When the survey began in 1997, 24 percent of the claims accounted for water damage.”).

361. See, e.g., Wilcox, *supra* note 353, at B1.

In California, and most other states, mold is not covered by a homeowners’ policy. “There is no money in the rates for mold. Mold claims, if you will, are a relatively new phenomenon,” said Jerry Carnahan, president the personal insurance line for the Farmers Group of Companies [H]omeowners are covered for water damage only if it is sudden and accidental. Mold resulting from this kind of happenstance would generally be covered. But Carnahan notes that damage from these kinds of accidents is usually fixed right away. *If mold results from maintenance issues like leaks, flooding, condensation or humidity, the problem is the homeowner’s responsibility.*

Id. (emphasis added).

362. See, e.g., Pondel, *supra* note 359, at B1 (“[M]old has caused far more damage to the insurance industry of late. As costs associated with claims continue to rise, insurance companies are having difficulty absorbing the onslaught of expenses.”).

363. See, e.g., Fleishman, *supra* note 360, at E1 (“Insurance firms . . . say they lose money on homeowners’ policies. . . . [According to Donald L. Griffin of the National Association of Independent Insurers, 2001] ‘was the first year that the whole industry lost money . . . about \$ 7.9 billion, and it was the first time our net worth fell below \$ 300 billion since 1996[.]’”).

364. See, e.g., Pondel, *supra* note 359, at B1.

365. See, e.g., Fleishman, *supra* note 360, at E1.

Homeowners insurance premiums are up as much as 25 percent in some parts of the country this year and could double in some states, including Texas and California, because of . . . sharply rising claims for mold damage. In Maryland and Virginia, there already have been double-digit percentage increases. . . . Homeowners insurance rates in Maryland were up about 12.6 percent in the first five months of the year, compared with 8.3 percent in 2001, said Maryland Insurance Commissioner Steven B. Larsen. In Virginia, five of the top 10 insurers have been granted rate increases ranging from 10.7 percent to 25 percent.

Id.

366. See, e.g., Pondel, *supra* note 359, at B1.

“Right now, there’s a very tough market in California,” said Lisa Wannamaker, a spokeswoman for . . . Allstate Corp. “For this reason . . . we decided not to write any more homeowners insurance for anyone with prior losses in the last three years.” . . . Among the largest insurers in California, State Farm has stopped writing any new homeowner policies, at least temporarily. Again, the company said the rising costs associated with claims, especially those involving water

In recent years, highly disgruntled owners of residential property in Texas³⁶⁷ and elsewhere have filed increasing numbers of toxic-mold lawsuits against their insurers,³⁶⁸ given the latter's propensity to deny mold claims. To be sure, the plaintiffs in *Fiess v. State Farm Lloyds*³⁶⁹ are members of that group.³⁷⁰ Tropical Storm Allison "ravaged the Texas coastline in the summer of 2001."³⁷¹ Richard and Stephanie Fiess lived in Harris County in Allison's path.³⁷² Like the insured in *Finger*, the Fiesses' property flooded during the storm.³⁷³

Approximately one week after the storm, the Fiesses began removing damaged sheetrock and discovered that an extensive amount of "black mold" had contaminated their house.³⁷⁴ The mold grew "in the walls adjoining the dining room, kitchen, bedrooms, and hall bath."³⁷⁵ To get a precise description of the mold, the Fiesses contacted NOVA Labs in Conroe, Texas.³⁷⁶ One of NOVA's experts, Dr. Paul Pearce, inspected the house, took samples, and

damage, have stifled State Farm financially.

Id.

Rate increases are not the only aggressive steps that insurers are taking, according to consumer activists. They are also tightening underwriting rules to weed out riskier customers or to limit coverage of those who have filed more than two claims in three years. . . . State Farm, Allstate and some other insurance companies have stopped writing new policies in Texas, California and Louisiana in large part because of a large number of water-damage claims and because of the costly mold cases. Florida may be the next state to lose insurers because of mold.

Fleishman, *supra* note 360, at E1.

367. See, e.g., R.A. Dyer, *Limited Relief Favored for Excessive Premiums*, FORT WORTH STAR-TELEGRAM, May 27, 2005, at B6 (reporting that the Texas Legislature enacted legislation "in the wake of an insurance crisis marked by multimillion-dollar lawsuits, toxic-mold claims, gubernatorial politics and dramatic grassroots lobbying"); Purva Patel, *Bay City, Texas Resident's Fight Against State Farm Has No End in Sight*, HOUS. CHRON., Feb. 29, 2004, available at 2004 WL 12381260 (reporting that a "Bay City resident, . . . a State Farm agent and his wife . . . moved out of their mold-infested house and filed a lawsuit against State Farm to help spur a settlement of his claim. But even that . . . could play out for years in court.").

368. See Fleishman, *supra* note 360, at E1 (reporting that "Texas, California, Louisiana and Florida [have experienced an escalation in] mold-related claims, lawsuits and awards").

Allstate has . . . attached a \$5,000 cap to mold claims, a necessary precaution given the costs associated with repair[.] . . . And until the water damage and mold claims ebb, families . . . will probably pursue litigation to settle their insurance issues. In the past six months, Agoura Hills-based law firm Chulak & Shiffman has seen 18 plaintiffs involved in mold cases. The goal of toxic mold lawsuits is to address the costs to fix underlying water problems, said Michael Chulak. "I haven't been involved in a single case that I haven't settled without suing the insurance company," Chulak said.

Pondel, *supra* note 359, at B1.

369. *Fiess v. State Farm Lloyds*, 392 F.3d 802 (5th Cir. Dec. 2004).

370. *Id.* at 804.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

determined that the hazardous mold was *stachybotrys*.³⁷⁷ After a more extensive inspection, the expert also discovered that “all of the naturally occurring environmental molds, [plus] *alternaria*,³⁷⁸ *chaetomium*,³⁷⁹ *cladosporium*,³⁸⁰ *aspergillus*³⁸¹ [and] *penicillium*”³⁸² contaminated the house.³⁸³

As the Fiesses’ expert witness, Dr. Pearce was prepared to testify that non-Allison related mold contaminated seventy percent of the insureds’ house.³⁸⁴ That contamination originated from “water damage” associated with “pre-flood roof leaks, plumbing leaks, heating, air conditioning and ventilation (HVAC) leaks, exterior door leaks, and window leaks.”³⁸⁵ He determined that Allison-related flooding caused the remaining thirty percent of the contamination.³⁸⁶ “He conceded, however, that the Allison-related damage had been extensive, leaving mold [up to three feet] on virtually every wall, stud, board and baseplate . . . of the house.”³⁸⁷

When Tropical Storm Allison appeared, State Farm Fire & Casualty Company insured the Fiesses’ house under two insurance contracts—a flood-insurance policy and a homeowners’ contract.³⁸⁸ The Fiesses filed a claim under the flood insurance policy, and State Farm issued a check for \$48,626 so the insureds could repair their home and replace flood-damaged personal property.³⁸⁹ The Fiesses also filed a mold-contamination claim under their homeowners’ insurance contract.³⁹⁰ Communicating its reservation of rights under the contract, State Farm paid the Fiesses \$34,425 for “non-covered mold remediation” because the insurer’s examination suggested that “small pre-

377. *Id.* “*Stachybotrys atra*” is “[a] mold that produces toxic compounds (mycotoxins). Prolonged exposure can be associated with symptoms such as fatigue, hearing loss, and memory loss.” J.E. SCHMIDT, M.D., ATTORNEYS’ DICTIONARY OF MEDICINE AND WORD FINDER S-273 (2002).

378. “*Alternaria*” refers to “a genus of Fungi Imperfecti of the form-class Hyphomycetes, form-family Dematiaceae; it has dark-colored conidia It causes several diseases of plants and is a common allergen in human bronchial asthma.” W.A. NEWMAN DORLAND, DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 54 (30th ed. 1994).

379. “*Chaetomium*” is “[a] genus of soil fungi. Some species may cause allergy.” J.E. SCHMIDT, M.D., *supra* note 377, at C-183.

380. “*Cladosporium*” is “[a] genus of fungi having dematiaceous or dark-colored conidiophores with oval or round spores, commonly isolated in soil or plant residues.” STEDMAN’S MEDICAL DICTIONARY 358 (27th ed. 1995).

381. “*Aspergillus*” refers to “[a] genus of fungi (class Ascomycetes) that contains many species, a number of them with black, brown, or green spores. A few species are pathogenic for humans, avians, and other animals.” STEDMAN’S, *supra* note 380, at 156.

382. “*Penicillium*” refers to “[a] genus of fungi (class Ascomycetes, order Aspergillales), species of which yield various antibiotic substances and biologicals.” STEDMAN’S, *supra* note 380, at 1340.

383. *Fiess v. State Farm Lloyds*, 392 F.3d 802, 804 (5th Cir. Dec. 2004).

384. *Id.*

385. *Id.*

386. *See id.*

387. *Id.* at 804-05.

388. *See id.*

389. *Id.* at 804.

390. *Id.* at 805.

flood water leaks” contributed to mold formation.³⁹¹

Concluding that State Farm’s offer was insufficient to fully cover the cost of eradicating mold attributable to pre-flood water leaks and to pay for mold-related damages, the Fiesses sued State Farm in Texas state court, listing a variety of common-law and statutory causes of action in their complaint.³⁹² Citing a diversity of citizenship, State Farm removed the case to the United States District Court for the Southern District of Texas, where the insurer filed a motion for summary judgment.³⁹³ After reviewing the homeowners’ policy and Texas’s law, the district court granted State Farm’s motion.³⁹⁴

The Fiesses appealed the adverse ruling, claiming that the federal district court committed three reversible errors.³⁹⁵ First, the Fiesses argued that water leaks—associated with faulty plumbing as well as with heating, ventilation, and air conditioning—were covered perils under the homeowners’ policy.³⁹⁶ Therefore, because water leaks were the efficient proximate cause of the mold, State Farm could not raise the mold-exclusion clause as an affirmative defense.³⁹⁷

The exclusion clause contained in section 1 of State Farm’s homeowners’ contract stated in relevant part:

“f. We [State Farm] do not cover loss caused by:

- (1) wear and tear, deterioration or loss caused by any quality in it to damages or destroy itself.
- (2) *rust, rot, mold or other fungi.*
- (3) dampness of atmosphere, extremes of temperature.
- (4) contamination.

...

We do not cover *ensuing loss* caused by collapse of building or any part of the building, *water damage* or breakage of glass which is part of the building if the loss would otherwise be covered under the policy.

...

i. *We do not cover loss caused by or resulting from flood*, surface water, waves, tidal water or tidal waves, overflow of streams or other bodies of water or spay from any of these whether or not driven by wind.”³⁹⁸

391. *Id.*

392. *Id.* The insureds filed the action in the “127th Judicial District Court of Harris County, asserting claims for violations of the Texas Deceptive Trade Practices Act (DTPA), breach of contract, and fraud and intentional misrepresentation.” *Id.* After removal to federal court, the “Fiesses then filed an amended complaint alleging claims for violations of the Texas Insurance Code and breach of warranty.” *Id.*

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.* at 806.

398. *Fiess v. State Farm Lloyds*, No. Civ. A. H-02-1912, 2003 WL 21659408, at *6 (S.D. Tex. June 4, 2003) (quoting insurance policy) (emphasis added).

The Fifth Circuit, however, refused to consider the purported HVAC and plumbing-leaks exceptions under the exclusion clause, concluding that it did not have jurisdiction.³⁹⁹ Put simply, the court of appeals found that the Fiesses (1) did not intend to incorporate the district court's order—regarding the exceptions—into their appeal since they filed their appeal *before* the lower court issued its order, and (2) failed to file a new or amended notice of appeal incorporating the order after the court issued the order.⁴⁰⁰

The insureds also argued that reversible error occurred when the district court (1) rejected their expert witness's testimony, and (2) refused to address their mold claims under the doctrine of concurrent causation.⁴⁰¹ The district judge concluded, "Because the Fiesses are unable to meet their burden of segregating the amount of damage caused solely by the purportedly covered peril from that caused by excluded perils, their mold loss claim must fail under the doctrine of concurrent causation."⁴⁰² To evaluate the merits of this finding, the Fifth Circuit reviewed the facts and Texas's law.⁴⁰³

At the outset, it is worth noting that courts must consider and apply corollary rules when determining whether to give a litigant relief under the "doctrine of concurrent causes."⁴⁰⁴ An insured bears the initial burden of proving that a liability insurance contract covers a loss, or that a peril insured against under a property insurance contract caused a loss.⁴⁰⁵ If the insured satisfies the initial burden, the burden shifts to the insurer, who must establish that language in the exclusion clause prevents the insured from recovering damages under the contract.⁴⁰⁶ If the insurance company satisfies its burden, the burden shifts again to the insured.⁴⁰⁷ At that point, the policyholder must prove that an exception exists, which precludes or negates the insurer's using language in the exclusion clause as an affirmative defense.⁴⁰⁸

399. *Fiess*, 392 F.3d at 806; *see also Warfield v. Fid. & Deposit Co.*, 904 F.2d 322, 325 (5th Cir. 1990) ("Where the appellant notices the appeal of a specified judgment only or a part thereof . . . this court has no jurisdiction to review other judgments or issues which are not expressly referred to and which are not impliedly intended for appeal.").

400. *Fiess*, 392 F.3d at 806-07; *see also Warfield*, 904 F.2d at 326 (stressing that if a litigant files a notice of appeal before a court issues an order, the litigant clearly did not intend to incorporate the order).

401. *Fiess*, 392 F.3d at 807-08.

402. *State Farm Lloyds*, 2003 WL 21659408, at *10.

403. *Fiess*, 392 F.3d at 807-08.

404. *See Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300, 302 (Tex. App.—San Antonio 1999, *pet. denied*) (reaffirming that "Texas recognizes the doctrine of concurrent causes").

405. *See Venture Encoding Serv., Inc. v. Atl. Mut. Ins. Co.*, 107 S.W.3d 729, 733 (Tex. App.—Fort Worth 2003, *pet. denied*); *see also Guar. Nat'l Ins. Co. v. Vic Mfg. Co.*, 143 F.3d 192, 193 (5th Cir. 1998) (applying Texas's law).

406. *Venture Encoding Serv., Inc.*, 107 S.W.3d at 733.

407. *Id.*

408. *See Vic Mfg. Co.*, 143 F.3d at 193; *Employers Cas. Co. v. Block*, 744 S.W.2d 940, 945 (Tex. 1988), *overruled by State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996); *Love of God Holiness Temple Church v. Union Standard Ins. Co.*, 860 S.W.2d 179, 181 (Tex. App.—Texarkana 1993, *no writ*).

