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The Court of Appeals for the Fifth Circuit: A Review of Selected 2009-2010 Insurance Decisions

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THE COURT OF APPEALS FOR THE FIFTH CIRCUIT: A REVIEW OF SELECTED 2009-2010 INSURANCE DECISIONS

Willy E. Rice[†]

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I. INTRODUCTION

Between July 1, 2009, and June 30, 2010, the Court of Appeals for the Fifth Circuit decided about 110 insurance-law or insurance-related disputes.¹ The overwhelming majority of those rulings appeared as slip opinions.² The Fifth Circuit's panels, however, collectively issued twenty-

1. On August 8, 2010, the author accessed Westlaw and searched the database (CTA5) that contains the Court of Appeals for the Fifth Circuit's cases. The following query was submitted: sy(insurance insurer) & da(after June 30, 2009 and before July 1, 2010). The retrieval system produced 108 insurance-law and insurance-related cases.

2. See *supra* note 1.

five thoroughly researched and fairly long insurance-related decisions.³ Of the latter number, twelve opinions are discussed in this review.⁴ Significantly, the greater majority of the court of appeals' non-slip opinions originated in only three federal district courts—the United States District Courts for the Eastern District of Louisiana, the Southern District of Mississippi, and the Southern District of Texas.⁵ The percentages of cases originating in those courts are 29%, 19%, and 24%, respectively. But, it should not be surprising that the Fifth Circuit's panels devoted a significant amount of time and judicial resources addressing the concerns of relatively large numbers of litigants who filed insurance-law disputes in those three federal district courts. Quite simply, of the controversies appearing in those lower courts, Hurricane Katrina generated the greater majority of insurance-coverage disputes.⁶

3. The following twenty-one decisions are discussed in this review: Case 1—*First Am. Bank v. First Am. Transp. Title Ins. Co.*, 585 F.3d 833 (5th Cir. Oct. 2009)—Eastern District of Louisiana; Case 2—*Borden v. Allstate Ins. Co.*, 589 F.3d 168 (5th Cir. Nov. 2009)—Eastern District of Louisiana; Case 3—*Grand Isle Shipyard, Inc. v. Seacor Marine, L.L.C.*, 589 F.3d 778 (5th Cir. Dec. 2009)—Eastern District of Louisiana; Case 4—*Versai Mgmt. Corp. v. Clarendon Am. Ins. Co.*, 597 F.3d 729 (5th Cir. Feb. 2010)—Eastern District of Louisiana; Case 5—*Todd v. Steamship Mut. Underwriting Ass'n (Bermuda) Ltd.*, 601 F.3d 329 (5th Cir. Mar. 2010)—Eastern District of Louisiana; Case 6—*Halmekangas v. State Farm Fire & Cas. Co.*, 603 F.3d 290 (5th Cir. Apr. 2010)—Eastern District of Louisiana; Case 7—*Nuñez v. Allstate Ins. Co.*, 604 F.3d 840 (5th Cir. Apr. 2010)—Eastern District of Louisiana; Case 8—*Bradley v. Allstate Ins. Co.*, 606 F.3d 215 (5th Cir. May 2010)—Eastern District of Louisiana; Case 9—*Smith v. Am. Family Life Assurance Co. of Columbus*, 584 F.3d 212 (5th Cir. Sept. 2009)—Western District of Louisiana; Case 10—*Martco Ltd. P'ship v. Wellons, Inc.*, 588 F.3d 864 (5th Cir. Nov. 2009)—Western District of Louisiana; Case 11—*Barden Miss. Gaming L.L.C. v. Great N. Ins. Co.*, 576 F.3d 235 (5th Cir. July 2009)—Northern District of Mississippi; Case 12—*Great Am. Ins. Co. of N.Y. v. Lowry Dev., L.L.C.*, 576 F.3d 251 (5th Cir. July 2009)—Southern District of Mississippi; Case 13—*QBE Ins. Corp. v. Brown & Mitchell, Inc.*, 591 F.3d 439 (5th Cir. Dec. 2009)—Southern District of Mississippi; Case 14—*Wiley v. State Farm Fire & Cas. Co.*, 585 F.3d 206 (5th Cir. Oct. 2009)—Southern District of Mississippi; Case 15—*Catlin Syndicate Ltd. v. Imperial Palace of Miss., Inc.*, 600 F.3d 511 (5th Cir. Mar. 2010)—Southern District of Mississippi; Case 16—*EnSCO Int'l, Inc. v. Certain Underwriters at Lloyd's*, 579 F.3d 442 (5th Cir. Aug. 2009)—Northern District of Texas; Case 17—*Ooida Risk Retention Grp., Inc. v. Williams*, 579 F.3d 469 (5th Cir. Aug. 2009)—Northern District of Texas; Case 18—*Westchester Surplus Lines Ins. Co. v. Maverick Tube Corp.*, 590 F.3d 316 (5th Cir. Dec. 2009)—Southern District of Texas; Case 19—*Trinity Universal Ins. Co. v. Emp'rs Mut. Cas. Co.*, 592 F.3d 687 (5th Cir. Jan. 2010)—Southern District of Texas; Case 20—*Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562 (5th Cir. Mar. 2010)—Southern District of Texas; Case 21—*Willbros RPI, Inc. v. Cont'l Cas. Co.*, 601 F.3d 306 (5th Cir. Mar. 2010)—Southern District of Texas; Case 22—*Delta Seaboard Well Servs., Inc. v. Am. Int'l Specialty Lines Ins. Co.*, 602 F.3d 340 (5th Cir. Mar. 2010)—Southern District of Texas; Case 23—*Travelers Lloyds Ins. Co. v. Pac. Emp'rs Ins. Co.*, 602 F.3d 677 (5th Cir. Apr. 2010)—Southern District of Texas; Case 24—*Wilshire Ins. Co. v. RJT Constr., L.L.C.*, 581 F.3d 222 (5th Cir. Aug. 2009)—Western District of Texas; and, Case 25—*Admiral Ins. Co. v. Ford*, 607 F.3d 420 (5th Cir. May 2010)—Western District of Texas. On the other hand, the following thirteen cases are not discussed fully in this review: Case 1; Case 3; Case 4; Case 9; Case 10; Case 11; Case 12; Case 15; Case 17; Case 18; Case 20; Case 22; and Case 24.

4. See *supra* note 3.

5. See *supra* note 3.

6. See, e.g., Michael Corkery, *Homeowner Problems with Chinese-Made Drywall Spread*, WALL ST. J., Apr. 17, 2009, at A4 ("Complaints about foul-smelling Chinese-made drywall that first emerged in a few dozen homes in Florida in January have spread to hundreds of homes in several states, fueling controversy over the Chinese import. Fearing that the construction material is making them sick,

More generally, the following jurisdictional, procedural, and substantive questions are distributed among the insurance decisions discussed in this review: (1) whether federal district courts have federal-question and supplemental jurisdiction to decide insurance-related statutory and common-law disputes;⁷ (2) whether an insurer may force an insured into arbitration before the insured commences a “direct action” lawsuit against the insurer;⁸ (3) whether foreign underwriters waived their contractual, forum-selection rights to remove a lawsuit from a Texas court to a federal district court;⁹ (4) whether property insurers have a contractual duty to pay first-party, tangible, and intangible property-damage claims;¹⁰ (5) whether liability insurance companies have a contractual duty to defend insureds from third parties’ personal-injury and property-damage lawsuits;¹¹ and (6) whether indemnity insurers have a contractual duty to reimburse or indemnify insureds after the latter used out-of-pocket funds to settle or defend against third-party lawsuits.¹²

II. JURISDICTIONAL, FORUM-SELECTION, AND ARBITRATION ISSUES SURROUNDING FIRST-PARTY AND THIRD-PARTY INSURANCE DECISIONS

A. *Removal, Original, and Supplemental Federal Jurisdiction Questions*

1. Original-Jurisdiction Question: Whether a Federal District Court Has Federal Question Jurisdiction Over a Hurricane Katrina-Related Coverage Dispute that Commenced in a Louisiana State Court Under the National Flood Insurance Act

In recent years, the Fifth Circuit has devoted a substantial amount of effort, ink, and paper addressing disputes involving the National Flood Insurance Act of 1968 (NFIA).¹³ In particular, insureds and insurers’

homeowners are moving out of their houses, filing lawsuits Drywall problems are also surfacing in the New Orleans area, in homes that were refurbished after Hurricane Katrina.”); Paulo Prada, *Class-Action Status Denied In Hurricane-Housing Suits—Judge Says Complaints Are Too Varied to Allow Single Case Over Toxins in Homes Government Supplied After 2005 Storms*, WALL ST. J., Dec. 30, 2008, at A3 (“A federal judge . . . denied class-action status to thousands of hurricane victims seeking damages for alleged exposure to a toxic chemical while living in emergency housing provided by the federal government after deadly Gulf Coast storms in 2005. Victims of Hurricanes Katrina and Rita, spread across Alabama, Mississippi, Louisiana and Texas, have filed hundreds of lawsuits over the past three years against the federal government and dozens of manufacturers of mobile housing trailers.”); see also *infra* Part III (discussing Hurricane Katrina-related cases).

7. See *infra* Part II.A.1.

8. See *infra* Part II.B.2.

9. See *infra* Part II.B.1.

10. See *infra* Part III.

11. See *infra* Part IV.B.

12. See *infra* Part IV.A.

13. See National Flood Insurance Act of 1968, Pub. L. No. 90-448, 82 Stat. 587 (codified as amended at 42 U.S.C. §§ 4001-4129 (2006)).

procedural questions have forced the court of appeals to deliver several NFIA-related decisions.¹⁴ Elsewhere, the author reviewed a few of those cases on two occasions; in each review, the author briefly outlined the history and scope of the NFIA, discussed coverage and exclusions under NFIA's Standard Flood Insurance Policies (SFIP), and highlighted the rights and obligations of so-called "Write-Your-Own" insurers who sell SFIP.¹⁵ During the 2009-2010 session, the court of appeals decided two additional NFIA controversies. On this occasion, both jurisdictional and substantive questions formed the basis of the complaints.

Consider the brief facts in *Borden v. Allstate Insurance Co.*¹⁶ Allstate participates in the National Flood Insurance Program (NFIP).¹⁷ Therefore, the insurer is a Write-Your-Own carrier.¹⁸ Earl Borden is a citizen of

14. See *Gallup v. Omaha Prop. & Cas. Ins. Co.*, 434 F.3d 341, 344-45 (5th Cir. 2005) (declaring that the NFIA preempted the insureds' state law actions—both tort-based and contract-based actions); *Wright v. Allstate Ins. Co. (Wright I)*, 415 F.3d 385, 390 (5th Cir. 2005) (refusing to allow an insured to commence tort-based, state-law actions against a Write-Your-Own insurer but allowing the insured to file a breach-of-contract action against the insurer and permitting the insurer to raise the doctrine of equitable estoppel—a defense to a breach-of-contract action); *Wright v. Allstate Ins. Co. (Wright II)*, 500 F.3d 390, 393 (5th Cir. 2007) (finding no congressional intent under the National Flood Insurance Act to allow courts to fashion extra-contractual causes of action for flood-related insurance claims).

15. See Willy E. Rice, *The Court of Appeals for the Fifth Circuit: A Legal Analysis and Statistical Review of 2005-2006 Insurance Decisions*, 39 TEX. TECH L. REV. 843, 869-73 (2007) (reviewing the NFIA and SFIPs as well as discussing the conflicting Fifth Circuit's decisions in *Gallup* and *Wright I*); Willy E. Rice, *The Court of Appeals for the Fifth Circuit: A Review of 2007-2008 Insurance Decisions*, 41 TEX. TECH L. REV. 1013, 1035-38 (2009) (reviewing the NFIA and SFIPs again as well as critiquing the Fifth Circuit's conflicting opinions in *Wright I* and *Wright II*).

16. See *Borden v. Allstate Ins. Co.*, 589 F.3d 168, 170 (5th Cir. Nov. 2009).

17. See *Bradley v. Allstate Ins. Co.*, 606 F.3d 215, 231 n.14 (5th Cir. May 2010) ("The Bradleys' flood policy is a write-your-own policy under the National Flood Insurance Program (NFIP). The purpose of the NFIP is 'to provide flood insurance protection to property owners in flood-prone areas under national policy promulgated by the Federal Emergency Management Agency (FEMA).' Congress also adopted a program to permit insurance companies to write their own flood insurance policies, remitting the premiums to the National Flood Insurance Administration. Write-your-own companies draw money from FEMA through letters of credit to disburse claims. Consequently, United States Treasury funds are used to pay the insured's claims." (internal citations omitted)).

18. See *Campo v. Allstate Ins. Co.*, 562 F.3d 751, 752 (5th Cir. Mar. 2009) ("Campo held a Standard Flood Insurance Policy ('SFIP') issued by Allstate as a Write-Your-Own ('WYO') carrier participating in the National Flood Insurance Program. . . . This policy expired just before Hurricane Katrina destroyed Campo's home."); *U.S. ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 374 (5th Cir. Feb. 2009) ("The insurer Defendants are participants in FEMA's Write-Your-Own flood insurance program. . . . This program allows private insurance companies to write and service, in their own names, the federally backed Standard Flood Insurance Policy. . . . Participants in the WYO program are responsible for determining the extent of an insured's flood damage, which in turn determines the amount of benefit ultimately paid out by the Federal Treasury."); *Wright II*, 500 F.3d at 392 ("Thomas Wright appeals the district court's refusal to grant him leave to amend his complaint to include extra-contractual claims against Allstate Insurance Company ('Allstate'), the Write Your Own ('WYO') insurance company that issued his federal flood insurance policy."); *Wright I*, 415 F.3d at 385-86 ("Wright purchased a Standard Flood Insurance Policy ('SFIP') to cover his Houston home. While Wright purchased his SFIP from Allstate, the insurance was provided through the National Flood Insurance Program ('NFIP') Allstate is a fiscal agent of the United States and, in the parlance of the NFIP, a Write Your Own insurer."); see also *Pecarovich v. Allstate Ins. Co.*, 309 F.3d 652, 656-57 (9th Cir. 2002) ("Under the federal Write-Your-Own ('WYO') program, insurance policies may be

Louisiana, and Allstate insured his house under an SFIP.¹⁹ In the wake of Hurricane Katrina, severe flooding damaged Borden's home on August 29, 2005.²⁰ "[A] week and a half later," the insured tried to file a claim under his flood-insurance contract.²¹ Allstate, however, disclosed that Borden's policy expired on July 8, 2005—nearly 55 days earlier.²² Quite simply, Allstate refused to process the claim because Borden failed to pay a renewal premium.²³ In response, Borden asserted that he never received an annual renewal notice.²⁴

Borden commenced a negligence-based lawsuit against Allstate in a Louisiana state court.²⁵ He alleged that the Write-Your-Own insurer "negligently failed to issue a flood insurance policy and negligently represented that Borden had flood insurance coverage."²⁶ Borden also joined Allstate's agent Greg Ruiz—another citizen of Louisiana—as a defendant.²⁷ Allstate—an Illinois corporate citizen—did not challenge the joinder.²⁸ Instead, the insurer removed the case to the District Court for the Eastern District of Louisiana.²⁹ Borden challenged the removal, asserting that complete diversity jurisdiction was absent under 28 U.S.C. § 1332(a)(1).³⁰

Although insisting that the federal district court had federal-question jurisdiction under 28 U.S.C. § 1331 and diversity jurisdiction under § 1332,

offered and administered by private insurers with the federal government acting as an underwriter. . . . Accordingly, Pecarovich's policy was titled an 'Allstate Dwelling Policy' on its cover sheet and the policy was endorsed by two Allstate executives on behalf of Allstate.")

19. *Borden*, 589 F.3d at 170.

20. *Id.*

21. *Id.*

22. *Id.*

23. *See id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 168.

30. *Id.* at 170. Under 28 U.S.C. § 1441, complete diversity is required at the time of a removal. *See* 28 U.S.C. § 1441 (2006). In *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), a unanimous Supreme Court declared that a procedural-jurisdictional defect under § 1441 was cured when the non-diverse party dropped out of the case after removal but before trial commenced. *Lewis*, 519 U.S. at 73-75. On the other hand, the Court declared that a § 1441 defect should be excused—even though the "statutory flaw . . . remained in the unerasable history of the case"—because: (1) complete diversity jurisdiction ultimately existed before *judgment* and (2) the case had already proceeded to judgment, making "considerations of finality, efficiency, and economy . . . overwhelming." *Id.* (emphasis added). Section 1332(a)(1) reads in relevant part: "Diversity of citizenship—The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different States." 28 U.S.C. § 1332(a)(1) (2006).

Allstate filed a motion for clarification of subject matter jurisdiction.³¹ Oddly, the insurer wanted the district court to “clarify” whether the district court had subject matter jurisdiction, even though federal district courts have “original exclusive jurisdiction over NFIP cases.”³²

The lower court did not address the motion for clarification.³³ On the other hand, the district court granted Allstate’s second motion for summary judgment and dismissed the claims against the Write-Your-Own insurer and its agent.³⁴ Borden appealed, asking the Fifth Circuit to decide both a subject-matter-jurisdiction question and a substantive question: whether an insured’s flood-protection insurance terminates under an SFIP if the insured did not receive a timely renewal notice and failed to pay the renewal premium in a timely manner.³⁵

Chief Judge Jones wrote for the panel.³⁶ And at the outset, she addressed Allstate’s motion for clarification that the district court ignored.³⁷ Judge Jones correctly observed that the lower court did not have diversity jurisdiction under § 1332 because Borden and Ruiz were both residents of Louisiana.³⁸ Citing the Supreme Court’s opinion in *Franchise Tax Board v. Construction Laborers Vacation Trust*, she wrote: “Federal question jurisdiction exists when ‘a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law.’”³⁹ And, in light of the facts in *Borden* and federal courts’ SFIP-related decisions, Chief Judge Jones declared that the District Court for the Eastern District of Louisiana properly exercised federal-question jurisdiction over the current SFIP controversy under § 1331.⁴⁰

31. *Borden*, 589 F.3d at 170. Section 1331 reads: “Federal question—The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (2006).

32. *See Borden*, 589 F.3d at 170; *see also* 42 U.S.C. § 4053 (2006) (granting “original exclusive jurisdiction” over National Flood Insurance Program adjustment cases to the “United States district court for the district in which the insured property . . . shall have been situated”).

33. *See Borden*, 589 F.3d at 170.

34. *Id.*

35. *Id.*

36. *Id.* The panel comprised Chief Judge Edith Jones and Circuit Judges Emilio M. Garza and Carl E. Stewart. *Id.*

37. *See id.*

38. *See id.* at 171.

39. *Id.* at 172 (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983)).