Now, the “doctrine of concurrent causation is not an affirmative defense or an avoidance issue; rather, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove that [the policy covers] their damage.”⁴⁰⁹ Put simply, it states the following: When covered and noncovered perils concurrently create a loss, the insured may receive damages only for the loss emanating from the covered peril.⁴¹⁰ Furthermore, since an insured may recover only for covered losses, the insured carries the additional burden of segregating covered damages from noncovered damages.⁴¹¹

Therefore, the insured must “present some evidence upon which the jury can allocate the damages attributable to the covered peril.”⁴¹² Although an insured does not have “to establish the amount of his damages with mathematical precision, there must be some reasonable basis upon which the jury’s finding [can rest].”⁴¹³ But the district court concluded that the Fiesses could not prevail under the doctrine of concurrent causation.⁴¹⁴ The lower court ruled that the Fiesses produced “no evidence that would provide a reasonable basis for distinguishing mold caused by the flood from mold caused by non-flood events.”⁴¹⁵

The Fifth Circuit, however, was not persuaded. Again, the Fiesses produced expert testimony from Dr. Pearce establishing that nonflood related water events produced seventy percent of the mold, and Allison-related flooding caused the remaining thirty percent.⁴¹⁶ Given that testimony, the court of appeals concluded the Fiesses “successfully raised a genuine issue of material fact regarding the amount of mold in their home not attributable to Allison-induced flood waters.”⁴¹⁷ Because Texas’s courts only require insureds to use a “reasonable basis” rather than “mathematical precision” to prove the amount of “covered damages,”⁴¹⁸ the court of appeals concluded that a jury

409. *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 258 (Tex. App.—Austin 2002, no pet.) (citing *Wallis*, 2 S.W.3d at 302-03).

410. See *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971); *Paulson v. Fire Ins. Exch.*, 393 S.W.2d 316, 319 (Tex. 1965); *Warrilow v. Norrell*, 791 S.W.2d 515, 527 (Tex. App.—Corpus Christi 1989, writ denied); see also *State Farm Fire & Cas. Co. v. Rodriguez*, 88 S.W.3d 313, 320-21 (Tex. App.—San Antonio 2002, no pet.) (citing *Wallis*, 2 S.W.3d at 302).

411. See *Rodriguez*, 88 S.W.3d at 321 (quoting *Wallis*, 2 S.W.3d at 303).

412. *Allison*, 98 S.W.3d at 258-59 (citing *Wallis*, 2 S.W.3d at 303); see *Rodriguez*, 88 S.W.3d at 321.

413. *Allison*, 98 S.W.3d at 258-59 (citing *Wallis*, 2 S.W.3d at 303); see *Rodriguez*, 88 S.W.3d at 321.

414. *Fiess v. State Farm Lloyds*, No. Civ. A. H-02-1912, 2003 WL 21659408, at *10 (S.D. Tex. June 4, 2003).

415. *Id.*

Damage to the residence caused by floodwaters is expressly excluded by the Policy. Although the Fiesses’ expert, Dr. Pearce, belatedly attributed 70% of the mold damage to water events other than the flood . . . Dr. Pearce conceded at deposition that there was mold on every wall, stud, baseboard, and base plate throughout the residence caused by the flood.

Id.

416. *Feiss v. State Farm Lloyds*, 392 F.3d 802, 808 (5th Cir. Dec. 2004).

417. *Id.*

418. *Id.* at 808 n.24; *Lyons v. Millers Cas. Ins. Co. of Tex.*, 866 S.W.2d 597, 601 (Tex. 1993)

could determine whether a covered peril caused the extensive mold contamination in the walls, and whether a covered peril caused the mold contamination above the maximum point where the Allison-related flooding occurred.⁴¹⁹

Finally, the Fiesses argued that the “ensuing loss” language in the exclusion clause covered their mold claims.⁴²⁰ Once more, the pertinent part of the exclusion clause reads as follows: “‘We [State Farm] do not cover loss caused by: . . . mold or other fungi . . . [But we] do cover *ensuing loss* caused by . . . *water damage* . . . if the loss would otherwise be covered under this policy.’”⁴²¹ The Fifth Circuit, however, could not find any Texas Supreme Court case that addressed the question of whether the “ensuing loss” language covers mold-related contamination that stems from otherwise covered “water damage.”⁴²²

Certainly, Texas’s lower courts have addressed the issue; but a major conflict exists among those decisions. Some courts have forced insurers to compensate insureds for mold contamination that results or ensues from a covered water damage.⁴²³ Others have not.⁴²⁴ Rather than engaging in the

(“When covered and excluded perils combine to cause an injury, the insured must present some evidence affording the jury a reasonable basis on which to allocate the damage.”) (citing *Paulson v. Fire Ins. Exch.*, 393 S.W.2d 316, 319 (Tex. 1965); *see, e.g., Wallis*, 2 S.W.3d at 304 (“[T]here must be some reasonable basis upon which the jury’s finding rests.”); *see also Rodriguez*, 88 S.W.3d at 321-22.

419. *Fiess*, 392 F.3d at 808.

420. *Id.* at 809.

421. *Id.* at 809 n.25 (quoting exclusion clause) (emphasis added).

422. *Id.* at 809.

423. *See Home Ins. Co. v. McClain*, No. 05-97-01479-CV, 2000 WL 144115, at *4 (Tex. App.—Dallas 2000, no pet.) (not designated for publication) (holding that mold contamination resulting or ensuing from otherwise covered water damage is not excluded from coverage by virtue of the ensuing loss provision); *Allstate Ins. Co. v. Smith*, 450 S.W.2d 957 (Tex. Civ. App.—Waco 1970, no writ) (construing the ensuing loss provision as providing coverage for wood rot, an excluded loss, that was caused by otherwise covered water damage); *see also Aetna Cas. & Sur. Co. v. Yates*, 344 F.2d 939, 941 (5th Cir. 1965) (“A likely case for application of the [ensuing loss] clause would be if water . . . coming from a burst pipe flooded the house and in turn caused rust or rot; loss from rust or rot so caused would be a loss ensuing on water damage.”); *Flores v. Allstate Tex. Lloyd’s Co.*, 278 F. Supp. 2d 810, 814 n.3 (S.D. Tex. 2003) (“[T]his Court construes the mold exclusion as precluding coverage for mold occurring naturally or resulting from a non-covered event, but not for mold ‘ensuing’ from a covered water damage event.”); *Salinas v. Allstate Tex. Lloyd’s Co.*, 278 F. Supp. 2d 820, 824 (S.D. Tex. 2003) (finding that the HO-B policy covers “mold claims to the extent that the claimed mold damage ensues from an otherwise covered water damage event”).

424. *See, e.g., Fiess v. State Farm Lloyds*, No. Civ. A. H-02-1912, 2003 WL 21659408, at *7 (S.D. Tex. June 4, 2003) (“For coverage to be restored via the ensuing loss clause, an otherwise covered loss must result or ensue from the excluded loss.”); *Harrison v. U.S.A.A. Ins. Co.*, No. 03-00-00362-CV, 2001 WL 391539, at *2 (Tex. App.—Austin 2001, no pet.) (not designated for publication) (“To qualify for the exception [under the ensuing loss clause], ensuing water damage must follow from one of the types of damage enumerated in exclusion (f). In other words, the ensuing loss provision covers water damage that results from, rather than causes, rotting.”); *Zeidan v. State Farm Fire & Cas. Co.*, 960 S.W.2d 663, 666 (Tex. App.—El Paso 1997, no writ) (interpreting an ensuing loss provision in conformity with *Lambros*); *Daniell v. Fire Ins. Exch.*, No. 04-94-00824-CV, 1995 WL 612405, at *2 (Tex. App.—San Antonio 1995, no writ) (“[W]hile an ensuing loss provision will cover water damage caused by an excluded event, it will not cover the excluded event even if it is caused by water damage.”); *Lambros v. Standard Fire Ins. Co.*, 530 S.W.2d

controversial game of “*Erie* guessing,”⁴²⁵ the Fifth Circuit certified the ensuing loss question to the Supreme Court of Texas.⁴²⁶ Finally, the court of appeals reversed the district court’s summary judgment in part.⁴²⁷ The Fifth Circuit found that the *Fiesses* provided sufficient evidence to raise an issue of fact regarding the degree to which nonflood related water damage caused the mold contamination and their financial loss.⁴²⁸

III. THIRD-PARTY INSURANCE CONTRACTS AND CLAIMS: STATE COMMON-LAW DECISIONS

A. *Third-Party Liability Claims: Injury to Persons*

1. *Whether Under Louisiana’s Law a Liability Insurer Has a Duty to Defend and Indemnify Its Insured After Third-Party Victims Sued the Insured for Injuries Originating on the Insured’s Vessel*

If a single contract and a single dispute were the focus of attention in *Johnson v. Seacor Marine Corp.*,⁴²⁹ the case would be an ideal teaching tool to use in a first-year contracts course. *Seacor* discusses or provides a fairly extensive overview of several principles of contracts—sufficient versus insufficient consideration, a promise for a promise, performance of a duty, a pre-existing duty, exclusions, misrepresentations, waiver of legal rights, equitable estoppel, subrogation of rights, and the rights of third-party beneficiaries.⁴³⁰ But, the central conflict in *Seacor* involves or implicates six complicated, express-written contracts.⁴³¹ Additionally, fairly complicated principles of admiralty law as well as the law of marine and liability insurance appear in the decision.⁴³² Therefore, attempting to understand the Fifth Circuit’s analysis would be an extremely taxing enterprise for novices.

138, 141 (Tex. Civ. App.—San Antonio 1975, writ ref’d) (holding that “an ensuing loss caused by water damage is a loss caused by water damage where the water damage itself is the result of a preceding cause” that is excluded from coverage under the policy).

425. Compare *Fiess*, 392 F.3d at 811 (“We could make an *Erie*-guess [about] . . . how the Texas Supreme Court would resolve this conflict. We think the better approach, given the significance of the issue, is to certify the question to the only court that can settle this uncertainty with finality.”), with *Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64, 89 (1938) (“[I]t is the duty of the federal court to determine as best it can, what the highest court of the state would decide.”)). See generally *Rice*, *supra* note 3, at 921, 963, 1029 (criticizing unwarranted *Erie* guessing and challenging the court to stop muddling settled Texas’s law).

426. *Fiess*, 392 F.3d at 811.

427. *Id.*

428. *Id.*

429. *Johnson v. Seacor Marine Corp.*, 404 F.3d 871 (5th Cir. Mar. 2005).

430. See *id.*

431. See *id.* at 873.

432. See *id.* at 871.

However, the court's discussion in *Seacor* is somewhat challenging even for arguably seasoned jurists. The reason is not terribly difficult: The Fifth Circuit overlooked or disregarded some settled principles of contract law to reach at least two questionable legal conclusions. Furthermore, the court of appeals delivered questionable rulings because the tribunal apparently did not clearly appreciate the relevant distinctions between marine-insurance contracts and other agreements—liability-insurance, maritime, and ordinary contracts. To be sure, if the court would have carefully examined the similarities and differences between, for example, maritime and comprehensive general liability (CGL) contracts, the analysis would have been more succinct, convincing, and intelligible.

A careful review of the intricate facts and numerous contractual agreements in *Seacor* should help illustrate the less-than-obvious problems with the Fifth Circuit's decision in that case. First, several important parties appear in the reported facts. Production Management Industries (PMI) is a labor contractor.⁴³³ PMI provides labor and other support services for the oil and gas industry in the Gulf of Mexico off the Louisiana coast.⁴³⁴ Gray Insurance Company (Gray) is PMI's CGL insurer.⁴³⁵ Among other contractual obligations, Gray agreed to defend PMI from third-party lawsuits and to indemnify PMI under appropriate circumstances.⁴³⁶

Chevron U.S.A., Inc. (Chevron)⁴³⁷ and Matrix Oil and Gas Co. (Matrix)⁴³⁸ are oil and gas companies. Among other operations, Chevron and Matrix explore for and distribute oil and gas worldwide.⁴³⁹ More relevant, both Chevron and Matrix also provide transportation services for other offshore oil-and-gas companies and individuals working on various oil rigs.⁴⁴⁰ SEACOR Marine, Inc. (SEACOR) "operates one of the world's largest fleets of

433. *Id.* at 873.

434. *Id.*; *see also* Contract Operations, <http://www.pmi.net/contoper.htm> (last visited Feb. 17, 2006).

Whether it's in the open waters of the Gulf of Mexico or on a remote land location on the Gulf Coast, PMI knows what it takes to optimize the complex task of efficiently and safely operating oil and gas producing properties. . . . Headquartered in New Iberia, Louisiana . . . PMI can also assist with your helicopter and marine transportation needs.

Id.

435. *Seacor*, 404 F.3d at 874.

436. *Id.*

437. *See* Chevron Worldwide Operations, <http://www.chevron.com/operations/> (last visited Feb. 17, 2006).

Chevron spans the globe [and is one] of the world's largest integrated energy companies Chevron is an international leader in finding, producing, and marketing oil and gas, as well as other energy products. Active in approximately 180 countries, the company's Caltex, Texaco and Chevron-branded products hold top-tier rankings worldwide.

Id.

438. *See* Matrix Oil HL, Operations & Projects, <http://www.matrixoil.com.au/operations.cfm> (last visited Feb 17, 2006) ("The Company's objective is to procure development oil and gas assets in known hydrocarbon producing area's [sic] of Indonesia.").

439. *See supra* notes 437-38.

440. *Seacor*, 404 F.3d at 873.

diversified marine support vessels,” which SEACOR uses “to [support] offshore oil and gas exploration and development.”⁴⁴¹ Among other places around the globe, SEACOR uses its vessels to deliver equipment, supplies, and personnel to rigs in the Gulf of Mexico and along the outer-continental shelf near Louisiana.⁴⁴²

During the late 1990s, PMI entered into separate contracts with Chevron and Matrix—PMI/Chevron Agreement and PMI/Matrix Agreement, respectively.⁴⁴³ Under each agreement, Chevron and Matrix agreed to transport PMI workers from the shore of Louisiana to offshore rigs.⁴⁴⁴ The oil companies formed additional contracts with SEACOR.⁴⁴⁵ Under the SEACOR/Chevron and SEACOR/Matrix “blanket time-charter” agreements, Chevron and Matrix agreed to purchase and SEACOR agreed to provide chartering services.⁴⁴⁶ Chevron and Matrix contacted SEACOR and asked the chartering company to transport PMI’s workers from Louisiana’s shore to the offshore oil rigs.⁴⁴⁷

A careful reading of the reported facts leaves very little doubt about the legal relationships involved: Under the tripartite arrangement, the legal relationships were clear. Chevron and Matrix were PMI’s contractors; and, SEACOR was PMI’s subcontractor.⁴⁴⁸ In fact, “knowing that its obligations under the charter agreements with [Chevron and Matrix] would probably involve transporting [PMI’s] employees, [SEACOR] contacted PMI directly and insisted that [SEACOR] would not transport any PMI employees until PMI signed a ‘Vessel Boarding and Utilization Agreement Hold Harmless’ (VBA).”⁴⁴⁹

PMI and SEACOR signed the VBA on July 17, 1999.⁴⁵⁰ Under that agreement, SEACOR agreed to transport PMI’s employees on SEACOR vessels.⁴⁵¹ As consideration, PMI agreed to name SEACOR as an additional insured under PMI’s CGL insurance policy.⁴⁵² PMI also agreed to accept a subrogation-rights waiver and to delete the watercraft-exclusion clause from

441. See SEACOR Marine, Profile, <http://www.seacormarine.com/> (last visited Feb. 17, 2006) (follow “Company Profile” hyperlink).

442. *Seacor*, 404 F.3d at 873.

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.* (“On December 20, 1990, Chevron and SEACOR signed a ‘blanket time-charter agreement.’ This agreement, subject to unilateral cancellation by either party, set the general terms that would apply to future vessel charters. . . . [However,] unlike Chevron, Matrix never directly contracted with SEACOR.”).