40. *Id.* at 171-72; *see also* *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 184 (2d Cir. 2006) (“In their original briefs to this court, both parties asserted that 42 U.S.C. § 4053 gives us [subject matter] jurisdiction over this case. Recognizing that our sister circuits have rejected this view, we ordered the parties to submit supplemental briefs addressing the jurisdictional question. Both parties have thought better of their original positions and now argue that jurisdiction exists under both 42 U.S.C. § 4072 and 28 U.S.C. § 1331.”); *Studio Frames Ltd. v. Standard Fire Ins. Co.*, 369 F.3d 376, 379-80 (4th Cir. 2004) (holding that NFIP-related breach-of-SFIP action satisfies § 1331 since the action raises a substantial question of federal law); *Downey v. State Farm Fire & Cas. Co.*, 266 F.3d 675, 681-82 (7th Cir. 2001)

To appreciate the significance of the substantive dispute in *Borden*, one must appreciate a general rule in Louisiana and in most states: Barring a bargained-for grace period in an insurance contract, insurers may cancel insurance contracts if the insureds do not renew their agreements and pay the requisite renewal premium.⁴¹ Also, insurers in Louisiana have no common-law, contractual obligation to send renewal notices.⁴² But, if certain conditions exist, an insurer may be estopped from terminating coverage.⁴³ In contrast, under standardized SFIPs, flood insurers have a federally imposed, contractual obligation to send renewal notices to insured property owners before renewal premiums are due.⁴⁴ On the other hand, if a Write-Your-Own insurer breaches that provision, then the regulations impose a duty on the insured: “[N]ot later than one year after the date on which . . . the renewal premium was due,” the insured must contact the insurer and disclose that she did not receive the mandatory, premium-renewal notice.⁴⁵

(finding that federal question jurisdiction existed since the lawsuit implicated the United States’ duties or rights under NFIP); *West v. Harris*, 573 F.2d 873, 881 (5th Cir. 1978) (finding that NFIP is a federal program effectuating federal policies and paid for with federal funding and holding that federal law applies to an SFIP-coverage dispute).

41. *Cf.* LA. REV. STAT. ANN. § 22:973(8) (2009). Section 22:973(8) gives insurers the option to cancel health and accident insurance contracts if those contracts comply with this proviso: “[T]here shall be prominently printed on the first page of such a policy a statement . . . informing the policyholder.” *Id.*

42. *See, e.g., Legier v. Cmty. Plasma Ctr.*, 649 So. 2d 498, 499-500 (La. Ct. App. 1994) (“The willingness to renew an insurance policy may be manifested by the insurer by giving the insured notice of the renewal premium. If the insured fails to timely pay the premium, the policy expires according to its terms. When an insurance policy expires because of nonpayment of the renewal premium, the insurer has no duty to send notice of cancellation to the insured.”).

43. *See, e.g., Carter v. Benevolent Life Ins. Co.*, 300 So. 2d 623, 625 (La. Ct. App. 1974) (“Plaintiffs rely on the doctrine of equitable estoppel. They say that defendant’s custom of accepting overdue premiums caused plaintiffs to reasonably believe that the policies would remain in effect even though the premiums were not paid when due. Plaintiffs rely on jurisprudence which allows recovery in such cases. These cases establish the following general rules: (1) There must be a habit or custom of accepting overdue premiums; (2) The insured must reasonably believe that by reason of this custom the insurer will maintain the policy in effect without prompt payment of premiums.”).

44. *See* 44 C.F.R. pt. 61, app. (A)(1), art. VII(H) (2009). In relevant part, the regulations read:

1. This policy will expire at 12:01 a.m. on the last day of the policy term;
2. We must receive payment of the appropriate renewal premium within 30 days of the expiration date.
3. If we find, however, that we did not place your renewal notice into the U.S. Postal Service, or . . . [we mailed it to] . . . an incorrect, incomplete, or illegible address, . . . then we will follow [certain] procedures.

Id.

45. *Id.* The relevant SFIP clause reads:

3. If we find, however, that we did not place your renewal notice into the U.S. Postal Service, or . . . we made a mistake . . . which delayed its delivery to you before the due date of the renewal premium, then we will follow these procedures:
 - a. . . . we will mail a second bill providing a revised due date, which will be 30 days after the date on which the bill is mailed;
 - b. If we do not receive the premium requested in the second bill by the revised due date, then we will not renew the

To repeat, the district court found that Borden's flood-insurance contract expired on July 8, 2005.⁴⁶ Hurricane Katrina damaged his home on August 29, 2005.⁴⁷ And, approximately a week and a half later, the insured contacted Allstate and reported that he had not received a renewal notice.⁴⁸ At that time, his insurance policy had expired nearly two months earlier—55 days to be exact.⁴⁹ Still, Borden had one year from his policy's expiration date to notify Allstate in order to secure a second renewal notice and to pay the renewal premium.⁵⁰ But the insured never paid the annual premium.⁵¹ And the district court found no evidence suggesting that Borden notified Allstate about the latter's mistake or omission in a timely manner.⁵² Consequently, the district court awarded Allstate's motion for summary relief.⁵³

Writing for the panel, Chief Judge Jones concluded that the district court erred.⁵⁴ She wrote:

Borden's notice of non-receipt . . . was timely The [district] court, however, overlooked Borden's affidavit averring the timeliness of his notice to Allstate. Because this admissible evidence sets the stage for further inquiry under the SFIP regulations, the district court must on remand proceed to adjudicate Borden's claim. We vacate the summary judgment in favor of Allstate.⁵⁵

2. Supplemental-Jurisdiction Question: Whether a Federal District Court Has Supplemental Jurisdiction to Decide a Hurricane Katrina-Related, Negligence-Based, First-Party Insurance Dispute that Originated in a Louisiana State Court

In numerous opinions, the Fifth Circuit has stressed and reiterated: District courts may not exercise supplemental jurisdiction over state-court lawsuits when the litigants are not diverse or when plaintiffs' state-law theories of recovery or causes of action do not sound in federal law.⁵⁶ Yet,

policy. In that case, the policy will remain an expired policy as of the expiration date shown on the Declarations Page.

Id.

46. *Borden v. Allstate Ins. Co.*, 589 F.3d 168, 170 (5th Cir. Nov. 2009).

47. *Id.*

48. *Id.* at 173.

49. *Id.*

50. *Id.*

51. *Id.* at 170.

52. *Id.* at 173.

53. *Id.*

54. *Id.*

55. *Id.*

56. *See Certain Underwriters at Lloyd's, London v. Warrantech Corp.*, 461 F.3d 568, 578 (5th Cir. 2006) ("In consideration of [the § 1367] factors, we have stated that it is our 'general rule' that courts should decline supplemental jurisdiction when all federal claims are dismissed or otherwise eliminated

practitioners generally, and insurance-defense attorneys in particular, continually litigate hundreds of supplemental-jurisdiction and removal disputes in federal district courts.⁵⁷ Put simply, something is amiss. Recently, the court of appeals decided *Halmekangas v. State Farm Fire and Casualty Co.*⁵⁸ Perhaps the analysis in that case can help reduce some of the confusion surrounding two arguably settled principles. Without exaggeration and barring one omission, the panel's opinion in *Halmekangas* is a well-written and long-overdue stellar exposition about federal supplemental jurisdiction and removal rights involving insurance-related lawsuits.⁵⁹ First, the relevant facts and underlying first-party controversy in *Halmekangas* require a thorough review.

Stephen Halmekangas owned and lived in a three-story house in New Orleans.⁶⁰ ANPAC Louisiana Insurance Company (ANPAC) insured the house against certain perils under a homeowners' insurance contract.⁶¹ The house comprised 5,400 square feet.⁶² But, in the insurance application, Stephen Harelson—ANPAC's agent—described the house incorrectly as “a two-floor, 3,400-square-foot dwelling.”⁶³ Clearly, the homeowners' policy underinsured the New Orleans house against a variety of specific perils, even though Halmekangas purchased flood insurance from Allstate—a Write-Your-Own insurer.⁶⁴ Allstate insured Halmekangas's house against flood under an SFIP.⁶⁵

In the aftermath of Hurricane Katrina, the first floor of the house flooded, and “five days later, a fire burned the house to the ground.”⁶⁶ The policy limit under the homeowners' insurance contract was \$346,700.⁶⁷ ANPAC paid the entire amount to cover the destroyed top two floors.⁶⁸ Still, Halmekangas filed a lawsuit against ANPAC and Harelson in a Louisiana state court (ANPAC lawsuit).⁶⁹ A careful reading of the reported

from a [state-law] case.”).

57. Using Westlaw, the author performed a cursory examination of the U.S. District Court cases for Louisiana, Mississippi, and Texas on August 20, 2010. Those databases are DCTLA, DCTMS, and DCTTX, respectively. The author used the following queries: (1) “supplemental jurisdiction”; and (2) “supplemental jurisdiction” /p “insurance insurer.” Briefly put, the combined queries generated more than 2100 cases—suggesting that federal district courts are using their precious time and limited resources to address supplemental-jurisdiction disputes and fashion an ever-increasing sea of slip opinions.

58. *Halmekangas v. State Farm Fire & Cas. Co.*, 603 F.3d 290 (5th Cir. Apr. 2010).

59. *See id.* The panel comprised Justices Edith B. Clement, Patrick E. Higginbotham, and Leslie H. Southwick. *Id.*

60. *Id.* at 291-92.

61. *Id.* at 292.

62. *Id.* at 291.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

facts suggests that the first-party, insurance-related complaint/pleadings listed two causes of action—common-law negligence and misrepresentation.⁷⁰ Under the former theory of recovery, the essence of Halmekangas’s allegation or claim was: Harelson, ANPAC, or both negligently failed to insure the entire 5,400-square-foot house.⁷¹ And, under the latter theory of recovery, the insured’s allegation was that he “relied to his detriment” on Harelson’s misrepresentation about the amount of coverage that the agent had secured under the homeowners’ policy.⁷² Briefly put, no dispute involving a federal question or diversity jurisdiction appeared in the ANPAC lawsuit.⁷³

A month after commencing the ANPAC lawsuit, Halmekangas filed a second lawsuit against State Farm in the United States District Court for the Eastern District of Louisiana (State-Farm lawsuit).⁷⁴ Like the disgruntled homeowner in *Borden*, Halmekangas filed an NFIP/SFIP-related, breach-of-contract cause of action against State Farm.⁷⁵ He alleged that the flood insurer breached the SFIP’s coverage provision “arbitrarily and capriciously” by paying “only \$83,399.57” to cover the flood-related destruction of the 2,000-square-foot ground floor.⁷⁶ Subject matter jurisdiction was not a disputed issue in the State-Farm lawsuit, since the NFIP creates federal question jurisdiction.⁷⁷

A conservative reading of 28 U.S.C. § 1367(a) reveals that a federal district court may exercise supplemental jurisdiction over state-based causes of action under limited circumstances.⁷⁸ In pertinent part, § 1367(a) reads:

[I]n any *civil action* of which the district courts have *original jurisdiction*, the district courts shall have supplemental jurisdiction over all *other claims* that are so related to claims in the action within such original jurisdiction that they form part of the *same case* or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include *claims* that involve the joinder or intervention of additional parties.⁷⁹

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*; see also *infra* note 90 (discussing cause of action, theory of recovery, and claims).

74. *Halmekangas*, 603 F.3d at 290.

75. *Id.*

76. *Id.* at 292.

77. See 42 U.S.C. § 4053 (2006) (granting to the “United States district court for the district in which the insured property . . . shall have been situated” the “original exclusive jurisdiction” of National Flood Insurance Program adjustment cases); *Borden v. Allstate Ins. Co.*, 589 F.3d 168, 172 (5th Cir. Nov. 2009).

78. See 28 U.S.C. § 1367(a) (2006).

79. *Id.* (alterations in original) (emphasis added).

And under proper conditions, a defendant may remove a state-based lawsuit to a federal district court pursuant to 28 U.S.C. § 1441(a).⁸⁰ That provision states in relevant part:

[A]ny *civil action* brought in a State court of which the district courts of the United States have *original jurisdiction*, may be *removed* by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.⁸¹

In *Halmekangas*, ANPAC removed the ANPAC lawsuit to federal court when the property insurer discovered the State-Farm lawsuit.⁸² Citing § 1367(a), ANPAC asserted that the Eastern District of Louisiana had supplemental jurisdiction over the ANPAC lawsuit.⁸³ Halmekangas disagreed, arguing in part that the state-based ANPAC lawsuit and the federal-based State-Farm lawsuit “did not arise from the same nucleus of common fact[s].”⁸⁴ The district court, however, refused to embrace Halmekangas’s argument, stressing and explaining that “the object of the litigation in the two matters was the same: Plaintiff’s home.”⁸⁵ Ultimately, the lower court granted ANPAC’s motion for summary judgment and Halmekangas appealed.⁸⁶

Before the Fifth Circuit panel, Halmekangas argued that the district court improperly removed the ANPAC lawsuit because “the district court never had subject-matter jurisdiction to hear the [state-based lawsuit].”⁸⁷ Writing for the panel, Judge Higginbotham embraced Halmekangas’s argument, vacated the summary judgment, remanded the case to the federal district court, and instructed the lower court to remand the ANPAC lawsuit to the Louisiana state court.⁸⁸ To reach those obviously correct results, Judge Higginbotham cited several settled federal principles: (1) Federal courts are courts of limited jurisdiction, having “only the authority endowed by the Constitution and that conferred by Congress”; (2) “[Defendant may remove to federal court only] state-court actions that originally could have been filed in federal court”; and (3) A federal court has removal jurisdiction under § 1441 only if a court has “original jurisdiction” over a state-based “civil action.”⁸⁹

80. See 28 U.S.C. § 1441(a) (2006).

81. *Id.* (emphasis added).

82. *Halmekangas v. State Farm Fire & Cas. Co.*, 603 F.3d 290, 292 (5th Cir. Apr. 2010).

83. *Id.*

84. *Id.* (alteration in original).

85. *Id.*

86. *Id.* (“State Farm settled out of court.”).

87. *Id.*

88. *Id.* at 291.

89. See *id.* at 292, 295 (citing *Epps v. Bexar-Medina-Atascosa Cnty. Water Improvement Dist. No. 1*, 665 F.2d 594, 595 (5th Cir. 1982); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987);

To illustrate how § 1367(a) and § 1441(a) work together and allow a defendant to bring a state-based lawsuit into a federal district court, Judge Higginbotham cited the facts in another Fifth Circuit case—*Whiting v. University of Southern Mississippi*—and wrote:

Suppose a young professor asserts that [a] . . . public university . . . wrongfully denied her tenure. She [files a single lawsuit] in state court, alleging 42 U.S.C. § 1983 violations alongside [a state-based breach-of-contract causes of action]. The university can remove the *whole case* to federal court. Although this permitted removal of state and federal [causes of action] is simultaneous, it is useful to view it in steps: first, a party will use § 1441 to remove the civil [cause of] action over which federal courts have original jurisdiction; and second, the party will invoke § 1367 to allow the state [causes of action] to piggyback the federal [cause of action]. In our rebuffed professor's example, the federal question presented under § 1983 provides the necessary original jurisdiction to remove, and the *common nucleus* shared by the federal and state [causes of action] allows the district court to exercise supplemental jurisdiction over the [breach-of-contract causes of action]. Sections 1367 and 1441 are bound together because the professor filed the federal and state [causes of action] in a single civil [lawsuit].⁹⁰

Certainly, the example is excellent and easy to understand. Yet, as mentioned before, a lot of confusion—about defendants' removal rights and supplemental jurisdiction—still exists among extremely learned federal district court judges in the Fifth Circuit.⁹¹ And the question is: Why? Here

Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 34 (2002) (“Section 1441 requires that a federal court have original jurisdiction over an action in order for it to be removed from a state court.”); and *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349, 4 L. Ed. 97 (1816) (“The power of removal . . . presupposes an exercise of original jurisdiction to have attached elsewhere.”).

90. *Id.* at 293-94 (alterations in original) (emphasis added) (citing *Whiting v. Univ. of S. Miss.*, 451 F.3d 339, 342-43 (5th Cir. 2006)). Also note: A legal distinction exists between a “cause of action” and a simple assertion, claim, or allegation. But often, the term “claim” is used to mean a “cause of action.” And often “theory of recovery” and “cause of action” are used interchangeably. Therefore, substitutions were made in the Justice Higginbotham's illustration to prevent the confusion—which often surrounds these terms—from clouding the point he was making. *See, e.g., Cmty. Initiatives, Inc. v. Chase Bank of Tex., N.A.*, No. EP-99-CA-282-DB, 2000 WL 33348721, at *4 (W.D. Tex. Feb. 16, 2000) (“Plaintiff misunderstands the difference between a cause of action (or claim) and a theory of recovery. Here, Plaintiff asserts eight separate causes of action in its Petition, each cause of action constituting a separate actionable injury. While a ‘cause of action’ is the ‘fact or facts which give a person a right to judicial redress, a theory of recovery is the legal basis upon which those facts constitute a cause of action. Moreover, each cause of action may be supported by several alternative theories of recovery.” (internal citations omitted)).

91. *See also Perret v. Am. Nat'l Prop. & Cas.*, Nos. 06-4618, 06-6867, 2006 WL 3412267, at *2, *6 (E.D. La. Nov. 27, 2006) (observing that “[this court] has previously analyzed whether supplemental jurisdiction under 28 U.S.C. § 1367 existed over the claims against the homeowner's insurer when it was joined in an action with the claims against the flood insurer” and concluding that “[w]hile the causes of action arise out of different insurance contracts that cover different perils, the object of the litigation is one and the same, i.e. Plaintiffs' home”); *Stay-N-Play Discovery Sch., Inc. v. Alvarez*, No. 06-2979, 2006 WL 2947878, at *3 (E.D. La. Oct. 14, 2006) (“Although perhaps covered under a

is an observation and, arguably, a significant omission in the *Halmekangas* opinion, which the Fifth Circuit might consider when the opportunity presents itself. In Judge Higginbotham's illustration, we find just one defendant and a single, state-based lawsuit—containing state-based *and* federal-based causes of action.⁹² But, those facts do not appear in *Halmekangas*. The opposite is true. In *Halmekangas*, the insured-plaintiff commenced two Hurricane Katrina-related lawsuits—the state-court ANPAC suit and the federal-court State-Farm lawsuit—and each lawsuit contained different causes of action.⁹³

Assume, however, that *Halmekangas* had filed a single lawsuit—like the plaintiff in Judge Higginbotham's example—and he filed that lawsuit in a Louisiana state court (Hypo lawsuit). Also, assume that complete diversity jurisdiction was absent because State Farm is a citizen of Illinois and *Halmekangas* and ANPAC are citizens of Louisiana. In addition, assume that the single complaint in the Hypo lawsuit contained mixed state and federal-based claims/allegations and theories of recovery. More specifically, assume that (1) *Halmekangas* filed a common-law, negligence cause of action only against ANPAC, and (2) he commenced a federal-based, NFIP/SFIP-related, breach-of-contract cause of action only against State Farm.