447. *Id.*

448. See *id.*

449. *Id.* (“[The terms under the VBA] *form contract* [applied] when a SEACOR vessel [transported] . . . *contractors’ employees.*”) (emphasis added).

450. *Id.* at 874.

451. *Id.*

452. *Id.*

the CGL policy that PMI purchased from Gray.⁴⁵³ The pertinent part of the latter clause excluded the following:

“g. ‘Bodily injury’ . . . arising out of the . . . use or entrustment to others of any . . . watercraft owned or operated by or rented or loaned to any insured. Use includes operation and ‘loading and unloading.’

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is:
 - (a) Less than 26 feet long; and
 - (b) Not being used to carry persons or property for a charge;
- . . .
- (4) Liability assumed under any ‘insured contract’ for the ownership, maintenance or use of aircraft or watercraft⁴⁵⁴

It is important to note that for all relevant time periods, Gray routinely furnished insurance certificates to PMI’s contractors.⁴⁵⁵ Those notices outlined the nature and extent of PMI’s coverage under the CGL policy.⁴⁵⁶ At PMI’s request, Gray sent a certificate to SEACOR.⁴⁵⁷ When Gray delivered the insurance certificate, however, Gray did not know that PMI and SEACOR had entered into a formal agreement and did not know the content of the VBA.⁴⁵⁸

Between late December 2000 and early February 2001, three of PMI’s employees received injuries while SEACOR transported them to Matrix- and Chevron-operated platforms in the Gulf.⁴⁵⁹ The employees sued SEACOR in three separate suits assigned to three different district judges.⁴⁶⁰ In each of those underlying lawsuits, SEACOR filed a third-party declaratory-judgment action—against both PMI and Gray—in the United States District Court for the Eastern District of Louisiana.⁴⁶¹ Citing the VBA and the CGL policy, SEACOR asserted that Gray had a contractual duty to provide a legal defense and to indemnify.⁴⁶²

453. *Id.*

454. *Id.* at 874 n.1 (emphasis added) (quoting the CGL Watercraft Exclusion of the Gray Insurance Co. commercial liability policy coverage form).

455. *Id.* at 874.

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.* (“On December 15, 2000, Plaintiffs Johnson and Hoffpauir were injured while transferring between Matrix operated platforms and the Shirley G. Plaintiff Fleming was injured while transferring from a Chevron platform to the Sylvia F on February 1, 2001.”).

460. *Id.*

461. *Id.* at 871, 874.

462. *Id.* at 874 (“[In the underlying lawsuit,] the three [injured workers] settled [their claims] against [PMI and SEACOR] and trials went forward on SEACOR’s third-party claims against PMI and Gray.”).

Gray filed a summary-judgment motion in each of the three underlying suits.⁴⁶³ Put simply, the insurer maintained that sufficient consideration did not support the VBA; therefore, the “hold-harmless” agreement was unenforceable.⁴⁶⁴ The district court judges reached conflicting conclusions about whether sufficient consideration supported the VBA.⁴⁶⁵ To resolve the conflict, the litigants appealed their respective adverse rulings to the Fifth Circuit, where the court consolidated the cases.⁴⁶⁶

On appeal, Gray presented a stellar argument in light of the facts and fairly settled contract principles. According to the insurer, the blanket charter agreements between PMI and the oil companies imposed a duty on SEACOR to transport PMI’s employees to Matrix’s and Chevron’s platforms.⁴⁶⁷ Consequently, as PMI’s alleged subcontractor, SEACOR had a preexisting duty to transport PMI’s employees to the oil platforms when the vessel owner consummated the VBA with PMI.⁴⁶⁸ And because there was a preexisting duty, SEACOR did not pay any new or additional consideration for PMI’s promises under the VBA.⁴⁶⁹

Under the preexisting-duty rule, one’s promise to do what one is already legally obligated to do is unenforceable.⁴⁷⁰ Every first-year law student—who has read *Stilk v. Myrick*,⁴⁷¹ the renowned English case about seamen who refused to work on the high seas unless they received additional pay—knows this general contract principle. Moreover, the Fifth Circuit has embraced this principle.⁴⁷² However, in *SEACOR*, the court of appeals decided to ignore the general principle and apply a questionable minority rule.

463. *Id.*

464. *Id.*

465. *Id.* (“In *Johnson v. SEACOR*, Judge Haik found [that consideration supported] the agreement . . . ; in *Hoffpauir v. SEACOR*, Judge Doherty ruled that the VBA [could not be enforced, given the] lack of [sufficient] consideration. In *Fleming v. Grand Isle Shipyard*, the third case, Judge Lemelle did not reach the issue.”).

466. *Id.* at 871, 874.

467. *Id.* at 875.

468. *See id.*

469. *Id.*

470. *See* 2 JOSEPH M. PERILLO & HELEN H. BENDER, CORBIN ON CONTRACTS § 7.1 (rev. ed. 1995); 3 RICHARD A. LORD, WILLISTON ON CONTRACTS § 7.36 (4th ed. 1992).

As a general principle, when a party does simply what he has already obligated himself to do under a contract, he cannot demand any additional compensation or benefit, and, it is clear that if he takes advantage of the situation and obtains a promise for more, the law in general regards it as not binding as lacking consideration.

LORD, *supra*, § 7.36.

471. *Stilk v. Myrick*, (1809) 170 Eng. Rep. 1168, 1169 (holding that a promise to pay seamen extra money for what they were obligated to do under a pre-existing contract ‘ship’s articles’ was void for lack of consideration).

472. *See, e.g.*, Gen. Intermodal Logistics Corp. v. Mainstream Shipyards & Supply, Inc., 748 F.2d 1071, 1074 (5th Cir. 1984).

Surprisingly, citing so-called “influential treatises”⁴⁷³—rather than settled principles of contract law in Louisiana—the Fifth Circuit concluded that SEACOR’s and PMI’s mutual promises were sufficient new consideration to enforce the VBA, notwithstanding SEACOR’s preexisting contractual duty.⁴⁷⁴ To justify that conclusion, the Fifth Circuit again cited treatises and concluded:

“A court should no longer accept [the preexisting-duty] rule [outright]. [A court] should never use it as the major premise of a decision, at least without giving careful thought to the circumstances of the particular case, to the moral desserts of the parties, and to the social feelings and interests that are involved.” It is *well accepted that the mere exchange of promises is ordinarily sufficient to satisfy the requirement of consideration*. . . . “[A]s long as the contracting parties gain some legally enforceable right as a result of the contract which they previously did not have, consideration is present.”⁴⁷⁵

However, a careful reading of the *SEACOR* opinion strongly suggests that Gray raised another argument before the Fifth Circuit. Given the court of appeals’s strong response, it appears that the insurer argued the following: SEACOR became PMI’s subcontractor when SEACOR formed the transportation agreements with Matrix and Chevron. Therefore, the vessel owner had a contractual duty to protect PMI—the third-party beneficiary—as well as PMI’s interests, its employees.

But the Fifth Circuit did not embrace that apparent argument. Instead, the court of appeals concluded, “[E]ven if SEACOR owed a duty to Chevron and Matrix to transport PMI employees under SEACOR’s agreements with those oil companies, *SEACOR owed no legally enforceable duty to PMI*. . . . [O]nly the oil companies had a remedy against SEACOR.”⁴⁷⁶ Without doubt, this is a remarkable conclusion, for it ignores settled law in Louisiana.

473. *Seacor*, 404 F.3d at 875 (citing PERILLO & BENDER, *supra* note 470, § 7.1) (“All of the most influential treatises urge courts to avoid using the preexisting duty rule if even minimal consideration supports the contract. Indeed, Corbin strongly cautions courts against relying on this rule in formulating their decisions.”).

474. *Id.* at 876.

475. *Id.* at 875 (quoting PERILLO & BENDER, *supra* note 470, § 7.1; CLAUDE D. ROHWER & ANTHONY M. SKROCKI, *CONTRACTS IN A NUTSHELL* § 2.24 (5th ed. 2000)) (emphasis added) (citations omitted) (arguing that if the promisee incurs any legal detriment that amounts to a bargained for exchange for the promisor’s promise, sufficient consideration is present). “In addressing the existence or non-existence of consideration, courts have not concerned themselves with the adequacy of fairness of the consideration but only with finding the presence of some legal detriment incurred as part of a bargain.” *Id.* (quoting ROHWER & SKROCKI, *supra*, § 2.24); *see also* Morrison Flying Serv. v. Deming Nat’l Bank, 404 F.2d 856, 861 (10th Cir. 1968); RESTATEMENT (SECOND) OF CONTRACTS § 73(d) (1981) (“But the tendency of the law has been simply to hold that the performance of contractual duty can be consideration if the duty is not owed to the promisor.”).

476. *Seacor*, 404 F.3d at 877 (emphasis added).

True, a presumption always exists against a benefit in favor of a third party when two persons form a valid, enforceable contract. Both Louisiana⁴⁷⁷ and Texas⁴⁷⁸ follow this rule. But the law is equally clear regarding another matter: The absence of privity to a contract does not necessarily prevent a third party from commencing a cause of action against the parties that formed the contract.⁴⁷⁹ More important, where parties intended to create a contractual relation for the benefit of another, the third-party beneficiary has a contractual right to secure common-law or equitable remedies under that contract.⁴⁸⁰

Therefore, in light of these latter principles of contract, it is difficult to understand the Fifth Circuit's rationale for inserting such highly questionable dicta in the decision regarding the rights of third-party beneficiaries in

477. See *Whitney Nat'l Bank v. Howard Weil Fin. Corp.*, 93-1568 (La. App. 4 Cir. 1/27/94); 631 So. 2d 1308, 1310 (concluding that in Louisiana, a contract for a third party's benefit is a stipulation *pour autrui*, and that the contract "gives the third party beneficiary the right to demand performance from the promisor") (citing LA. CONST. art. 1981); see also *Smith v. State Farm Ins. Cos.*, 2003-1580 (La. App. 4 Cir. 3/3/04); 869 So. 2d 909, 912-13 (stressing that "a contract for the benefit of a third-party [or] a stipulation *pour autrui* . . . is never presumed. Rather, the intent of the contracting parties to stipulate a benefit in favor of a third-party must be made manifestly clear." (citing *Homer Nat'l Bank v. Tri-Dist. Dev. Corp.*, 534 So. 2d 154, 156 (La. Ct. App. 1988))).

478. See *Corpus Christi Bank & Trust v. Smith*, 525 S.W.2d 501, 503-04 (Tex. 1975) ("[W]e must begin with the presumption that parties contract for themselves, and a contract will not be construed as having been made for the benefit of third parties unless it clearly appears that such was the intention of the contracting parties."); see also *Econ. Forms Corp. v. Williams Bros. Constr. Co.*, 754 S.W.2d 451, 455 (Tex. App.—Houston [14th Dist.] 1988, no writ) (explaining that, in deriving intent from a contract, a court presumes "that parties contract for themselves and will not construe a contract as having been made for the benefit of third parties unless it clearly appears that this was the intention of the parties to the contract"); *Knight Constr. Co. v. Barnett Mortgage Trust*, 572 S.W.2d 381, 382-83 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.) (adopting the proposition that a third party's right "to enforce [a] contract . . . 'should not rest on implication,' but should be clearly apparent, and any doubt should be resolved against such intent" (citation omitted)).

479. See *Lumber Prods., Inc. v. Hiriart*, 255 So. 2d 783, 789-90 (La. Ct. App. 1971).

The traditional notion that lack of privity to a contract eliminates any actionable interest in one not privy might (in the absence of other law) prevent one's recovery of damages for breach of contract against his contractor's subcontractor. But this is not the only law here pertinent. [By statute, the third-party beneficiary has a right to sue and] non-privity has been eliminated as a defense to the subcontractor's claim against the owner by the building contract law in cases [under statute]. . . . Thus non-privity is not necessarily determinative

Id.

480. See *Concept Design, Inc. v. J.J. Krebs & Sons, Inc.*, 96-1295 (La. App. 4 Cir. 3/19/97); 692 So. 2d 1203, 1205-06 (concluding that "'to establish a stipulation *pour autrui* . . . [t]he third-party relationship must form the consideration for a condition of the contract[, and] the benefit may not be merely incidental to the contract'" (quoting *In re Adoption of S.R.P.*, 555 So. 2d 612, 618 (La. Ct. App. 1989))); see also *Econ. Forms Corp.*, 754 S.W.2d at 456 ("A third party [may] recover upon a contract made between other parties only if the parties intended to secure some benefit to that third party, and only if the contract was entered into directly and primarily for the third party's benefit.") (second emphasis added); *Dorsett Bros. Concrete Supply, Inc. v. Safeco Title Ins. Co.*, 880 S.W.2d 417, 421 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (citing *Econ. Forms Corp.*, 754 S.W.2d at 456); *Thomson v. Espey Huston & Assocs., Inc.*, 899 S.W.2d 415, 418 (Tex. App.—Austin 1995, no writ) (adopting the rule in *Economy Forms* and concluding that "[a] third party may recover on a contract made between other parties only if the parties intended to secure some benefit to that third party [A]ny doubt must be resolved against finding . . . a third-party beneficiary").

Louisiana. Without doubt, the dicta only cloud the law, and it was not necessary. In the end, the Fifth Circuit ruled in favor of Gray Insurance Company.⁴⁸¹

To repeat, ignoring Gray's argument, the court of appeals declared that the VBA was valid and PMI had an obligation to cover SEACOR under PMI's CGL policy.⁴⁸² However, citing the watercraft exclusion in the liability-insurance contract,⁴⁸³ the Fifth Circuit declared that the watercraft exclusion plainly excluded SEACOR's request for a legal defense and the company's request for indemnification.⁴⁸⁴ Stated differently, Gray had no contractual duty to defend SEACOR in the underlying lawsuits or to indemnify SEACOR for expenditures associated with settling the underlying lawsuits.⁴⁸⁵

2. *Whether Under Texas's Law a Liability Insurer Has a Duty to Defend and Indemnify Its Insured: A Provider of Disability Home-Care Services After a Third-Party Complainant Sued the Insured for Negligence*

Arguably, one of the Fifth Circuit's more poorly researched, highly strained, and unfair decisions appears in *Allstate Insurance Co. v. Disability Services of the Southwest Inc.*⁴⁸⁶ Texas implemented a voucher program that provides transitional living assistance for persons with disabilities.⁴⁸⁷ Among other state agencies, the Texas Department of Human Services (TDHS) administers the housing program for the disabled.⁴⁸⁸ Disability Services of the

481. *Seacor*, 404 F.3d at 878.

482. *Id.* at 877.

483. *See* *Acadia Ins. Co. v. McNeil*, 711 A.2d 873, 875 (N.H. 1998) (observing that liability and traditional marine insurance differ). The latter is "an indemnity policy, which requires an insurer to reimburse the insured only for payments actually made." *Id.* Under a liability policy, "the insurer [is] 'responsible for any liability incurred by the insured while the policy was effective.'" *Id.* (quoting *Miller v. S.S. Owners Mut. Prot.*, 509 F. Supp. 1047, 1048 (S.D.N.Y. 1981)); *see also* *Backhus v. Transit Cas. Co.*, 549 So. 2d 283, 288, 291 (La. 1989) (recognizing that the "statutory definition of marine insurance [includes] both property insurance and liability insurance" and recognizing other dimensions of marine insurance, which include "insurance against loss or damage to property and marine protection and indemnity insurance").

484. *Seacor*, 404 F.3d at 877.

485. *Id.* at 878.

486. *Allstate Ins. Co. v. Disability Servs. of the Sw. Inc.*, 400 F.3d 260 (5th Cir. Feb. 2005).

487. *See* TEX. GOV'T CODE ANN. § 531.059(b) (Vernon 2005).

Subject to the availability of funds, the commission shall coordinate with the Texas Department of Human Services, the Texas Department of Housing and Community Affairs, and the Texas Department of Mental Health and Mental Retardation to develop a housing assistance program to assist persons with disabilities in moving from institutional housing to integrated housing. In developing the program, the agencies shall address:

- 1) eligibility requirements for assistance;
- 2) the period during which a person with a disability may receive assistance;
- 3) the types of housing expenses to be covered under the program; and
- 4) the locations at which the program will be operated.

Id.

488. *Id.*

Southwest Incorporated (DSSW) provides personal care as well as home- and community-based services for the disabled at eight locations in Texas.⁴⁸⁹ DSSW has one location in Houston, Texas, where the company operates a "24-Hour Shared Attendant Program (Program) at the Airport Landing Apartments."⁴⁹⁰

TDHS awarded a contract to DSSW, under which the company agreed to provide daily living assistance for disabled residents living in the apartments.⁴⁹¹ Kenneth Ray Lofton (KRL) was quadriplegic and was "unable to use his legs or arms, [although he] was able to speak without difficulty and use a mouth stick to perform certain tasks. KRL needed assistance, however, for all of his daily living activities."⁴⁹² In November 2000, he entered DSSW's Program and secured an apartment at the Airport Landing Apartments.⁴⁹³ Again, under the terms of the contract, "DSSW was obligated to provide assistance for KRL's daily living."⁴⁹⁴

Less than five days after arriving at the apartments, KRL developed a severe urinary-tract infection.⁴⁹⁵ He could not report his condition to DSSW because they had not installed necessary communication devices in KRL's bedroom.⁴⁹⁶ Although a telephone was located outside his bedroom, KRL could not reach or use it because he was quadriplegic.⁴⁹⁷ Consequently, KRL died four days after arriving at the apartments.⁴⁹⁸ Shortly thereafter, KRL's family and estate filed a mixed-claims lawsuit against DSSW.⁴⁹⁹ They alleged the following: (1) DSSW negligently failed to arrest the urinary-tract infection that contributed to KRL's death, and (2) DSSW negligently failed to install communication devices in KRL's apartment so KRL could easily report his needs directly to DSSW or to intermediaries and his family.⁵⁰⁰

During all relevant periods, Allstate Insurance Company insured DSSW under a commercial general-liability policy.⁵⁰¹ After learning about the underlying third-party lawsuit, Allstate filed a declaratory-judgment action in the United States District Court for the Southern District of Texas.⁵⁰² The insurer asked the district court to declare that Allstate had no duty to defend DSSW against KRL's estate and family's mixed-claims lawsuit.⁵⁰³ Again,

489. Disability Services of the Southwest, <http://www.dsswtx.org> (last visited Feb. 17, 2006).

490. *Disability Servs. of the Sw. Inc.*, 400 F.3d at 262.

491. *Id.*

492. *Id.*

493. *Id.*

494. *Id.*

495. *Id.*

496. *Id.*

497. *Id.*

498. *Id.*

499. *Id.*

500. *Id.* at 261.

501. *Id.* at 262.

502. *Id.* at 261.

503. *Id.*

following an all too common, inefficient, and arguably unwarranted practice in state and federal declaratory-judgment trials, Allstate filed a motion for summary judgment.⁵⁰⁴ The district court granted the motion,⁵⁰⁵ and DSSW appealed to the Court of Appeals for the Fifth Circuit.⁵⁰⁶

In the district court, Allstate argued that DSSW's alleged failure to provide communication devices for KRL was inseparable from the estate and family's claim that DSSW also failed to provide adequate medical care for the deceased quadriplegic.⁵⁰⁷ Therefore, citing an exception in the so-called "medical services exclusion clause," Allstate asserted that it had no contractual duty to defend DSSW.⁵⁰⁸ To determine whether the district court's summary judgment was proper and whether Allstate had a duty to defend DSSW in the underlying lawsuit, the Fifth Circuit first examined the exclusion clause in the insurance contract.⁵⁰⁹ That provision states the following:

"[T]his insurance does not apply to 'bodily injury', 'property damage' or 'personal and advertising injury' arising out of:

1. The rendering or failure to render: a. Medical, surgical, dental, x-ray or nursing service, treatment advice or instruction, or the related furnishing of food or beverages; b. Any health or therapeutic service, treatment, advice or instruction; or c. Any services, treatment, advice or instruction for the purpose of appearance or skin enhancement, hair removal or replacement of personal grooming.
2. The furnishing or dispensing of drugs or medical, dental or surgical supplies or appliances; or
3. The handling or treatment of dead bodies, including autopsies, organ donation or other procedures."⁵¹⁰

However, after examining the exclusion clause, the Fifth Circuit essentially accepted Allstate's argument without carefully and intelligently applying Texas's "eight corners" doctrine.⁵¹¹ Settled law in Texas is

504. *Id.*

505. *Id.*

506. *Id.* 261-62.

507. *Id.* at 263.

508. *Id.* at 262.

509. *Id.* at 262-63.

510. *Id.* at 262 n.1 (quoting the insurance contract).

511. See *Am. States Ins. Co. v. Bailey*, 133 F.3d 363, 369 (5th Cir. 1998); *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002) (reaffirming that under the "eight corners" rule, the "four corners" of the factual allegations in the underlying complaint and the "four corners" of the insurance policy solely determine whether an insurer has a duty to defend, and the pleadings must allege facts within the scope of coverage for a duty to defend the insured to exist); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merch. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997) (emphasizing that under the "eight corners" rule, the pleadings and allegations are liberally interpreted and their truth is presumed); *St. Paul Fire & Marine Ins. Co. v. Green Tree Fin. Corp.*, 249 F.3d 389, 391 (5th Cir. 2001) (concluding that an insurer must defend the entire underlying lawsuit if a court finds that the insurance contract covers any part of the lawsuit).

exceptionally clear: Courts must compare the allegations in a third-party complaint to the coverage provision in a liability policy to determine whether an insurer has a duty to defend.⁵¹² If the coverage clause covers or potentially covers the allegation in the complaint, the insurer must defend the insured against the underlying lawsuit.⁵¹³

More important, Texas's law is clear regarding another issue: If there is doubt about whether the allegations against the insured state a covered cause of action under a liability policy and require the insurer to defend the action, courts must resolve such doubt in favor of the insured.⁵¹⁴ Yet, in light of these settled principles and the Texas Supreme Court's decisions, the Fifth Circuit summarily discarded them. Instead, the appellate court ruled as follows: "[T]he claim that KRL's death was caused by the failure to provide communication devices is inseparable from the Lofton family's claim that DSSW failed to provide adequate medical care, and the medical services exclusion applies. Accordingly, Allstate has no duty to defend DSSW."⁵¹⁵

To reach that conclusion, the court of appeals adopted and applied a very narrow and highly inapplicable holding found in *Duncanville Diagnostic Center, Inc. v. Atlantic Lloyds Insurance Co. of Texas*.⁵¹⁶ In that case, the Eleventh Court of Appeals in Eastland held that an insurer has no duty to defend an insured in an underlying lawsuit (1) if the insured negligently performed professional medical services, and (2) the ensuing covered and excluded third-party injuries and causes were related or interdependent.⁵¹⁷ But again, *Duncanville* is inapplicable; for Allstate did not establish, and the trial court did not find, that DSSW failed to provide medical care or professional medical services.⁵¹⁸

In fact, Allstate failed to prove, and the Fifth Circuit did not determine, whether DSSW was a health-care provider.⁵¹⁹ Once more, under the exclusion clause, Allstate had no duty to defend only if its insured health care providers

512. See *supra* note 511.

513. See *Nat'l Union Fire Ins. of Pittsburgh, Pa.*, 939 S.W.2d at 142 (holding that an insurer has a duty to defend if the claims in an underlying, fairly and reasonably construed petition state a cause of action that the insurance contract potentially covers).

514. See *id.* (citing *Heyden Newport Chem. Corp. v. S. Gen. Ins. Co.*, 387 S.W.2d 22, 26 (Tex. 1965)).

515. *Disability Servs. of the Sw. Inc.*, 400 F.3d at 265.

516. *Duncanville Diagnostic Ctr., Inc. v. Atl. Lloyds Ins. Co. of Tex.*, 875 S.W.2d 788 (Tex. App.—Eastland 1994, writ denied).

517. *Id.* at 791-92.

The negligent acts and omissions were not independent and mutually exclusive; rather, they were related and interdependent. Therefore, the professional services exclusion operated to exclude coverage not only for the claims of negligence in rendering the professional services but also for the related allegations of negligent hiring, training, and supervision and negligent failure to establish adequate policies and procedures.

Id.

518. *Disability Servs. of the Sw. Inc.*, 400 F.3d at 265.

519. See *id.*

engaged in certain proscribed acts.⁵²⁰ Yet, a careful reading of the reported facts⁵²¹ and Texas's cases⁵²² reveal that TDHS contractors are not health care providers simply because they provide home care and daily living services.⁵²³ And one needs only to examine the definition of "health care provider,"⁵²⁴ "health care,"⁵²⁵ "medical care,"⁵²⁶ and "professional services"⁵²⁷ under Texas's

520. See *id.*

521. See *id.* at 262-65.

Under the terms of the contract between the Texas Department of Human Services and DSSW, DSSW was obligated to *provide assistance for KRL's daily living*. . . . If KRL had not been a quadriplegic, he would not have required communication devices that could be operated by a mouth stick. *Providing this service to KRL is typical, if not integral, to the provision of a 24-Hour Shared Attendant Program for someone in KRL's condition*, as evidenced in the contract between DSSW and TDHS. . . . The contract between DSSW and TDHS makes clear the purpose of the communication devices: *it required DSSW to "[a]rrange for each household to have a telephone or an emergency response device for requesting assistance in emergency situations and for requesting assistance with activities for daily living."* Even DSSW understood the emergency nature of the communication devices.

Id. (emphasis added) (alteration in original) (quoting the insurance contract).

522. See, e.g., *Farm & Home Sav. Ass'n v. Magnolia Ret. Servs. & Consulting Co.*, No. 01-89-01187-CV, 1990 WL 39464, at *1 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (not designated for publication) (observing that "Pine Place converted [its] property into a *personal care home* where approximately 105 residents are cared for under a contract with the Texas Department of Human Services" and noting that "commercial kitchen equipment, dining room equipment, an emergency response system, and a fire alarm system were . . . [equipment for] the apartment complex and not . . . additional equipment for the health care facility"); *Tex. Dep't of Human Servs. v. Trinity Coal., Inc.*, 759 S.W.2d 762,763 (Tex. App.—El Paso 1988, writ dismissed w.o.j.) (reporting that "Trinity had provided *home day care services* in the El Paso area under contracts with Texas Department of Human Services since 1975" (emphasis added)).

523. See *supra* notes 521-22.

524. See TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.03(3) (Vernon Supp. 1993). Section 1.03(3) defined "health care provider" as follows:

[A]ny person, partnership, professional association, corporation, facility, or institution duly licensed or chartered by the State of Texas to provide health care as a registered nurse, hospital, dentist, podiatrist, pharmacist, or nursing home or an officer, employee, or agent thereof acting in the course and scope of his employment.

Id.; see also TEX. CIV. PRAC. & REM. CODE § 74.001(a)(12)(A) (repealing TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.03(3)). Section 74.001(a)(12)(A) defines "health care provider" as follows:

[A]ny person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care, including: a registered nurse, a dentist, a podiatrist, a pharmacist, a chiropractor, an optometrist or a health care institution.

§ 74.001(a)(12)(A); see also *Townsend v. Catalina Ambulance Co.*, 857 S.W.2d 791, 796 (Tex. App.—Corpus Christi 1993, no writ) (observing that section 1.03(3) of the Medical Liability and Insurance Improvement Act specifically defines "entities that are health care providers, including hospitals and nursing homes" and concluding that an "ambulance company is not one of those specifically listed").

525. See TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10) (defining "health care" as "any act or treatment performed or furnished, or that should have been performed or furnished, by any *health care provider* for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement" (emphasis added)).

526. See *id.* § 74.001(a)(19) (defining "medical care" as "any act . . . under Section 151.002 [of the] Occupations Code [that was] performed or furnished, or [that] should have been performed . . . by *one licensed to practice medicine* in [Texas] for, to, or on behalf of a patient during the patient's care, treatment, or confinement" (emphasis added)).

527. See *id.* § 74.001(a)(24) (defining "professional or administrative services" as "those duties or

statutes to establish that DSSW was not a health care provider.

But there is more. Even if DSSW were a bona fide health care provider, the exclusion clause should not have released Allstate from its contractual duty to provide a legal defense. Texas's law is exceedingly strict about an insurer's responsibility when third parties file mixed-claims⁵²⁸ lawsuits against insureds: If an insurer has a duty to defend any portion of a third-party lawsuit, the insurer must defend the entire suit.⁵²⁹ Therefore, whether DSSW's alleged failure to provide medical services was inseparable from the company's alleged failure to provide communications devices was not the relevant question. The two allegations of negligence were distinct or mixed. Moreover, given Allstate's failure to prove that DSSW was a health care provider, the Fifth Circuit's ruling in favor of the insurer was arguably unfair and a major flaw in the decision.

3. Whether a Liability Insurer Has a Duty to Defend Its Insured Under Texas's Law After Third-Party Parents Sued the Insured for Allegedly Causing the Death of the Third Parties' Children in Mexico

*Lincoln General Insurance Co. v. Reyna*⁵³⁰ presents another remarkable illustration of the Fifth Circuit's failure to apply Texas's mixed-claims rules to help resolve duty-to-defend conflicts between an insurer and its insured. To be sure, insurance-defense and personal-injury attorneys have the primary duty to cite relevant state-law rules and statutes in their complaints, answers, motions, and briefs. Stated another way, insureds' and insurers' counsels must clearly outline and educate judges about various theories of recovery and affirmative defenses. On the other hand, courts must thoroughly research state laws and apply those laws intelligibly and fairly. Put simply, the Fifth Circuit performed the latter tasks poorly in *Reyna*.

services that a physician or *health care provider* is required to provide as a condition of maintaining the *physician's or health care provider's license*, accreditation status, or certification to participate in state or federal health care programs" (emphasis added)).

528. See, e.g., Rice, *supra* note 231, at 535, 619-20 & nn.388-92 (discussing Texas's declaratory-judgment trials, Texas's duty-to-defend doctrine, and the law of mixed claims, mixed allegations, or mixed complaints); 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, 1068-69 & n.393 (2000) (discussing declaratory judgment, the duty-to-defend doctrine, and the law of mixed claims, mixed allegations, or mixed complaints).

529. See *Harken Exploration Co. v. Sphere Drake Ins. P.L.C.*, 261 F.3d 466, 474 (5th Cir. 2001) (holding that an insurer "must defend [the insured] against the entire suit including causes of action that would not alone trigger the duty to defend, regardless whether the complaint is pled in the alternative or not because the [underlying plaintiffs'] factual allegations of negligence are sufficient to trigger the duty to defend"); *Investors Ins. Co. of Am. v. Breck Operating Corp.*, No. Civ. A. 1:02-CV-122-C, 2003 WL 21056849, at *7 (N.D. Tex. 2003) (concluding that the policy's exclusion of coverage for the "reckless, wilful, wanton, or knowing actions [did] not preclude the policy's potential coverage of the claimed property damage").