Here are the questions: (1) May the Eastern District of Louisiana exercise federal-question, original jurisdiction over the Hypo lawsuit?; and (2) Would the state-based and federal-based causes of action share a sufficient “common nucleus” to allow the district court to exercise supplemental jurisdiction over the common-law, negligence cause of action? Federal district courts are struggling with these types of questions in cases where diversity jurisdiction is absent and an insured-plaintiff sues more than one defendant in separate lawsuits containing different causes of action. Perhaps, when the Fifth Circuit has an opportunity to address these latter questions more fully, the confusion surrounding supplemental

different insurance policy, the state law claims that arise out of the same factual events that give rise to questions under the SFIP presents an appropriate occasion for the exercise of the [c]ourt's supplemental jurisdiction.”); *Jamal v. Travelers Lloyd's of Tex. Ins. Co.*, 97 F. Supp. 2d 800, 806 (S.D. Tex. 2000) (“*Jamal's* claims under the two policies are factually intertwined, as they both seek recovery for damages allegedly sustained as a result of identical meteorological events and similar conduct of the defendants. . . . Hence, as jurisdiction over *Jamal's* flood insurance claims is exclusively federal and his claims under the homeowners' insurance policy arise out of the same nucleus of operative facts as his claims under the flood insurance policy, it is logical to try these claims together.”); *Winkler v. State Farm Fire & Cas. Co.*, 266 F. Supp. 2d 509, 512-13 (S.D. Miss. 2003) (“Here, Plaintiff's claims arise out of the disallowance of portions of her claims for insurance benefits. One of the policies in question is an SFIP flood insurance policy, issued by State Farm acting as a WYO insurer. . . . [And all of plaintiff's claims] are . . . closely related [and] form part of the same case or controversy. None of the factors counseling judicial discretion to decline supplemental jurisdiction exist here. In fact, other factors counsel strongly in favor of exercising supplemental jurisdiction.”).

92. See *supra* text accompanying note 90.

93. *Halmekangas*, 603 F.3d at 292.

jurisdiction under § 1367(a) and removal rights under § 1441(a) might dissipate a bit.⁹⁴ Still, the analysis in *Halmekangas* is commendable.

B. First- & Third-Party Jurisdictional Disputes Under Arbitration and Forum-Selection Clauses in Insurance Contracts

In this part, an analysis of jurisdictional and removal disputes also appears. Two cases are discussed: *Todd v. Steamship Mutual Underwriting Association (Bermuda) Ltd.* and *Ensco International, Inc. v. Certain Underwriters at Lloyd's*. But, unlike the defendants in *Borden* and *Halmekangas*, the defendants-insurers in *Ensco* and *Todd* are foreigners.⁹⁵ Also, in the former cases, disputes arose over whether federal district courts had subject matter jurisdiction under 28 U.S.C. § 1367(a) and whether national insurers could remove insurance-related disputes from state courts under 28 U.S.C. § 1441(a).⁹⁶ In *Ensco* and *Todd*, § 1367(a) and § 1441(a) are not controversial.⁹⁷ Instead, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention) and, to a lesser extent, the Federal Arbitration Act of 1925 (FAA) are at the center of the two lawsuits.⁹⁸ Therefore, a very brief overview of the Convention and FAA is warranted before discussing *Ensco* and *Todd*.

First, in *Scherk v. Alberto-Culver Co.*, the Supreme Court observed the following: (1) English courts viewed arbitration agreements as an attack on the courts' jurisdiction and, therefore, refused to enforce them; (2) the FAA was enacted to stop courts' hostility toward arbitration; (3) the FAA was also designed to allow parties to avoid "the costliness and delays of litigation"; and (4) Congress enacted the arbitration statute to put arbitration agreements "upon the same footing as other contracts."⁹⁹

Congress divided the FAA into three chapters. Chapter 1 is the so-called "domestic FAA" provision.¹⁰⁰ It outlines a set of default rules which are designed to counter "the judiciary's longstanding refusal to enforce

94. Also, if one reads § 1367(a) extremely carefully, there is arguably some ambiguity in the statute. In particular, the following words and phrases appear in the statute: "civil action," "other claims," "claims in the action," and "same case." Does "same case" mean "same lawsuit"? Does "civil action" mean "civil lawsuit" or "cause of action"? Do "other claims" mean "other causes of action" or "other theories of recovery"? Moreover, the term "civil action" also appears in § 1441(a). In the first instance, a fair reading of that statute strongly suggests that "civil action" means "a single civil lawsuit." However, that same term could mean a "single cause of action in a lawsuit." Arguably, these imprecise terms and very few definitions are generating some of the confusion surrounding supplemental jurisdiction under § 1367(a) and removal rights under § 1441(a). See *supra* note 90 and the accompanying discussion.

95. See *infra* Parts II.B.1 & II.B.2.

96. See *supra* Part II.A.2.

97. See *infra* Parts II.B.1 & II.B.2.

98. See *infra* Parts II.B.1 & II.B.2.

99. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 & n.4 (1974) (citing H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924)).

100. 9 U.S.C. §§ 1-16 (2006).

agreements to arbitrate.”¹⁰¹ More specifically, the domestic FAA “requires courts to enforce privately negotiated [arbitration] agreements . . . like other contracts, in accordance with their terms.”¹⁰² Of course, the domestic FAA does not prevent courts from enforcing arbitration agreements under a different set of rules.¹⁰³ Thus, when “parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA.”¹⁰⁴ In contrast, the Convention’s implementing legislation appears in Chapter 2 of the FAA.¹⁰⁵ Put simply, Congress enacted those rules to ensure that foreign governments deliver and that United States citizens receive predictable enforcement of certain arbitration contracts and arbitral awards originating in the United States and in other signatory nations.¹⁰⁶

Briefly, the Convention, itself, is a treaty under which the United States has commitments.¹⁰⁷ The Convention states that each signatory nation “shall recognize an agreement in writing under which the parties undertake to [arbitrate]” a dispute over a subject matter that arbitration can settle.¹⁰⁸ Furthermore, under the Convention, signatory courts must enforce arbitral awards and resolve international parties’ arbitration claims fairly and in a timely manner.¹⁰⁹ Also, under the Convention and FAA enabling legislation, standards exist to determine whether a defendant improperly waived or exercised his right to remove an arbitration dispute from, say, a state court in the United States to a federal district court.¹¹⁰ Discussions of these latter rules and the types of insurance-related conflicts that they generate appear in *Enesco* and *Todd*, respectively.¹¹¹

101. See *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989).

102. *Id.* at 478.

103. *Id.* at 479.

104. *Id.*

105. 9 U.S.C. §§ 201-08.

106. See, e.g., *Suter v. Munich Reins. Co.*, 223 F.3d 150, 154 (3d Cir. 2000); see also *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 286 n.7 (3d Cir. 2010) (“To clarify, the Convention and Chapter 2 of the FAA are distinct. The Convention is the multilateral treaty to which the United States acceded. Chapter 2 of the FAA is the implementing legislation for the Convention, and it provides the mechanism for enforcement of the Convention in United States courts.”).

107. See *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 587 F.3d 714, 719 (5th Cir. Nov. 2009).

108. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(1), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

109. See *id.* art. II(3) (“The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”); see also 9 U.S.C. § 201 (2006) (“The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.”).

110. See *infra* Parts II.B.1-2.

111. See *infra* Parts II.B.1-2.

1. Forum-Selection Question: Whether Certain Underwriters at Lloyd's of London Waived Their Contractual Forum-Selection Right to Remove—Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Treaty—the Insured's Hurricane Katrina-Related Dispute from a Texas Court to a Federal District Court

EnSCO International, Inc. (EnSCO) owned an offshore-Louisiana, oil-and-gas platform that was located in the Outer Continental Shelf's Mississippi Canyon.¹¹² Certain underwriters at Lloyd's of London (Underwriters) insured the platform and other production equipment against various risks under several insurance contracts.¹¹³ When Hurricane Katrina arrived in the Gulf of Mexico in August 2005, the oil-and-gas platform, mobile drilling rigs, and other equipment were damaged severely.¹¹⁴ In fact, one of EnSCO's derricks severed and fell to the sea floor and settled near another oil-and-gas company's platform.¹¹⁵ EnSCO submitted a loss-of-property claim to Underwriters.¹¹⁶ Although indemnifying EnSCO for the "constructive total loss of the rig," Underwriters refused to reimburse EnSCO for removing the debris from the sea floor.¹¹⁷

After Underwriters refused to fully indemnify, EnSCO initiated a lawsuit in the 191st District Court of Dallas County, Texas.¹¹⁸ The complaint outlined a declaratory-judgment action, a breach-of-contract cause of action, and claims under the Texas Insurance Code.¹¹⁹ Asserting that United States District Court for the Northern District of Texas had original jurisdiction over the controversy under 9 U.S.C. § 203, the international and foreign Underwriters removed the lawsuit to that district court.¹²⁰ Again, it is worth repeating that § 203 allows federal district courts to exercise jurisdiction over disputes originating under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹²¹

Of course, a bargained-for-exchange, forum-selection clause—entitled "Choice of Law & Jurisdiction"—appeared in the Underwriters' property-

112. *EnSCO Int'l Inc. v. Certain Underwriters at Lloyd's*, No. 3:07-CV-1581-O, 2008 WL 958205, at *1 (N.D. Tex. Apr. 8, 2008).

113. *Id.*

114. *Id.*

115. *Id.*; *EnSCO Int'l Inc. v. Certain Underwriters at Lloyd's*, 579 F.3d 442, 443 (5th Cir. Aug. 2009).

116. *Certain Underwriters at Lloyd's*, 2008 WL 958205, at *1.

117. *EnSCO*, 579 F.3d at 443.

118. *Certain Underwriters at Lloyd's*, 2008 WL 958205, at *1.

119. *Id.*

120. *Id.* Section 203 reads in pertinent part: "An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. § 203 (2006).