530. *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 355 (5th Cir. Feb. 2005).

To help prove the point, consider the extremely sparse, yet undisputed facts in the case. Cesar Reyna is a resident of Texas, and he does business as Reyna Travel Tours Company.⁵³¹ While in Mexico, Reyna's bus collided with another vehicle.⁵³² Reyna's employee—Joel Lozano—was driving the bus when the incident occurred.⁵³³ Two people in the other vehicle died after the head-on collision.⁵³⁴ In May 2002, the estate and relatives of the deceased, third-party victims, sued Reyna and Lozano in a Texas court.⁵³⁵

During all relevant periods, Lincoln General Insurance Company insured Reyna Travel Tours Company under a business-automobile insurance contract.⁵³⁶ After learning about the third-party lawsuit, Lincoln informed Reyna that it would deny coverage and would not provide a legal defense in the underlying state-court action.⁵³⁷ As a consequence, "Reyna never filed an answer, and on September 11, 2002, the [third-party] plaintiffs obtained a default judgment against Reyna and Lozano."⁵³⁸ In November 2002, the Texas court entered a final judgment against Reyna and Lozano for approximately \$13 million.⁵³⁹ Reyna was liable for ninety percent of the damages.⁵⁴⁰

To determine whether it indeed had a contractual duty to defend Reyna in the underlying action, Lincoln filed a declaratory-judgment action in the United States District Court for the Southern District of Texas.⁵⁴¹ The district court allowed the third-party plaintiffs in the underlying lawsuit (Intervenors) to intervene in the declaratory-judgment action.⁵⁴² Lincoln and the Intervenors filed cross-motions for summary judgment.⁵⁴³ Ultimately, the federal district court awarded Lincoln's motion for summary relief and denied the Intervenors' motion.⁵⁴⁴ The Intervenors appealed to the Fifth Circuit.⁵⁴⁵

The court of appeals examined the record, reviewed the undisputed facts, applied Texas's eight corners doctrine, and declared that the district court's summary-judgment award—in favor of Lincoln—was legally sound.⁵⁴⁶ The Fifth Circuit concluded that Lincoln had no duty to defend Reyna in the

531. *Id.* at 349.

532. *Id.*

533. *Id.*

534. *Id.* ("Jorge Cantu and Manuel Oyervidez, . . . both in the other vehicle, were killed.")

535. *Id.* ("Mayra Lizeth Arellano Medina, Jose Rodrigo Garza Ramos, Maria Del Socorro Cantu Serna, and Manuel Guadalupe Alaniz Muniz [were] all relatives of Mr. Cantu.")

536. *Id.*

537. *Id.*

538. *Id.*

539. *Id.*

540. *Id.*

541. *Id.*

542. *Id.* Among other reasons, the federal district court allowed the third-party plaintiffs to intervene because, in its final judgment, the Texas judge "transferred Reyna's right to the insurance proceeds [to the third-party plaintiffs]." *Id.*

543. *Id.*

544. *Id.*

545. *Id.*

546. *See id.* at 350 & nn.8-15. For a discussion of the eight corners doctrine, see *supra* notes 511-14.

underlying lawsuit.⁵⁴⁷ As a consequence, the Intervenor—as judgment creditors—had no contractual right to secure damages from Lincoln.⁵⁴⁸

To reach that decidedly questionable conclusion, the Fifth Circuit first reviewed the Intervenor’s allegations in the underlying, state-court complaint.⁵⁴⁹ Multiple mixed claims could have formed the foundation for several independent causes of action against Reyna and Lozano collectively. The Intervenor alleged that: (1) Lozano negligently operated the bus in Mexico, thereby causing the head-on collision and damages; (2) Reyna negligently entrusted the bus to Lozano; (3) Reyna negligently failed to implement safety policies; (4) Reyna failed to enforce the company’s safety policies; and (5) Reyna negligently hired, trained, supervised, and retained Lozano.⁵⁵⁰

After examining the Intervenor’s underlying complaint, the Fifth Circuit reviewed the coverage clause in the business-automobile insurance contract.⁵⁵¹ That provision stated in relevant part that Lincoln would satisfy a claim “when ‘bodily injury or property damage’ results from an ‘accident’ and ‘from the ownership, maintenance or use of a covered auto.’”⁵⁵² The policy defined an “‘accident’ as [the] ‘continuous or repeated exposure to the same conditions resulting in bodily injury or property damage.’”⁵⁵³ Furthermore, the contract outlined another condition precedent before Lincoln would pay proceeds: “[An] accident or loss must occur within (1) the policy period and (2) the coverage territory,”⁵⁵⁴ which included “the United States, territories and possessions of the United States, Puerto Rico, and Canada.”⁵⁵⁵

To justify its decision to affirm the district court’s ruling, the Fifth Circuit focused on a single argument appearing in the Intervenor’s appellate brief. The Intervenor asserted that Lincoln had a duty to defend Reyna because “Reyna’s . . . negligent[] hiring, training, and supervision [of] Lozano [comprised] an ‘accident’ as defined [in the insurance contract].”⁵⁵⁶ As support for their argument, the Intervenor cited the Texas Supreme Court’s analysis and holding in *King v. Dallas Fire Insurance Co.*,⁵⁵⁷ because the insurance contracts in *King* and in *Reyna* contained “nearly identical” words and phrases

547. *Id.* at 349.

548. *See id.*; *cf.* *United States v. Feldman*, 324 F. Supp. 2d 1112, 1117 n.6 (C.D. Cal. 2004) (“California law defines a ‘judgment creditor’ as [a] person in whose favor a judgment is rendered or, if there is an assignee of record, . . . the assignee of record.” (alteration in original)).

549. *Reyna*, 401 F.3d at 351.

550. *Id.* The Intervenor asserted that Lozano breached “the duty to exercise ordinary care in operating the bus ‘reasonably and prudently.’” *Id.* They also alleged that Reyna was “vicariously liable . . . because of Lozano’s negligence.” *Id.*

551. *Id.*

552. *Id.* (quoting the insurance policy).

553. *Id.* (quoting the insurance policy).

554. *Id.*

555. *Id.*

556. *Id.*

557. *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185 (Tex. 2002).

in the coverage provisions.⁵⁵⁸

In *King*, the Texas Supreme Court declared that the insurer had a duty to defend because the negligent hiring, training, and supervision claim was an accident under the liability policy.⁵⁵⁹ But the Fifth Circuit distinguished *King* from *Reyna*.⁵⁶⁰ The appellate court concluded that the Texas Supreme Court's determination—that an accident occurs when an insured negligently hires, trains, and supervises—only “applies in cases involving intentional conduct where the court is required to interpret intent and from whose standpoint.”⁵⁶¹ Therefore, the Fifth Circuit rejected the notion that “*King* intended the term ‘accident’ to always include a claim for negligent hiring, training, and supervision regardless of the type of employee conduct.”⁵⁶²

From the court of appeals's perspective, embracing the rule in *King*—where complaints in underlying, third-party lawsuits accuse the insureds of negligent conduct—would always raise a question of intent when, in fact, no allegation of intent appears in the underlying complaint.⁵⁶³ Consequently, *King* did not apply to the facts in *Reyna*.⁵⁶⁴ But it is exceedingly clear that the Fifth Circuit's analysis and conclusion in *Reyna* are flaccid. Among other reasons, the court of appeals, wittingly or unwittingly, overlooked an entire body of Texas insurance law that instructs courts how to resolve mixed-claims, duty-to-defend cases.

Again, as outlined above, the third-party intervenors or judgment creditors in *Reyna* raised at least five allegations against Reyna and his employee, Lozano, in the underlying lawsuit.⁵⁶⁵ Therefore, Texas's mixed-claims rules require courts—including the Fifth Circuit in diversity cases—to determine whether a coverage provision in a liability policy covers or potentially covers any of the allegations.⁵⁶⁶ Furthermore, Texas's law is equally clear about another matter: If tribunals have doubt about whether the factual allegations in an underlying third-party complaint state a cause of

558. *Reyna*, 401 F.3d at 351-52.

559. *King*, 85 S.W.3d at 188-89. In *King*, an insured company commenced a declaratory-judgment action against its insurer to determine whether the insurer had a duty to defend under a commercial general liability policy. *Id.* at 186. In the underlying suit, the third-party victims alleged that the company's employee intentionally assaulted the victim and that the injury arose out of the company's allegedly negligent hiring, training, and supervision of the employee. *Id.* at 187. The issue before the *King* court was whether the employer's allegedly negligent hiring, training, and supervision was an “occurrence” under the insurance contract when the employee's intentional conduct caused the injury. *Id.* at 186. The exclusion clause in the contract excluded insurance proceeds for any intentional or expected injury or damage. *Id.* at 188. The Texas Supreme Court, however, held that the exclusion clause expressly stated that whether an occurrence was an accident depends on the insured's standpoint. *Id.* Consequently, the insurer had a duty to defend. *Id.*

560. *Reyna*, 401 F.3d at 353.

561. *Id.*

562. *Id.*

563. *Id.*

564. *Id.*

565. *Id.* at 351.

566. See *supra* notes 528-29 and accompanying text.

action—within the coverage provision of a liability policy—and require the insurer to provide a legal defense, courts must resolve such doubts in favor of the insured.⁵⁶⁷ Certainly, in *Reyna*, the Fifth Circuit did not adhere to these rules. In fact, the court of appeals deviated from its own settled rules.⁵⁶⁸ And, as a consequence, the court decided undeniably and incorrectly against the insured's judgment creditors.

B. Third-Party Liability Claims: Injury to Property and Business Interests

1. Whether Under Texas's Law a Liability Insurer Has a Duty to Defend an Insured Oil and Gas Company Against Third-Party Landowners' Lawsuits After the Insured Company Allegedly Polluted the Landowners' Property

The substantive conflict in *Primrose Operating Co. v. National American Insurance Co.* also concerns whether an insurer has a duty to defend its insured against a third-party lawsuit.⁵⁶⁹ But unlike many of the Fifth Circuit's decisions, *Primrose* presents a comprehensive and intelligible analysis of the facts and legal issues. More important, the decision is based soundly upon a careful and thoughtful analysis and application of Texas's law. Even more important, the Fifth Circuit's analysis and conclusions in *Primrose* are written lucidly. Even laypersons can readily understand what appears in the decision.

The facts in *Primrose* are extremely familiar and easy to understand, especially if one owns land and leases mineral rights in Texas. The Senn family has a ranch in West Texas.⁵⁷⁰ From 1992 to 1999, Primrose Operating Company (Primrose) had a lease to drill for oil and gas on the ranch.⁵⁷¹ In 1999, CADA Operating, Inc. (CADA) acquired the lease from Primrose and began drilling on the land.⁵⁷² In September 1999, the Senns sued Primrose, CADA, and several other oil companies in a Texas court, alleging that the companies were liable for polluting the Senns' ranch.⁵⁷³ Among various causes, the Senns listed negligence, gross negligence, trespass, and nuisance in their complaint.⁵⁷⁴

567. See *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997).

568. See, e.g., *Guar. Nat'l Ins. Co. v. Azrock Indus., Inc.*, 211 F.3d 239, 243 (5th Cir. 2000) (stressing that the eight corners rule must be applied liberally in favor of the insured, with any doubts resolved in favor of the insured); *Enserch Corp. v. Shand Morahan & Co.*, 952 F.2d 1485, 1492 (5th Cir. 1992) (emphasizing that an insurer must defend if the insurance contract potentially covers any allegation in the third-party complaint).

569. *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 552 (5th Cir. Aug. 2004).

570. *Id.* at 550.

571. *Id.*

572. *Id.*

573. *Id.*

574. *Id.*

After a settlement, the Senns dismissed CADA from the underlying lawsuit.⁵⁷⁵ But, after a second trial in the state court, a jury found that Primrose negligently polluted the Senns' ranch and awarded the Senns \$2,194,000 in damages.⁵⁷⁶ When the pollution occurred, Primrose was insured under three comprehensive general liability (CGL) insurance contracts.⁵⁷⁷ The Chubb Insurance Group (Chubb) insured Primrose from April 1, 1991 until April 1, 1997.⁵⁷⁸ The Mid-Continent Casualty Company (Mid-Continent) insured Primrose from April 1, 1997 until April 1, 1999.⁵⁷⁹ Additionally, the National American Insurance Company (NAICO) covered Primrose from April 1, 1999 until Primrose transferred the lease to CADA in December 1999.⁵⁸⁰ Thereafter, from December 1999 until April 1, 2001, only NAICO insured CADA.⁵⁸¹

Shortly after the Senns filed their lawsuit, Primrose and CADA reported the pending third-party action to their respective CGL insurers and requested a legal defense.⁵⁸² Chubb and Mid-Continent agreed to defend Primrose under a reservation of rights.⁵⁸³ NAICO, however, refused to defend both Primrose and CADA.⁵⁸⁴ In March 2002, the two insured companies sued NAICO in another Texas court, because both Primrose and CADA were "citizens of Texas with their principal places of business in Texas."⁵⁸⁵ In the insured companies' complaint, they alleged that NAICO breached a contractual duty when the insurer refused to defend the companies against the Senns' various claims and actions.⁵⁸⁶

Of course, NAICO is a foreign insurance corporation, whose principal place of business is in Oklahoma.⁵⁸⁷ Therefore, alleging complete diversity, the liability insurer removed the duty-to-defend case to the United States District Court for the Northern District of Texas.⁵⁸⁸ In that court, the litigants

575. *Id.* at 551 (On the other hand, "[a]t the time the Senn litigation went to trial in October 2001, a number of the other defendant oil companies . . . had been dismissed.").

576. *Id.* ("Primrose has appealed this judgment.").

577. *Id.* at 550.

578. *Id.*

579. *Id.*

580. *Id.*

581. *Id.*

582. *Id.* at 551.

583. *Id.* at 550; *see also* Farmers Tex. County Mut. Ins. Co. v. Wilkinson, 601 S.W.2d 520, 522 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.). A reservation of rights means that the insured and insurer agrees—prior to a determination of the insured's liability in an underlying lawsuit—"to suspend the operation of the doctrines of waiver and estoppel. When coverage is in doubt, an insurer defending the insured under such an agreement, reserves to itself all of its policy defenses in case the insured is subsequently found liable." *Wilkinson*, 601 S.W.2d at 522.

584. *Primrose*, 382 F.3d at 551.

585. *Id.*

586. *Id.* In addition, Primrose and CADA alleged that NAICO violated, presumably, article 21.21 of the Texas Insurance Code and Texas's Deceptive Trade Practices Act. *Id.*

587. *Id.*

588. *Id.*

posited their arguments before a jury, and after the close of all evidence, both the insured companies and NAICO petitioned the district court for a judgment as a matter of law.⁵⁸⁹ The district court completely denied Primrose's and CADA's motions.⁵⁹⁰ The lower court, however, partially granted NAICO's motion.⁵⁹¹ Ultimately, the jury awarded damages for NAICO's breach of contract, as allowed under article 21.55⁵⁹² of the Texas Insurance Code.⁵⁹³

NAICO timely filed an appeal asserting that the district court erroneously denied its motion for judgment as a matter of law and refused to alter or amend the judgment.⁵⁹⁴ To determine whether NAICO's petition was meritorious, the Court of Appeals for the Fifth Circuit performed an eight corners analysis to assess whether the insurer had a duty to defend Primrose and CADA during the Senns' trial.⁵⁹⁵ Again, Texas's eight corners rule is not complicated: A court must compare the allegations against an insured—those appearing in an underlying third-party complaint—with the coverage provision in a liability insurance policy.⁵⁹⁶ If the insurance policy potentially covers any allegation outlined in the complaint, the insurer has a duty to defend.⁵⁹⁷

589. See *Pineda v. United Parcel Serv., Inc.*, 360 F.3d 483, 486 (5th Cir. 2004). A motion for judgment as a matter of law should be granted if “there is no legally sufficient evidentiary basis for a reasonable jury to find for a party.” *Id.* (quoting FED. R. CIV. P. 50(a)). “[I]f reasonable persons could differ in their interpretations of the evidence, then the motion should be denied.” *Id.* (quoting *Thomas v. Tex. Dep’t of Criminal Justice*, 220 F.3d 389, 392 (5th Cir. 2000)). “A post-judgment motion for judgment as a matter of law should only be granted when the ‘facts and inferences point so strongly in favor of the movant that a rational jury could not reach a contrary verdict.’” *Id.* (quoting *Thomas*, 220 F.3d at 392 (quoting *Waymire v. Harris County, Tex.*, 86 F.3d 424, 427 (5th Cir. 1996))).

590. *Primrose*, 382 F.3d at 551.

591. *Id.* The district court concluded that Primrose and CADA failed “to offer any evidence to support their DTPA claims” and that CADA failed “to present sufficient evidence supporting its claims under the Texas Insurance Code.” *Id.*

592. The prior statute was Texas Insurance Code, article 21.55, section 6. TEX. INS. CODE ANN. art 21.55, *repealed by* Act of Apr. 1, 2003, 78th Leg., R.S., ch. 1274, § 26(a)(1), 2003 Tex. Gen. Laws 3000, 4138. The present statute is Texas Insurance Code, section 542.060, which states:

- a) If an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable attorney's fees.
- b) If a suit is filed, the attorney's fees shall be taxed as part of the costs in the case.

TEX. INS. CODE ANN. § 542.060 (Vernon 2005).

593. *Primrose*, 382 F.3d at 551.

NAICO filed a motion for judgment as a matter of law and an alternative motion for a new trial, both of which were denied by the district court. After the district court entered judgment for [Primrose and CADA], NAICO filed a motion to alter or amend the judgment, arguing that the district court miscalculated prejudgment interest and the statutory penalty under Article 21.55 [of the Texas Insurance Code]. NAICO also renewed its motion for judgment as a matter of law and for a new trial. The district court also denied these motions.

Id.

594. *Id.*

595. *Id.* at 552.

596. See *Potomac Ins. Co. of Ill. v. Jayhawk Med. Acceptance Corp.*, 198 F.3d 548, 551 (5th Cir. 2000).

597. *Enserch Corp. v. Shand Morahan & Co.*, 952 F.2d 1485, 1492 (5th Cir. 1992).

The Fifth Circuit carefully sifted through the facts, discovering the following relevant bits of information. First, Primrose and CADA argued, and NAICO conceded, that the respective CGL policies covered the Senns' allegations.⁵⁹⁸ Put simply, the Senns claimed that the two licensees and others severely polluted the groundwater on the ranch as well as the surface and subsurface of the land.⁵⁹⁹ Second, NAICO stressed that the identical pollution-exclusion clauses in the CGL policies excluded the Senns' allegations.⁶⁰⁰

To determine whether facts supported the insurer's argument, the Fifth Circuit examined the pollution-exclusion clause.⁶⁰¹ That provision excluded coverage for the following:

"f. Pollution

(1) 'Bodily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, see page, migration, release or escape of pollutants:

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;

...

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:

...

(2) Any loss, cost or expense arising out of any:

(a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants[.]⁶⁰²

NAICO asserted that section f(1)(a) excluded the underlying claims because Primrose and CADA "occupied" land where the pollution occurred.⁶⁰³ Certainly, the insured companies agreed that—without knowing more—the pollution-exclusion clause barred coverage. But Primrose and CADA stressed

598. *Primrose*, 382 F.3d at 553.

599. *Id.* at 552.

[T]he operative pleading for purposes of our analysis is the Senns' Fourth Amended Original Petition, in which the Senns alleged that Primrose and CADA, along with several other oil companies, polluted their ranch through releases of saltwater, oil, and other fluids. Specifically, the Senns contended that these releases contaminated the surface, subsurface, and groundwater of their ranch.

Id.

600. *Id.* at 553 & n.5.

601. *Id.* at 553.

602. *Id.* (quoting pollution-exclusion clause) (omissions and alteration in original).

603. *Id.*

the following: (1) They purchased a "pollution endorsement," and (2) under that endorsement, the insurer agreed to cover pollution-contamination claims if the insureds satisfied six conditions.⁶⁰⁴ Of course, NAICO argued before the district court and on appeal that it had no duty to defend because the companies breached several conditions.⁶⁰⁵

More specifically, one part of a multi-pronged condition required the pollution to be "sudden and accidental."⁶⁰⁶ Another awkwardly stated prong required the contamination to be "neither expected nor intended by any insured."⁶⁰⁷ NAICO maintained that the companies "expected" the types of pollution and corollary losses appearing in the Senns' complaint.⁶⁰⁸ Furthermore, the insurer argued that the pollution was "neither sudden nor accidental."⁶⁰⁹ To decide whether the insurer's argument was sound, the Fifth Circuit reviewed Texas's law, which is only marginally clear about the meaning of these terms.⁶¹⁰

In Texas, "accidental" means an unforeseen and unexpected event,⁶¹¹ and "sudden" means an abrupt or brief event.⁶¹² Therefore, the "sudden and accidental" requirement unambiguously excludes coverage for all "pollution

604. *Id.* (According to the companies, "the Pollution Exclusion precludes NAICO's duty to defend, only if one of . . . six conditions [was] not met.")

605. *Id.*

606. *Id.* at 554.

607. *Id.*

608. *Id.*

609. *Id.*

610. *See Gulf Metals Indus., Inc. v. Chicago Ins. Co.*, 993 S.W.2d 800, 805 (Tex. App.—Austin 1999, pet. denied). That court stated as follows:

[In] *Mustang Tractor*[, the Fifth Circuit] applied Texas law in interpreting the pollution-exclusion clause of a general liability policy almost identical to the clause here. The [Fifth Circuit], after applying Texas rules of contractual construction, reached an opposite conclusion to that urged by Gulf Metals when analyzing "sudden" as joined with "accidental" to form the phrase "sudden and accidental." The court reasoned that the use of both words *together* reflected two *separate* requirements. Because "accidental" describes an unforeseen or unexpected event, to ascribe the same meaning to "sudden" would render the terms redundant and violate the rule that each word in a contract be given effect. The court stated that "sudden" therefore must contain a temporal element meaning abrupt or brief.

Id. (citing *Mustang Tractor & Equip. Co. v. Liberty Mut. Ins. Co.*, 76 F.3d 89 (5th Cir. 1996)); *see also N. Ins. Co. v. Aardvark Assocs., Inc.*, 942 F.2d 189, 192-93 (3d Cir. 1991).

"The very use of the words 'sudden *and* accidental' . . . reveal a clear intent to define the words differently, stating two separate requirements. Reading 'sudden' in its context, i.e., joined by the word 'and' to the word 'accident,' the inescapable conclusion is that 'sudden,' even if including the concept of unexpectedness, also adds [an] additional element because 'unexpectedness' is already expressed by 'accident.' This additional element is the temporal meaning of sudden, i.e. abruptness or brevity. To define sudden as meaning only unexpected or unintended, and therefore as a mere restatement of accidental, would render the suddenness requirement mere surplusage."

Gulf Metals, 993 S.W.2d at 805 (quoting *Mustang Tractor*, 76 F.3d at 92).

611. *Gulf Metals*, 993 S.W.2d at 805.

612. *See Pioneer Chlor Alkali v. Royal Indem. Co.*, 879 S.W.2d 920, 937 (Tex. App.—Houston [14th Dist.] 1994, no writ).

that is not released quickly as well as unexpectedly and unintentionally.”⁶¹³ After carefully examining the underlying complaint, the Fifth Circuit correctly observed that the Senns did not allege that Primrose and CADA *expected* the pollution.⁶¹⁴ Instead, the third-party complainants alleged that the companies were *negligent*, thereby causing potentially permanent groundwater contamination and other environmental damage.⁶¹⁵

Furthermore, from the court of appeals’s viewpoint, “[n]ot expecting a particular incident to occur and an accidental occurrence are completely consistent with a claim of negligence,”⁶¹⁶ thereby allowing the companies to satisfy the first multi-prong condition.⁶¹⁷ And because an unexpected and accidental pollution incident could have caused at least one of the Senns’ negligence allegations, NACIO had a duty to cover the resulting losses.⁶¹⁸ Moreover, a “prior incidents” condition in the pollution endorsement inelegantly stated: A loss could “‘not [be] caused or contributed to . . . by any pollution incident that commenced prior to the beginning of the policy period.’”⁶¹⁹ In the underlying third-party pleadings, the Senns listed Primrose and CADA as joint defendants and alleged that the two committed an assortment of negligent acts.⁶²⁰ But the complaint did not identify the companies’ respective acts. The Senns simply alleged that “‘acts of negligence . . . produced an indivisible injury to [their] property.’”⁶²¹

In light of an “indivisible injury,” NAICO argued that since Primrose and CADA’s respective negligent acts occurred before and after the insurer began to cover CADA and Primrose, a pollution incident commenced before the beginning of the respective policy periods.⁶²² Therefore, given those “prior acts,” the insurer insisted that the companies breached a condition, which extinguished NAICO’s duty to defend the insureds in the underlying action.⁶²³

613. *Guar. Nat’l Ins. Co. v. Vic Mfg. Co.*, 143 F.3d 192, 193-94 (5th Cir. 1998) (quoting *Mustang Tractor*, 76 F.3d at 93).

614. *See Primrose*, 382 F.3d at 554.

615. *See id.*

616. *Id.*

617. *Id.*

618. *Id.*; *see also* *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 828 (Tex. 1997) (reaffirming that “an ‘accident’ includes the ‘negligent acts of the insured causing damage which is undesigned and unexpected’” (quoting *Mass. Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396, 400 (Tex. 1967))); *Hallman v. Allstate Ins. Co.*, 114 S.W.3d 656, 661 (Tex. App.—Dallas 2003), *rev’d on other grounds*, 159 S.W.3d 640 (Tex. 2005) (embracing the view that “there is an accident when the action is intentionally taken but is performed negligently and the effect is not what would have been intended or expected had the deliberate action been performed non-negligently”); *Harken Exploration Co. v. Sphere Drake Ins. P.L.C.*, 261 F.3d 466, 472 (5th Cir. 2001) (adopting the same principle).

619. *Primrose*, 382 F.3d at 556 (quoting “condition d” of the pollution-exclusion clause).

620. *Id.*

621. *Id.* (quoting Senns’ complaint).

622. *Id.*

623. *Id.*

Of course, the Fifth Circuit found that argument unpersuasive.⁶²⁴ The court of appeals observed that “NAICO fail[ed] to distinguish [clearly] among the alleged negligent acts, the resulting pollution incidents, and the injury arising from the pollution incidents.”⁶²⁵ The third-party complaint “state[d] that . . . ‘acts of negligence . . . produced an indivisible injury’ [and] not that . . . negligent acts or . . . pollution incidents [were] indivisible.”⁶²⁶ Therefore, the Fifth Circuit concluded that Primrose’s and CADA’s respective negligent acts—during the respective policy periods—could have produced a completely indivisible pollution incident.⁶²⁷

The final pertinent condition in the endorsement stated that a “‘failure to comply with any government statute, rule, regulation, or order’” must not contribute to or be the cause of a pollution incident.⁶²⁸ In their underlying complaint, the Senns stated that Texas’s laws require companies to clean up any spills.⁶²⁹ The complaint also stated that Primrose and CADA failed to clean up the spills that produced the injuries.⁶³⁰ Therefore, citing the language in the complaint, NAICO argued that the companies’ failure to comply with Texas law contributed to the alleged pollution.⁶³¹

The Fifth Circuit dismissed this latter argument, concluding that it was meritless.⁶³² The court noted that “the Senns’ negligence [claims were] completely independent of any allegation of statutory or regulatory noncompliance.”⁶³³ In the end, the Court of Appeals for the Fifth Circuit affirmed the district court’s ruling and declared that NAICO had a contractual duty to defend Primrose and CADA in the underlying lawsuit.⁶³⁴

624. *See id.*

625. *Id.*

626. *Id.* at 557 (quoting third-party complaint).

627. *Id.* at 557 & n.9.

For instance, the Senns allege that [Primrose and CADA’s] negligence caused groundwater contamination. As [Primrose and CADA’s] have occupied the same land, but at different times, groundwater damage is likely an indivisible injury[;] it may be difficult to identify what portion of the injury came from which [company]. Yet, the pollution incidents causing the damage would be wholly independent of each other.

Id. at 557 n.9.

628. *Id.* at 557 (quoting “condition f” of the pollution-exclusion clause).

629. *Id.*

630. *Id.*

631. *Id.*

632. *Id.*

633. *Id.*

634. *Id.* at 566.

2. *Whether Under Louisiana's Law a Commercial General Liability Insurer Has a Duty to Defend and Indemnify After a Third-Party Business Sued the Contractor for Allegedly Interfering with the Third Party's Contractual Relationships with Others*

The legal questions in *Lamar Advertising Co. v. Continental Casualty Co.* were whether the insurer had a duty to defend as well as a duty to indemnify its insured, Lamar Advertising Company.⁶³⁵ Among other services, Lamar sells advertising displays to municipalities for the latter's billboards, buses, bus shelters, and benches throughout the United States.⁶³⁶ Between January 1999 and January 2002, Lamar wanted to expand its advertising business; therefore, the company purchased two companies—Triumph Outdoor Holdings, L.L.C. (Triumph), and Transit America Las Vegas, L.L.C. (Transit).⁶³⁷

Shortly after Lamar purchased Triumph and Transit, RAL Construction Company sued Lamar's "predecessors in interest" as well as Lamar in the United States District Court for the Southern District of California.⁶³⁸ "[T]he California suit arose as a result of a *contract* dispute between RAL and Lamar's predecessors in interest."⁶³⁹ Under an agreement entitled the Transit Shelter Maintenance and Construction Agreement (Agreement), RAL was the exclusive provider of maintenance and construction services for Triumph and Transit's bus shelters.⁶⁴⁰ The duration of the contract was for a period of "no less than ten years."⁶⁴¹

Lamar purchased Triumph and Transit before the Agreement expired, and shortly thereafter, Lamar breached the Agreement and stopped using RAL's services.⁶⁴² In addition, Lamar formed new contracts with municipalities and decided not to purchase RAL's services for those jobs.⁶⁴³ Claiming a breach of contract, RAL commenced a lawsuit.⁶⁴⁴ The original complaint only sought breach-of-contract damages.⁶⁴⁵ RAL did not assert any tort-based actions or claims.⁶⁴⁶

635. *Lamar Adver. Co. v. Cont'l Cas. Co.*, 396 F.3d 654 (5th Cir. Jan. 2005).