121. *See supra* note 120.

insurance contracts.¹²² The clause stated: “‘The proper and exclusive law of this insurance shall be Texas law. Any disputes arising under or in connection with it shall be subject to the exclusive jurisdiction of the Courts of Dallas County, Texas.’”¹²³ In light of the valid forum-selection provision, EnSCO filed a motion to remand the lawsuit to the Dallas court.¹²⁴ Specifically, the insured oil-and-gas company argued that “removal was improper because the forum selection clause . . . vests the ‘Courts of Dallas County, Texas’ with exclusive jurisdiction over any disputes.”¹²⁵

In response, Underwriters asserted that the forum-selection clause was not an express waiver of their right to remove under the Convention.¹²⁶ According to Underwriters, the insurance contracts “contain a mandatory arbitration clause.”¹²⁷ Thus, the insurers insisted that the federal district court, rather than the Dallas court, was the proper forum to address and resolve the various claims and theories of recovery appearing in the lawsuit.¹²⁸ Embracing EnSCO’s argument, the Northern District of Texas remanded the lawsuit to the Dallas court.¹²⁹ The district court found that the forum-selection clause was an ironclad, express waiver of Underwriters’ right to remove the lawsuit under the Convention and 9 U.S.C. § 205.¹³⁰ The insurers appealed.¹³¹

Underwriters asked a Fifth Circuit panel to decide a single question: Whether the forum-selection clause expressly waived the foreign insurers’ right to remove the disputed claims from the Texas state court to the district court.¹³² Writing for a 2-1 majority, Judge Smith concluded that the forum-selection clause was an express waiver of Underwriters’ removal right.¹³³ To be sure, the less-than-unanimous decision in favor of EnSCO is less important than several other facts: Judges Smith and Owen agreed to

122. *EnSCO*, 579 F.3d at 443.

123. *Id.*

124. *Certain Underwriters at Lloyd’s*, 2008 WL 958205, at *1.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *EnSCO Int’l Inc. v. Certain Underwriters at Lloyd’s*, 579 F.3d 442, 443 (5th Cir. Aug. 2009).

130. *Id.*; see also 9 U.S.C. § 205 (2006) (“Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial . . . remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.”).

131. *EnSCO*, 579 F.3d at 443.

132. *Id.* The panel comprised Justices E. Grady Jolly, Jerry Smith, and Priscilla Owen. *Id.*

133. *Id.*

remand the case for quite different and conflicting reasons.¹³⁴ And Judge Jolly wrote an intelligent and compelling dissenting opinion.¹³⁵

To reach his conclusion, Judge Smith relied heavily on the analysis in *City of New Orleans v. Municipal Administrative Services, Inc.*—a case that he authored for a different Fifth Circuit panel.¹³⁶ Judge Smith also incorporated into his *Ensco* analysis an extended discussion of another Fifth Circuit case—*McDermott International, Inc. v. Lloyds Underwriters*.¹³⁷ On one hand, *New Orleans* focused on removal under 28 U.S.C. § 1441—a defendant’s right to remove a lawsuit from a state court to a federal district court.¹³⁸ On the other hand, *McDermott* focused almost exclusively on the test for establishing whether a defendant expressly waived his removal rights under the Convention.¹³⁹ Still, Judge Smith minimized the importance of the express-waiver rules and holding in *McDermott*, preferring instead to entertain the idea that an implicit waiver is okay.¹⁴⁰

Although embracing Judge Smith’s conclusion that Underwriters in *Ensco* expressly waived their forum-selection rights under the Convention, Judge Owen refused to embrace the former judge’s analysis.¹⁴¹ She wrote:

I concur in the judgment only. With great respect, I do not join Judge Smith’s opinion because it relies heavily on this court’s decision in [*New Orleans*] . . . which concerned removal under 28 U.S.C. § 1441. Our decision in *McDermott* . . . examined removal under 9 U.S.C. § 205, and we should adhere to that binding precedent.¹⁴²

Again, Judge Jolly penned a persuasive dissenting opinion. The following excerpt is a representation of his concern and insight:

134. *Id.* at 449-50.

135. *See id.* at 450-52 (Jolly, J., dissenting).

136. *See id.* at 443 (majority opinion) (citing *City of New Orleans v. Mun. Admin. Servs., Inc.*, 376 F.3d 501 (5th Cir. 2004)).

137. *Id.* (citing *McDermott Int’l, Inc. v. Lloyds Underwriters*, 944 F.2d 1199 (5th Cir. 1991)).

138. *See New Orleans*, 376 F.3d at 503 (noting that Municipal Administrative Services (MAS) “entered into a contract with the city to audit BellSouth’s royalty payments to the city. . . . The city refused to pay MAS its 20% contingency fee and sued in state court for a declaratory judgment that it did not owe the fee. MAS removed to federal court and filed a counterclaim for the fees The city moved for remand on the basis of a contractual clause [under which MAS allegedly] waived its right to removal. The district court denied remand.”).

139. *See McDermott*, 944 F.2d at 1209.

140. *See Ensco*, 579 F.3d at 445 (“If the *McDermott* court had required actual reference to ‘waiver’ and ‘removal,’ the analysis of the *McDermott* contract would have been straightforward: The court could merely have decided that because no such reference was present, there was no waiver. But the *McDermott* court did not do so; quite to the contrary, it began its analysis by observing that ‘[w]hen a policy’s service-of-suit clause applies, its probable effect is to waive the insurer’s removal rights.’ The *McDermott* court, in other words, would have considered accepting a waiver based on the second ground used in *New Orleans*, notwithstanding the fact that such a waiver would have been implicit.” (internal citations omitted)).

141. *Id.* at 449 (Owen, J., concurring).

142. *Id.* (Owen, J., concurring).

Like Judge Owen, I believe that Judge Smith's opinion mistakenly relies upon [*New Orleans*, a 28 U.S.C. § 1441 case]. . . . The Underwriters removed [the present lawsuit under] 9 U.S.C. § 205, and the removal right . . . cannot be waived by anything less than an express statement of waiver. I disagree, however, with Judge Owen's conclusion that the exclusive jurisdiction clause at issue here constitutes an express waiver of removal rights. Purporting to apply this [c]ourt's express waiver standard, she suggests that language may be implicitly express. I respectfully dissent from the failure of both Judges Smith and Owen to apply our precedent in *McDermott*.¹⁴³

The Fifth Circuit will very likely have to rehear and decide the central question in *Ensco*. At this point, the decisions in *New Orleans*, *McDermott*, and *Ensco* conflict badly. Consequently, those analyses and holdings provide little certainty and direction for practitioners.

2. *Forced-Arbitration Question: Whether a Federal Court May Compel an Injured Louisiana Steamboat Worker to Arbitrate Rather than Litigate His Third-Party "Direct Action" Against a Steamboat Owner's Foreign Insurer Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Treaty*

Without doubt, when compared to the Convention-removal controversy, the court's analysis, and the majority's conclusion in *Ensco*, the analysis and holding in *Todd* generated considerably less confusion about a slightly different removal question under the Convention. Consider the pertinent facts in *Todd*. Delta Queen Steamboat Company (Delta) owned and operated the M/V American Queen—a replica steamboat.¹⁴⁴ Steamship Mutual Underwriting Association (Bermuda) Limited (Steamship) insured Delta against employees' personal-injury claims and lawsuits under a liability-insurance contract.¹⁴⁵ Anthony Todd was a chef

143. *Id.* at 450-51 (Jolly, J., dissenting) (internal citations omitted) ("The Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides a removal right (9 U.S.C. § 205) that is substantially broader than the one found in the general removal statute (28 U.S.C. § 1441) In accord with these policy concerns and § 205's extensive grant of removal rights, a waiver of these removal rights will only be enforced if it is express and explicit. Judge Smith attempts to maneuver around *McDermott*, but [that case's clear and repeated] . . . holding is inescapable: 'There are four reasons why we will give effect only to *explicit waivers* of Convention Act removal rights'; '*we adopt the express waiver rule* here to afford maximum protection to all those who rely on the Convention'; '[o]ur *express waiver rule* minimizes this danger by providing a *bright-line standard* for determining when parties surrender the full panoply of Convention Act rights'; '[f]uture forum choice disputes in Convention cases will not languish in this court under our *bright-line express waiver rule*.' . . . A majority of our panel today correctly concludes that the analysis in *City of New Orleans* is limited to general removal under § 1441. [But,] *McDermott* is binding." (internal citations omitted)).

144. *Todd v. Steamship Mut. Underwriting Ass'n (Bermuda) Ltd.*, 601 F.3d 329, 330 (5th Cir. Mar. 2010).

145. *Id.* at 331.

on the steamboat.¹⁴⁶ In early 2000, he was injured onboard as the ship was cruising on the Mississippi River along the shores of Louisiana.¹⁴⁷

In 2001, Delta filed for bankruptcy protection; but the bankruptcy court allowed Todd to commence a personal-injury lawsuit against Delta (personal-injury suit).¹⁴⁸ Although Todd won a judgment against Delta in a Louisiana state court six years later, Delta never satisfied the judgment.¹⁴⁹ Eight years after the injury and his inability to collect damages from insolvent Delta, Todd filed a “direct action” lawsuit against Delta’s liability insurer in a Louisiana state court (direct-action suit).¹⁵⁰ The claims in the latter lawsuit were numerous.¹⁵¹

In response, Steamship removed the direct-action suit to the United States District Court for the Eastern District of Louisiana.¹⁵² The liability insurer asked that tribunal to stay the direct-action proceedings and to compel Todd to arbitrate his claims under the Convention.¹⁵³ Steamship’s liability-insurance contract contained an arbitration clause “requiring Delta . . . to arbitrate certain disputes with Steamship.”¹⁵⁴ The controversial arbitration clause read:

If any difference or dispute shall arise between a Member and the Club concerning . . . the insurance afforded by the Club under these Rules, or any amount due from the Club to the Member, such difference or dispute

146. *Id.* at 330.

147. *Id.*

148. *Id.*

149. *Id.* at 330-31.

150. *Id.* at 331; *see also* LA. REV. STAT. ANN. § 22:1269 (2009). Section 22:1269 states, in pertinent part:

A. [T]he insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person, or his [or her] survivors . . . or heirs against the insurer.

B. (1) The injured person or his or her survivors or heirs mentioned in Subsection A . . . shall have a right of direct action against the insurer within the terms and limits of the policy; and, such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido.

Id.

151. *Todd*, 601 F.3d at 331. Specifically, Todd asserted that:

1) Steamship [was] liable . . . for his injuries onboard the M/V A[merican] Q[ueen], less any deductible; 2) Steamship failed to negotiate with Todd in good faith; 3) Steamship failed to make reasonable efforts to settle with Todd, and 4) Steamship’s “members”—i.e., other entities insured by Steamship—should be declared jointly and severally liable to Todd.

Id.

152. *Id.*

153. *Id.*; *see supra* note 108 and the accompanying text to review the discussion about the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

154. *Todd*, 601 F.3d at 331.

shall in the first instance be referred to and adjudicated by the Directors If the Member does not accept the decision of the Directors the difference or dispute shall be referred to the arbitration of two arbitrators, one to be appointed by each of the parties, in London.¹⁵⁵

The Eastern District of Louisiana in *Todd* did not write an opinion to explain its decision.¹⁵⁶ Instead, the lower federal court declared that the Fifth Circuit's decision in *Zimmerman v. International Companies & Consulting, Inc.* conclusively resolved Todd and Steamship's Convention-related arbitration dispute.¹⁵⁷ Briefly, in *Zimmerman*, an accident injured several seaman onboard their employer's vessel.¹⁵⁸ Citing Louisiana's direct-action statute, each worker filed a lawsuit against the employer's protection and indemnity insurer in a federal court.¹⁵⁹ The insurance contract contained an arbitration clause, requiring the insured employer and the insurer to arbitrate a covered dispute "in London according to English law."¹⁶⁰ Ultimately, citing the court of appeals' decision in *In the Matter of Talbott Big Foot, Inc.* and the FAA rather than the Convention, the Fifth Circuit panel in *Zimmerman* concluded that the direct-action seamen "were not bound by the arbitration clause."¹⁶¹ Again, standing alone, that holding

155. *Id.* at 331 n.3.

156. *Id.* at 331.

157. *Id.* (citing *Zimmerman v. Int'l Cos. & Consulting, Inc.*, 107 F.3d 344 (5th Cir. 1997)).

158. *Zimmerman*, 107 F.3d at 345-46.

159. *Id.* at 346.

160. *Id.*

161. *Id.* at 347 (citing *In re Talbott Big Foot, Inc.*, 887 F.2d 611 (5th Cir. 1989)). The court stated:

The district courts correctly followed the applicable Louisiana law as interpreted by . . . *Big Foot*. . . . In *Big Foot* this court recognized that when the Louisiana direct action statute, La. R.S. 22:655, is applicable and authorizes a direct suit against a tortfeasor's insurer, the statute is read into and becomes a part of the insurance policy by law, even though the policy does not contain the language required by the statute, or contains language prohibited by the statute. . . . By the same token, this court in *Big Foot* held a policy clause that requires a personal injury claimant to await arbitration of a coverage dispute before litigating a suit against the insurer would have the same effect and must therefore meet the same fate of annulment or supersession.

The district courts also correctly followed the steps of *Big Foot* in interpreting the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"), as not requiring arbitration for parties who have not contractually bound themselves to arbitrate their disputes. The FAA does not require arbitration unless the parties to a dispute have agreed to refer it to arbitration. Likewise, the mandatory stay provision of the FAA does not apply to those who are not contractually bound by the arbitration agreement. Thus, the FAA, the source of the federal policy favoring arbitration, has no application to require direct action plaintiffs to arbitrate or to stay their lawsuits during arbitration.

We are not persuaded by Sphere Drake's argument that direct action plaintiffs are deemed to have consented to be bound by the insurance policy's arbitration clause simply because courts have said that such plaintiffs are to be treated as if they were third party beneficiaries of the insurance contract having standing to sue the insurer on the contract. . . . [T]he statute does not require the direct action plaintiff to consent to or abide by any policy provision that would contravene the right of the injured party to bring a direct action as provided by the statute.

in *Zimmerman* was sufficient for the Eastern District of Louisiana in *Todd* to deny Steamship's motion to stay Todd's direct-action lawsuit and to allow Todd to evade arbitration.¹⁶² Steamship appealed.¹⁶³

After the district court denied Steamship's motion, the Supreme Court released its opinion in *Arthur Andersen L.L.P. v. Carlisle*.¹⁶⁴ The panel reviewed the decision; and, writing for the majority, Judge Benavides concluded that "*Carlisle* effectively overrules *Zimmerman*, at least insofar as *Zimmerman* would . . . prevent Steamship from compelling Todd to arbitrate his claims."¹⁶⁵ He also stressed that *Carlisle* overruled *Big Foot*.¹⁶⁶ But even more importantly, Judge Benavides raised and addressed forthrightly, intelligently, and thoughtfully two issues that might cause some jurists to question the soundness of the analysis and holding in *Todd*.¹⁶⁷

First, in *Zimmerman* and *Big Foot*, the injured seamen sued the foreign insurers under Louisiana's direct-action statute.¹⁶⁸ And, in response, the insurers filed a motion to stay the seamen's direct-action laws until the insurers had exercised their contractual right to arbitrate with the seamen's employers.¹⁶⁹ On the other hand, in *Todd*, Steamship—a foreign insurer—tried to compel a direct-action plaintiff to arbitrate.¹⁷⁰ And Todd won a judgment against Steamship's insured and sued Steamship to collect damages, unlike the direct-action plaintiffs in *Big Foot* and *Zimmerman*.¹⁷¹

Judge Benavides observed, however: Before *Carlisle*, the analyses in *Zimmerman* and *Big Foot* would still apply and be sufficiently broad to allow Todd to evade arbitration.¹⁷² To accentuate that point, in *Zimmerman*, the panel concluded that it would be inappropriate to stay an injured worker's direct action because:

The FAA does not require arbitration unless the parties to a dispute have agreed to refer it to arbitration. Likewise, the mandatory stay provision of the FAA does not apply to those who are not contractually bound by the arbitration agreement. Thus, the FAA, the source of the federal policy

Id. at 346-47 (internal citations omitted).

162. *Todd*, 601 F.3d at 331.

163. *Id.*

164. See *Arthur Andersen L.L.P. v. Carlisle*, 129 S. Ct. 1896 (2009).

165. *Todd*, 601 F.3d at 332.

166. *Id.* at 332 ("[W]e conclude that *Carlisle* invalidates *Zimmerman* and *Big Foot*.").

167. *Id.*

168. See *Zimmerman v. Int'l Cos. & Consulting, Inc.*, 107 F.3d 344, 345 (5th Cir. 1997); *In re Talbott Big Foot, Inc.*, 887 F.2d 611, 612 (5th Cir. 1989).

169. See *Zimmerman*, 107 F.3d at 345; *Big Foot*, 887 F.2d at 612.

170. *Todd*, 601 F.3d at 333.

171. See *id.*

172. *Id.* at 333-34.

favoring arbitration, has no application to require direct action plaintiffs to arbitrate or to stay their lawsuits during arbitration.¹⁷³

The second question that might raise concern is “whether *Zimmerman*, *Big Foot*, and *Carlisle* are relevant [under the facts in *Todd*].”¹⁷⁴ Again, the actions and motion-to-stay in the former three cases commenced under the FAA arbitration statutes rather than under the Convention.¹⁷⁵ Indeed, the Convention and the FAA differ in major respects.¹⁷⁶ But, Judge Benavides observed: In both FAA and Convention controversies, “courts have largely relied on the same common law contract and agency principles”—rather than on a statute or a treaty—to decide whether nonsignatories must arbitrate.¹⁷⁷ Therefore, in light of the Supreme Court’s decision in *Carlisle*, the Fifth Circuit panel (1) reversed the district court’s ruling against Steamship, (2) remanded the case for the court to determine whether Todd must arbitrate, and (3) instructed the district court to address other issues in the case that “were not fully fleshed out in the proceedings below.”¹⁷⁸

173. *Zimmerman*, 107 F.3d at 346.

174. *Todd*, 601 F.3d at 334.

175. *See supra* note 161 and accompanying text.

176. *Compare* *Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490, 492 (5th Cir. 2006) (concluding that the McCarran-Ferguson Act allows states’ business-of-insurance regulations to “reverse preempt” the FAA), *with* *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 587 F.3d 714, 717 (5th Cir. Nov. 2009) (en banc) (declaring that states’ business-of-insurance regulations may not reverse preempt the Convention and its implementing legislation).

177. *Todd*, 601 F.3d at 334 & nn.10-11.

178. *Id.* at 336 (“First, . . . the record does not include a complete copy of Steamship’s 1999/2000 Rules, which contain the arbitration clause Todd should have the opportunity to review the full Rules and bring to the district court’s attention any provisions suggesting that the arbitration clause does not apply to nonsignatories like Todd. Second, during this appeal, the parties have not addressed what law should apply to determine whether Todd must arbitrate as a nonsignatory. . . . [O]n remand, the parties should address the effect of the clause in the Delta Queen policy selecting English law to govern ‘contractual or other substantive or procedural rights and obligations.’ Third, the parties have not extensively addressed in their briefing on appeal whether all of Todd’s causes of action fall within the scope of the arbitration clause in the Delta Queen’s policy with Steamship. . . . In conclusion, we stress that [these] issues . . . are nonexhaustive; we only suggest that these issues should be considered within the framework of a full analysis of whether Todd can be bound to arbitrate.”).