636. *See* Lamar Advertising Company, <http://www.lamaroutdoor.com/main/products> (last visited Feb. 17, 2006).

637. *Lamar*, 396 F.3d at 657.

638. *Id.* at 656. The California suit or underlying suit was "a suit styled *RAL Construction v. Lamar Advertising Co. et al.*" *Id.* at 657.

639. *Id.* at 657.

640. *Id.*

641. *Id.*

642. *Id.*

643. *Id.*

644. *Id.*

645. *Id.*

646. *Id.*

However, less than a year after filing the original complaint, RAL filed a second amended complaint that contained additional claims.⁶⁴⁷ More specifically, along with the breach-of-contract action, RAL's amended complaint outlined two tort-based causes against Lamar: (1) an action for the interference with contractual relations, and (2) an action for the negligent interference with prospective advantage.⁶⁴⁸ Ultimately, Lamar and RAL settled the California suit, but Lamar incurred over \$1.8 million dollars in defense costs and settlement payments.⁶⁴⁹

In 1999, Lamar purchased a comprehensive general liability (CGL) policy from Continental Casualty Company.⁶⁵⁰ The insurance contract commenced January 1, 1999 and terminated January 1, 2002.⁶⁵¹ Two pertinent coverage provisions appeared in the CGL contract.⁶⁵² Under Coverage A, "Continental agreed 'to pay those sums that the insured becomes legally obligated to pay as damages [because of] property damage.'"⁶⁵³ And "[u]nder Coverage B, "Continental agree[d] 'to pay those sums that the insured becomes legally obligated to pay as damages because of 'personal injury.'"⁶⁵⁴

During the policy period, Lamar sent two letters and copies of the original and amended complaints to Continental.⁶⁵⁵ In one of the letters, Lamar asked Continental to pay the cost of defending against RAL's lawsuit and to make reimbursements for the cost of settling the underlying lawsuit.⁶⁵⁶ The insurer refused to reimburse Lamar's expenditures for defending itself and for settling the case.⁶⁵⁷ To determine whether Continental had a duty to defend as well as a duty to indemnify, Lamar filed suit against Continental in a Louisiana court.⁶⁵⁸ Continental removed the suit to a federal district court in Louisiana,

647. *Id.* at 657. "RAL filed a first amended complaint, but only named additional defendants; the substantive assertions merely re-alleged the breach of contract claim." *Id.*

648. *Id.*

649. *Id.* at 656.

650. *Id.*

651. *Id.*

652. *See id.*

653. *Id.* at 657 (quoting general liability policy) (alteration in original). The policy defined "property damage" in two ways: "(1) 'Physical injury to tangible property, including all resulting loss of use of that property . . .'; and (2) '[l]oss of use of tangible property that is not physically injured.'" *Id.* at 658 n.3 (quoting general liability policy) (alteration and omission in original).

654. *Id.* at 658 (quoting general liability policy). The policy defined "personal injury" as follows: "Personal injury" means injury, other than "bodily injury," arising out of one or more of the following offenses:

...

d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services. . . .

Id. at 658 n.4 (quoting general liability policy) (omissions in original).

655. *Id.* at 657-58.

656. *Id.* at 658.

657. *Id.*

658. *Id.*

claiming diversity of citizenship.⁶⁵⁹

Lamar and Continental filed motions for summary judgment.⁶⁶⁰ In its motion, Lamar cited the CGL contract's two coverage provisions and RAL's property-damage and personal-injury allegations in the second amended complaint as being sufficient to establish Continental's duty to defend and indemnify.⁶⁶¹ Specifically, in the underlying complaint, RAL asserted that Lamar knew RAL had a "prior contractual relationship with Triumph and Transit."⁶⁶² Yet, Lamar interfered with that relationship by persuading Triumph and Transit to terminate their contractual relationship with RAL.⁶⁶³ RAL also asserted that Lamar negligently caused Triumph and Transit to terminate their relationship with RAL (1) by inappropriately soliciting and hiring RAL's employees and (2) by causing RAL's employees to disfavor employment with RAL.⁶⁶⁴

After considering both parties' summary judgment motions and examining Louisiana's law, the federal district judge ruled in favor of Continental.⁶⁶⁵ Lamar appealed its adverse ruling to the Fifth Circuit.⁶⁶⁶

Like Texas, Louisiana has embraced the eight corners rule to determine whether an insurer has a duty to defend its insureds against third-party lawsuits.⁶⁶⁷ In Louisiana, an insurer must defend if an unambiguous coverage provision covers the claims outlined by an underlying third party.⁶⁶⁸ In light of this rule, the court of appeals carefully reviewed the underlying facts and the two coverage clauses.⁶⁶⁹ Lamar acknowledged that under Coverage A, Continental was not liable for consequential economic damages if Lamar could not establish that RAL's property experienced some physical injury.⁶⁷⁰ But Lamar insisted that RAL's employees were considered property under the CGL insurance contract.⁶⁷¹ Therefore, Lamar's alleged interference with those contractual relations was a covered tort under the contract, which required Continental to provide a legal defense.⁶⁷² The Fifth Circuit, however, after

659. *Id.*

660. *Id.*

661. *Id.*

662. *Id.*

663. *Id.*

664. *Id.*

665. *Id.*

666. *Id.*

667. *See Am. Home Assurance Co. v. Czarniecki*, 230 So. 2d 253, 259 (La. 1969) (concluding an "insurer's duty to defend suits brought against its insured is determined by the allegations of the injured plaintiff's petition, with the insurer being obligated to furnish a defense unless the petition unambiguously excludes coverage").

668. *See Cont'l Cas. Co. v. Smith*, 243 F. Supp. 2d 576, 580 (E.D. La. 2003) (applying Louisiana's law).

669. *Lamar*, 396 F.3d at 660-65.

670. *Id.* at 660.

671. *Id.*

672. *Id.*

thoroughly and intelligently considering the case law, flatly rejected Lamar's assertion that RAL's employees were property.⁶⁷³ The Fifth Circuit dismissed Lamar's first argument.⁶⁷⁴

As stated earlier, RAL also alleged that Lamar negligently interfered with RAL's prospective advantage.⁶⁷⁵ Therefore, according to Lamar, that negligence claim fell squarely under Coverage B—within the scope of the personal injury clause.⁶⁷⁶ But curiously and quite surprisingly, the Fifth Circuit did not address the negligence issue.⁶⁷⁷ Instead, the court of appeals fashioned Lamar's argument as follows:

Lamar contends that RAL asserted a claim for disparagement against Lamar which was covered under Coverage B. Lamar points to RAL's allegation in the second amended complaint stating that Lamar "wrongfully and *intentionally* advised, counseled, persuaded, and otherwise induced [Lamar's predecessors-in-interest] to terminate . . . their contractual agreement with RAL."⁶⁷⁸

Then, the appellate court proceeded to discuss—ad nauseam—Louisiana's defamation, disparagement, and libel laws.⁶⁷⁹ Ultimately, the Fifth

673. *Id.* at 660-63 & n.6 ("Lamar has cited no controlling case authority . . . [I]t merely points to four cases it contends are analogous to the facts pleaded in the second amended complaint. We find three of these cases inapposite, and the fourth case inapplicable on other grounds."); see *Borden, Inc. v. Howard Trucking Co.*, 454 So. 2d 1081, 1082-83 (La. 1983) (finding that a compressor was equipment rather than a person and that the compressor was physically damaged); *Nelson v. Want Ads of Shreveport, Inc.*, No. 31168-CA (La. App. 2 Cir. 10/30/98); 720 So. 2d 1280, 1282-83 (finding that coupons were tangible property and that the insured had alleged facts sufficient to raise a claim for misappropriation or conversion—sufficient to trigger coverage under the policy's definition of property); *Dietrich v. Travelers Ins. Co.*, 551 So. 2d 64, 65-67 (La. Ct. App. 1989) (concluding that the right to the benefit was intangible property, but the employee's actual benefit was tangible property; and remanding the case to the trial court to determine whether a breach of contract or obligation, or a tort conduct—as defined under the insurance contract—caused the employee's loss); *Williamson v. Historic Hurstville Ass'n*, 556 So. 2d 103, 107 & n.2 (La. Ct. App. 1990). In *Williamson*, the court held that injury to reputation and loss of profitability constitutes damages to tangible property within the meaning of a homeowner's policy, which "defin[ed] 'property damage' as 'physical injury to or destruction of tangible property including loss of its use.'" *Id.* The court, however, employed Webster's Dictionary to define tangible rather than using the Louisiana Supreme Court's or the Louisiana Civil Code's definition to decide whether tangible property is corporeal property. *Id.* at 107 n.2.

674. *Lamar*, 396 F.3d at 663.

675. *Id.* at 657.

676. *Id.* at 663.

677. *See id.* at 663-65.

678. *Id.* at 663 (emphasis added).

679. *See id.* at 664. The court stated:

Although Louisiana does not recognize disparagement as an independent tort, other jurisdictions define disparagement as the "[d]efamation of the quality of goods or services," a standard that is consistent with the language under Coverage B of Continental's policy. "An action for defamation in Louisiana requires the plaintiff to plead and prove: (1) defamatory words, (2) publication, (3) falsity, (4) malice, and (5) resulting injury." . . . Lamar cites no case in support of the proposition that a disparagement claim may be "gleaned" from the face of a complaint that contains no specific reference to defamatory words, falsity, malice, or publication

Circuit found that Lamar's second argument did not "pass muster because the factual allegations in RAL's second amended complaint [did] not state a cause of action for disparagement."⁶⁸⁰ Therefore, the Fifth Circuit concluded that the federal district court's rulings were sound⁶⁸¹ and that Continental had no duty to defend⁶⁸² and no duty to indemnify.⁶⁸³ Clearly, the Fifth Circuit knows the legal distinction between negligence-based and intentional torts and claims. Upon careful review, the court's legal analysis in the latter part of *Lamar* seriously undermines that prevailing view.

IV. A BRIEF STATISTICAL OVERVIEW: FIFTH CIRCUIT'S 2004-2005 INSURANCE DECISIONS

On other occasions, this Author presented brief statistical overviews and dispositions of the Fifth Circuit Court of Appeals's insurance decisions.⁶⁸⁴ Those exercises proved revealing to both jurists and empiricists who sample judicial decisions and look for trends as well as meaningful relationships among legal and extralegal variables.⁶⁸⁵

to a third party. Although Louisiana case law requires a liberal interpretation of RAL's claims, courts will not read into a complaint an allegation of defamation that has not been made.

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

680. *Id.* at 664. "RAL's complaint made no specific allegation of any disparaging or defamatory oral or written publication by Lamar." *Id.* at 663.

681. *Id.* at 666 ("For the foregoing reasons, the district court's grant of summary judgment and final judgment in favor of Continental, dismissing Lamar's complaint, are hereby AFFIRMED.").

682. *Id.* at 665 ("Accordingly, we find [after plainly reading] the policy's terms, Coverage B's definition of 'personal injury' does not encompass RAL's claims for breach of contract, tortious interference with a contract, or wrongful solicitation and hiring of RAL's workforce, even under the most liberal construction of RAL's pleadings.").

683. *Id.* at 665-66. The court stated the following:

Lamar also contends that . . . genuine issues of material fact [exist] concerning Continental's obligation to indemnify it which preclude the district court's grant of the motion for summary judgment. In support of this position, Lamar contends that the district court failed to consider certain excerpts of deposition testimony proffered by Lamar which, according to Lamar, "at a minimum" create a genuine factual dispute about whether "RAL was actually disparaged, or its employees were actually raided, . . . and whether these actions . . . caused property damage and/or personal injury." Continental counters that because an insurer's duty to defend is broader than its duty to indemnify, the district court's ruling that it owed no duty to defend Lamar is dispositive of Lamar's indemnification claim. . . . Even assuming that consideration of extrinsic evidence to determine coverage liability is proper in the absence of an ambiguity in the policy's terms, these excerpts do not support Lamar's argument. As Continental correctly points out, Lamar has not identified the relationships of each deponent to the parties in this litigation. Moreover, it is impossible to discern whether some of them were RAL employees, Lamar employees, or unrelated to those companies. . . . Lamar's contention that there exists a genuine issue of material fact [regarding whether] Continental [has an] obligation to indemnify it is therefore without merit. We, accordingly, affirm the district court's grant of the summary judgment motion in favor of Continental.

Id.

684. See Willy E. Rice, *Insurance Decisions—A Survey and An Empirical Analysis*, 35 TEX. TECH L. REV. 947, 1026-34 (2004); see also Rice, *supra* note 3, at 1017-29.

685. See Rice, *supra* note 684, at 1026-34; Rice, *supra* note 3, at 1017-29.

But, like before, this Part does not present an extensive statistical review of the Fifth Circuit's 2004-2005 insurance decisions. Put simply, the Court of Appeals for the Fifth Circuit decided only twenty-four cases.⁶⁸⁶ That small number of cases does not allow one to conduct a more sophisticated statistical examination to reveal the causal connection between the insureds' and insurers' win-loss ratio and various legal and extralegal variables.

But a review of simple descriptive statistics—frequencies and percentages—often reveals noteworthy or unanticipated patterns or both in judicial opinions. Therefore, given those potential positive benefits, this Author performed a content analysis of the twenty-four cases and reported a series of simple descriptive statistics in three tables.⁶⁸⁷

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 2004-2005.⁶⁸⁸

686. See cases cited *supra* note 1.

687. See Tables A-C, *infra* notes 689, 698, 715.

688. See Table A, *infra* note 689.

TABLE A. SOME SELECTED DEMOGRAPHIC CHARACTERISTICS OF INSURANCE-LAW LITIGANTS WHO PETITIONED THE FIFTH CIRCUIT COURT OF APPEALS FOR REVIEW—2004-2005⁶⁸⁹

Demographic Characteristics	Frequencies (N = 24)	Percentages (100.0)
States Where Cases Originated:		
Louisiana	6	25.0
Mississippi	3	12.5
Texas	15	62.5
Federal Districts Where Cases Originated:		
Louisiana-Eastern District	2	8.3
Louisiana-Middle District	2	8.3
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	5	20.8
Texas-Southern District	8	33.3
Texas-Western District	1	4.2
Types of Plaintiffs:		
Insured Individuals	15	62.5
Primary Insurers	2	8.3
Excess Insurers	2	8.3
Insured Corporations	4	16.7
Estate	1	4.2
Types of Insurance Contracts		
Comprehensive General Liability	10	41.7
Property	3	12.5
Automobile	3	12.5
Health/HMO	2	8.3
Homeowners	3	12.5
Life	2	8.3
Officers & Directors	1	4.2

689. Willy E. Rice, TABLE A. SOME SELECTED DEMOGRAPHIC CHARACTERISTICS OF INSURANCE-LAW LITIGANTS WHO PETITIONED THE FIFTH CIRCUIT COURT OF APPEALS FOR REVIEW—2004-2005 (2006) [hereinafter Table A].

Types of Insurance Complaints:

First-Party Complaints	19	79.2
Third-Party Complaints	5	20.8

Nearly sixty-three percent (62.5%) of the cases originated in Texas, and the remainder originated in Mississippi and Louisiana—12.5% and 25.0%, respectively.⁶⁹⁰ But nearly sixty-seven percent (66.6%) of various actions began in three federal district courts—the Southern District Court of Mississippi (12.5%), the Northern District Court of Texas (20.8%), and the Southern District Court of Texas (33.3%).⁶⁹¹

While a variety of persons petitioned the Fifth Circuit for declaratory and summary relief, the overwhelming majority were insured individuals (62.5%) and insured corporations (16.7%).⁶⁹² Furthermore, the overwhelming majority of petitions involved first-party complaints—79.2%.⁶⁹³ And while an equal number of disputes involved automobile, property, and homeowners' insurance contracts—12.5% respectively—disputes involving comprehensive general liability insurance contracts comprised nearly forty-two percent (41.7%) of the cases.⁶⁹⁴

Table B presents frequencies and percentages for a number of legal variables.⁶⁹⁵ During the 2004-2005 session, class-action suits comprised less than five percent (4.0%) of the cases.⁶⁹⁶ Overwhelmingly, the greater majority of cases were individual actions—96.0%.⁶⁹⁷

690. *Id.*

691. *Id.*

692. *Id.*

693. *Id.*

694. *Id.*

695. See Table B, *infra* note 698.

696. *Id.*

697. *Id.*

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—2004-2005⁶⁹⁸

Theories of Recovery, Remedies & Outcomes	Frequencies (N = 24)	Percentages (100.0)
Types of Actions:		
Individual Actions	23	96.0
Class Actions	1	4.0
†Petitioners' Legal Theories (Causes):		
Breach of Contract	17	70.8
Declaratory Judgment	13	54.2
Negligence/Bad-Faith	5	20.8
Fraud	3	12.5
Equitable Subrogation	1	4.2
Unfair Business Practices	2	8.3
†Remedies Sought:		
Declaratory Relief	13	54.2
Actual Damages	7	29.2
Legal Defense	7	29.2
Indemnification	10	41.6
Grounds for Disposing Cases in Federal District Courts:		
On the Merits	15	62.5
Procedurally	9	37.5
Disposition of Cases in Federal District Courts:		
Plaintiffs/Insureds Won	9	37.5
Defendants/Insurers Won	15	62.5
Disposition of Cases in the Fifth Circuit Court:		
Plaintiffs/Insureds Won	10	41.7
Defendants/Insurers Won	14	58.3

698. Willy E. Rice, THEORIES OF RECOVERY, REMEDIES, AND THE DISPOSITION OF INSURANCE-LAW ACTIONS IN FEDERAL DISTRICT COURTS AND IN THE FIFTH CIRCUIT COURT OF APPEALS—2004-2005 (2006) [hereinafter Table B].

Litigants' Success-Failure Rate Before the
Fifth Circuit:

Affirmed for Insurers/Defendants	9	37.5
Affirmed for Insureds/Plaintiffs	3	12.5
Reversed Against Insureds/Plaintiffs	4	16.7
Reversed Against Insurers/Defendants	5	20.8
Affirmed & Reversed in Part	3	12.5

† Multiple causes of action appeared in several cases; therefore, the reported percentages can exceed one-hundred percent.

Second, the insureds and insurance companies petitioned the Fifth Circuit and the federal district courts for a variety of remedies under an array of recovery theories.⁶⁹⁹ Plaintiffs-insureds commenced breach-of-contract actions in nearly seventy-one percent (70.8%) of the cases; and, about forty-two percent (41.6%) filed tort-based actions—negligence, bad faith, fraud, and unfair practices—against various insurers.⁷⁰⁰ But in fifty-four percent (54.2%) of the lawsuits, insurance companies and consumers initiated declaratory-judgment actions, asking the courts for declaratory relief under a variety of insurance contracts.⁷⁰¹

Litigants petitioned the Fifth Circuit for a variety of remedies. Once more, in about fifty-four percent (54.2%) of the cases, insureds and insurers asked the court of appeals for declaratory relief.⁷⁰² In nearly thirty-percent (29.2%) and forty-two percent (41.6%) of cases, respectively, insureds asked the Fifth Circuit to declare that insurers had a duty to defend and indemnify insureds.⁷⁰³ Additionally, in nearly thirty percent (29.2%) of the cases, the complainants asked the Fifth Circuit to award actual damages.⁷⁰⁴

What were plaintiffs-insureds' and defendants-insurers' success-failure ratios in the district courts and in the Fifth Circuit Court of Appeals? The reported percentages reveal that the federal courts were *substantially more likely to rule against plaintiffs-insureds*.⁷⁰⁵ More specifically, the federal district courts *decided in favor of the defendants-insurers* an astounding sixty-three percent (62.5%) of the time.⁷⁰⁶ But on appeal, that percentage decreased only slightly. The Fifth Circuit *decided in favor of the defendants-insurers* nearly fifty-eight percent (58.3%) of the time.⁷⁰⁷ These 2004-2005 win-loss

699. *Id.*

700. *Id.*

701. *Id.*

702. *Id.*

703. *Id.*

704. *Id.*

705. *See id.*

706. *Id.*

707. *Id.*

percentages and outcomes are very similar to 2002-2003 and 2003-2004 reported findings.⁷⁰⁸

The last displayed percentages in Table B represent a breakdown of the litigants' success-failure ratio before the Fifth Circuit.⁷⁰⁹ Those percentages provide some added information about plaintiffs-insureds' and defendants-insurers' likelihood of prevailing on appeal. First, the Fifth Circuit *affirmed* thirty-eight percent (37.5%) of the federal district courts' decisions in favor of the insurers and *reversed* in favor of the insurers seventeen percent (16.7%) of the district courts' pro-insureds decisions.⁷¹⁰ On the other hand, the Fifth Circuit *affirmed* just thirteen percent (12.5%) of the district courts' pro-insured decisions, while *reversing* twenty-one percent (20.8%) of the district courts' pro-insurer decisions.⁷¹¹ These findings support what other judicial studies consistently uncover: On average, federal courts of appeals have a higher propensity to decide in favor of defendants than in favor of plaintiffs.⁷¹²

Finally, Table C illustrates and compares the dispositions of the insurance cases among the federal district courts and in the Fifth Circuit Court of Appeals.⁷¹³ The reported percentages show the relationships between a few selected background variables and the litigants' likelihood of success.⁷¹⁴

708. See Rice, *supra* note 684, at 1027 n.793; Rice, *supra* note 3, at 1022-23.

709. See Table B, *supra* note 698.

710. *Id.*

711. *Id.*

712. See Rice, *supra* note 684, at 1026 nn.787-89 and accompanying text.

713. See Table C, *infra* note 715.

714. *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—2004-2005⁷¹⁵

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	36.8	63.2	(N=19)	42.1	57.9	(N=19)
Third-Party Complaints	40.0	60.0	(N=5)	40.0	60.0	(N=5)
Litigants' Domicile (States):						
Louisiana	16.7	83.3	(N = 6)	16.7	83.3	(N=6)
Mississippi	33.3	66.7	(N = 3)	-0-	100.0	(N=3)
Texas	46.7	53.3	(N = 15)	60.0	40.0	(N=15)
Federal Districts Where Cases Originated:						
Louisiana-Eastern District	-0-	100.0	(N=2)	-0-	100.0	(N=2)
Louisiana-Middle District	50.0	50.0	(N=2)	50.0	50.0	(N=2)
Louisiana-Western District	-0-	100.0	(N=1)	-0-	100.0	(N=1)
Mississippi-Northern District	-0-	100.0	(N=1)	100.0	-0-	(N=1)
Mississippi-Southern District	33.3	66.7	(N=3)	-0-	100.0	(N=3)
Texas-Eastern District	100.0	-0-	(N=1)	100.0	-0-	(N=1)
Texas-Northern District	80.0	20.0	(N=5)	66.0	40.0	(N=5)
Texas-Southern District	37.5	62.5	(N=8)	50.0	50.0	(N=8)
Texas-Western District	-0-	100.0	(N=1)	-0-	100.0	(N=1)

⁷¹⁵Willy E. Rice, 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—2004-2005 [hereinafter Table C].

First, the types of insurance complaints affected insureds and insurers' likelihood of prevailing.⁷¹⁶ Among the district court cases, insurers won sixty-three percent (63.2%) of the time if the underlying lawsuit involved a first-party claim; insurers won an equally impressive sixty-percent (60.0%) of cases in the district courts when litigants asked district judges to determine whether insurers had a duty to settle or defend insureds against third-party claims.⁷¹⁷

However, after the Fifth Circuit reviewed the district courts' rulings, the percentages did not change substantially overall. On appeal, insurers still won sixty percent (60.0%) of the cases if the underlying lawsuit involved a third-party claim.⁷¹⁸ But insurers won fifty-eight percent (57.9%) of cases in the court of appeals if the controversy concerned whether insurers had a duty to pay or settle a first-party claim in an underlying lawsuit.⁷¹⁹

Second, among the actions *decided in the federal district courts*, insureds had a slight, an equal, or a greater likelihood of winning only if they (1) resided in Texas (46.7%), (2) filed their complaints in the Middle District Court of Louisiana (50.0%), or (3) commenced their action in the Northern District Court of Texas (80.0%).⁷²⁰ However, in all other instances, insurance companies had the greater likelihood of prevailing in the federal district courts.⁷²¹ Insurers definitely experienced this rate of success if their principal places of business were located in Louisiana or Mississippi; the reported percentages are 83.3% and 66.7%, respectively.⁷²²

Furthermore, an examination of litigants' probability of winning before the Fifth Circuit did not reveal an overabundance of dramatic reversals. First, as reported above, insureds that lived in Texas won a modest forty-seven percent (46.7%) of the cases in the federal district courts.⁷²³ But before the Fifth Circuit, insured Texans won an impressive sixty percent (60.0%) of the cases.⁷²⁴ On the other hand, defendants-insurers still had the greater likelihood of prevailing before the Fifth Circuit if their principal places of business were located in Louisiana and in Mississippi; the reported percentages are 83.3% and 100%, respectively.⁷²⁵

Also, barring one significant instance, the insureds-plaintiffs experienced considerably less success before the Fifth Circuit—depending on the location of the district court in which they commenced their lawsuits. In the Southern District Court of Texas, insureds only won thirty-eight percent (37.5%) of the

716. *Id.*

717. *Id.*

718. *Id.*

719. *Id.*

720. *Id.*

721. *Id.*

722. *Id.*

723. *Id.*

724. *Id.*

725. *Id.*

cases.⁷²⁶ However, before the Fifth Circuit, those same litigants prevailed fifty percent (50.0%) of the time.⁷²⁷

But insureds who filed their complaints in the Northern District Court of Texas won eight percent (80.0%) of the cases in that court; but, before the Fifth Circuit, they won slightly less—66.0%.⁷²⁸

The central finding is clear: On average, insurers-defendants had a significantly larger likelihood of prevailing in the federal district courts as well as before the Fifth Circuit Court of Appeals. These results materialized whether insureds filed first- or third-party complaints against the insurers or whether the federal courts applied Louisiana's, Mississippi's, or Texas's legal principles.

V. CONCLUSION

The thoroughness, intelligibility, and soundness of the Fifth Circuit's 2004-2005 insurance-law decisions closely mirrored that appellate court's decisions between late 2002 and early 2004. Stated simply, the quality of the twenty-four decisions were extremely inconsistent. Without doubt, several decisions and analyses were stellar. But more often than not, the intelligibility and richness of the opinions were less than ideal.

Additionally, this Author's prior Fifth Circuit reviews stated the reasons for the marginal presentations.⁷²⁹ First, like before, far too many legal questions were not thoroughly researched. Often, the court cited several irrelevant cases and overlooked many relevant decisions to reach an arguably strained and less than fair conclusion. Second, as before, the Fifth Circuit continues to embrace and apply the "law of the panel," which prevents one panel from overruling another panel's ruling.⁷³⁰ But more problematic, the Fifth Circuit applies its "law of the circuit" too frequently—when the application of settled Louisiana's, Mississippi's, and Texas's rules would be more appropriate.⁷³¹

Again, this Author stresses what has been stressed before. Louisiana, Mississippi, and Texas have adopted and consistently apply five standard doctrines to interpret insurance contracts: (1) the traditional rules of contract

726. *Id.*

727. *Id.*

728. *Id.*

729. See Rice, *supra* note 684, at 1035-36; Rice, *supra* note 3, at 1029-30.

730. See *St. Paul Reinsurance Co. v. Greenberg*, 134 F.3d 1250, 1255 (5th Cir. 1998) (reaffirming doctrine that one panel of the Fifth Circuit cannot overrule another); *Broussard v. S. Pac. Transp. Co.*, 665 F.2d 1387, 1389 (5th Cir.1982) (en banc) (declaring that absent an intervening change in the law, one panel cannot overturn another panel's ruling).

731. See, e.g., *St. Paul Fire & Marine Ins. Co. v. Vest Transp. Co.*, 666 F.2d 932, 948 (5th Cir. 1982) (stressing that the law of the circuit controls and applying insurance-law principles that have evolved in the Fifth Circuit).

construction and interpretation,⁷³² (2) the doctrine of plain meaning,⁷³³ (3) the adhesion doctrine,⁷³⁴ (3) the doctrine of ambiguity,⁷³⁵ and (5) the doctrine of reasonable expectations.⁷³⁶ However, federal district courts rarely apply these rules, preferring instead to issue highly questionable summary judgments.

And the Fifth Circuit rarely applies these doctrines consistently to help decipher the meaning of obtuse words and phrases and to determine insurers' and insureds' rights and obligations under various insurance contracts. Without doubt, the time has arrived for each panel within the Fifth Circuit to study, embrace, and apply the five doctrines outlined above more carefully and consistently. Very likely, after implementing those changes, the overall clarity, soundness, and predictability of the Fifth Circuit's insurance-law decisions will improve substantially.

732. See, e.g., *Ledbetter v. Concord Gen. Corp.*, 95-0809 (La. 1/6/96); 665 So. 2d 1166, 1169 (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, 741 (Tex. 1998) (reiterating that insurance contracts are subject to the same rules of construction as other contracts).

733. See, e.g., *La. Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.*, 93-0911 (La. 1/8/94); 630 So. 2d 759, 763 (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 (Miss.1999) (holding that courts must give terms used in insurance policies their ordinary and popular definition); *Transp. Ins. Co. v. Standard Oil Co. of Tex.*, 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).

734. See, e.g., *Duncan v. Kan. City S. Ry. Co.*, 99-232 (La. App. 3 Cir. 11/3/99); 747 So. 2d 656, 674 (observing that "[i]t is well settled that . . . insurance policies are generally contracts of adhesion"); *Lewis v. Allstate Ins. Co.*, 97-CA-00183-SCT (¶ 34) (Miss. 1998); 730 So. 2d 65, 72 (concluding that "[i]nsurance 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).

735. See, e.g., *Succession of Fannaly v. Lafayette Ins. Co.*, 2001-1355 (La. 1/15/02); 805 So. 2d 1134,1138 (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).

736. See, e.g., *Leblanc v. Babin*, 00-1813 (La. App. 5 Cir. 4/24/01); 786 So. 2d 850 (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"); *Brown v. Blue Cross & Blue Shield of Miss., Inc.*, 427 So. 2d 139, 141 n.2 (Miss. 1983) (adopting the principle that "[t]he 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"); *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, 145 n.8 (Tex. 1994) (observing that Texas law does not recognize the doctrine of reasonable expectation as a basis to disregard unambiguous policy provisions).