III. FIRST-PARTY INSURANCE CONTRACTS—SUBSTANTIVE QUESTION:
 WHETHER UNDER LOUISIANA AND MISSISSIPPI’S LAWS PROPERTY
 AND CASUALTY INSURERS HAVE A CONTRACTUAL DUTY TO PAY
 ADDITIONAL PROCEEDS UNDER HOMEOWNERS’ INSURANCE
 CONTRACTS AFTER PROPERTY OWNERS SETTLED OR PARTIALLY
 SETTLED THEIR RESPECTIVE HURRICANE KATRINA-RELATED,
 PROPERTY-DAMAGE CLAIMS WITH THE INSURERS

A. *Trilogy I—Review of Pertinent Facts in “Additional Payment” Cases*

Comprising various combinations of circuit-court and designated district-court judges, nine panels decided three trilogies of cases during the Fifth Circuit’s 2009-2010 term.¹⁷⁹ And within each trilogy, identical first-party or third-party insurance questions produced very different analyses and conflicting holdings. Trilogy I includes the following cases: *Wiley v. State Farm Fire and Casualty Co.*,¹⁸⁰ *Nuñez v. Allstate Insurance Co.*,¹⁸¹ and *Bradley v. Allstate Insurance Co.*¹⁸² And, among the first trilogy of cases, three different panels considered and decided a central question: whether property insurers have a contractual duty to pay additional proceeds under first-party insurance contracts after Hurricane Katrina destroyed “covered” tangible property and homeowners received some payment for “covered” loss claims.¹⁸³ A review of the facts in the respective cases appears before discussing the panels’ respective findings and holdings.

First, in *Bradley*, Felton and Lucille Bradley (the Bradleys) lived in a house that they owned in New Orleans, Louisiana.¹⁸⁴ Allstate Insurance Company (Allstate) insured the house under a homeowners’ insurance contract, which excluded flood-related losses and damage.¹⁸⁵ The coverage limits under the homeowners’ policy were \$105,600 for the structure, \$73,920 for the contents, and \$10,560 for other structures.¹⁸⁶ To insure what Allstate’s policy excluded, the Bradleys purchased a flood-insurance contract from Fidelity National Insurance Company (Fidelity).¹⁸⁷ Both insurance contracts were current when Hurricane Katrina arrived in New

179. Trilogies II and III are discussed *infra* Part IV.A and *infra* Part IV.B, respectively.

180. *See infra* notes 237-57.

181. *See infra* notes 211-36.

182. *See infra* notes 184-210.

183. *See Versai Mgmt. Corp. v. Clarendon Am. Ins. Co.*, 597 F.3d 729, 736 & n.1 (5th Cir. Feb. 2010). A different panel also considered the “additional payment” question. *See id.*

184. *Bradley v. Allstate Ins. Co.*, 606 F.3d 215, 221 (5th Cir. May 2010).

185. *Id.*

186. *Id.*

187. *Id.*

Orleans.¹⁸⁸ Katrina totally destroyed the Bradleys' house, leaving only "a few badly damaged concrete blocks . . . on the property."¹⁸⁹

After the Bradleys filed a timely notice of loss, Allstate's engineers concluded that a "combination of hurricane winds and flooding" totally destroyed the structure.¹⁹⁰ After reviewing a second engineers' report, Allstate's adjusters, however, concluded that "[c]atastrophic [w]ind [d]amage" made the dwelling unlivable.¹⁹¹ Ultimately, Allstate settled the claim and "paid \$41,339.06 for structural damage and \$10,632 for contents under the homeowners' policy."¹⁹² To be sure, those payments were substantially lower than the respective policy limits for a destroyed structure and its contents.¹⁹³ On the other hand, the Bradleys received the policy limits under the flood-insurance contract—\$63,800 for structural damage and \$6,200 for destroyed contents.¹⁹⁴ Thus, the insurers paid collectively a total payment of \$105,139.06 for the structural damages.¹⁹⁵

The Bradleys, however, wanted to build another house. Allstate appraised the pre-Katrina market value of the Bradleys' destroyed home at \$85,000.¹⁹⁶ The Bradleys determined that the pre-storm value of their home was between \$85,000 and \$97,000.¹⁹⁷ Moreover, their expert estimated that the Bradleys would need \$265,427 to rebuild their house.¹⁹⁸ Allstate refused the Bradleys' request for additional payments and the homeowners sued the insurer in a Louisiana state court.¹⁹⁹ Their complaint raised several claims and causes of action sounding in both contract and tort.²⁰⁰ In particular, the Bradleys cited Louisiana's Value Policy Law (VPL) and asserted that their house was a "total loss."²⁰¹ They also claimed that Allstate had a duty to pay the full policy limits without deductions or

188. *See id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* Specifically, Allstate paid 60.85% (\$64,260.94) and 85.6% (\$63,288) less than the insurance contract promised to pay for structural damages and destroyed contents, respectively. *See id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* ("To date, the Bradleys have not rebuilt their Tennessee Street house [in New Orleans], although Mr. Bradley stated [in a] deposition that he intends to rebuild. In order to benefit from government assistance through the Road Home program, the Bradleys attested that they will rebuild and return to the property. The Bradleys did purchase another home in New Orleans East for \$134,500, but they have not designated that home as a replacement property.")

199. *Id.*

200. *Id.* at 221-22 & n.1 ("The Bradleys claimed that Allstate breached the insurance contract, acted negligently, and acted in bad faith. . . . [Thus, they sought] compensation for mental anguish and emotional distress [as well as] damages for Allstate's alleged bad faith [under] LA. REV. STATS. §§ 2:1220 and 22:658 [the latter recodified as § 22:1892].")

201. *Id.*; LA. REV. STAT. ANN. §§ 22:1318, 22:695(A) (2009).

offsets.²⁰² Furthermore, the homeowners insisted that Allstate should pay additional proceeds to cover their personal-property losses and additional living expenses.²⁰³

Allstate removed the case to the United States District Court for the Eastern District of Louisiana citing diversity jurisdiction.²⁰⁴ Ultimately, the district court awarded some damages for the Bradleys "additional living expenses"; but the award was less than requested.²⁰⁵ Regarding the homeowners' other claims, the district court granted Allstate's motions for summary judgment.²⁰⁶ More specifically, the Eastern District of Louisiana decided that the Bradleys could only receive the actual cash value of their destroyed house, which was less than the total payment (\$105,139.06) that they received for structural damages under their homeowners and flood policies.²⁰⁷

Additionally, the district court dismissed the "total loss" claim.²⁰⁸ The lower court wrote:

Although the Bradleys allege that the property was damaged by wind and flood and that the home is a total loss, there is no allegation that the total loss was caused by wind or any other peril covered under the homeowner's policy. Accordingly, there are no disputed issues of material fact, and Allstate is entitled to judgment as a matter of law that Louisiana's VPL does not apply.²⁰⁹

The Bradleys appealed to the Fifth Circuit.²¹⁰

Of course, the facts in *Nuñez* are fairly similar to those in *Bradley*. Chet and Wendy Nuñez (Nuñezes) owned and occupied a house in Chalmette, Louisiana.²¹¹ Although the Nuñezes evacuated their house before Hurricane Katrina arrived in Louisiana on August 29, 2005, they asserted that rain, fire, and flooding destroyed the house.²¹² They also

202. *Bradley*, 606 F.3d at 221.

203. *Id.*

204. *Id.*

205. *Id.* at 221-22.

206. *Id.* at 222.

207. *Id.*

208. See *infra* note 209 and accompanying text.

209. *Bradley v. Allstate Ins. Co.*, No. 07-3748, 2008 WL 2952974, at *4 (E. D. La. July 25, 2008); see also *Bradley*, 606 F.3d at 222 ("The [federal district] court also dismissed the Bradleys' claims for loss of personal property for failure to introduce evidence of ownership or the value of the items claimed. The mental and emotional distress claims were rejected for failure to advance any evidence of mental anguish or emotional distress. With regard to the Bradleys' bad faith claims, the court found that Allstate had fully paid the Bradleys' claims under the policy and therefore there was no 'valid, underlying, substantive claim.'").

210. *Id.*

211. *Nuñez v. Allstate Ins. Co.*, 604 F.3d 840, 842 (5th Cir. Apr. 2010).

212. *Id.* ("[The Nuñezes] were not present during the storm and did not witness the damage to their home as it occurred.").

alleged that at least eight feet of floodwater entered their house, which reached the ceiling.²¹³ Unlike the Bradleys, the Nuñezes purchased a flood-insurance contract as well as an all-risk homeowners' insurance policy from Allstate Insurance Company.²¹⁴

The policy limits under the homeowners' policy were: \$115,166 for "Dwelling Protection," \$11,517 for "Other Structures Protection," and \$80,617 for "Personal Property Protection—Reimbursement Provision."²¹⁵ The total policy limit under the homeowners' policy was \$207,300.²¹⁶ Allstate gave the Nuñezes "\$19,856.08 for wind-related structural damage to the house, \$1,135.69 for wind damage to other structures, \$3,103.72 for wind damage to personal property, and \$4,960 in additional living expenses."²¹⁷ Therefore, the Nuñezes secured a total of \$29,055.49 under their homeowners' policy.²¹⁸ The policy limits under the flood insurance contract were: \$75,000 for damage to a structure and \$30,000 for the contents in a structure.²¹⁹ Allstate delivered a \$105,000 check to the Nuñezes, which was the total policy limit under the flood-insurance contract.²²⁰ In the end, Allstate gave the Nuñezes a grand total of \$134,055.49 for their Hurricane Katrina-related losses.²²¹

After receiving the insurance proceeds, "the Nuñezes moved to Houston and used the money . . . to buy a house for \$172,000."²²² They "guttered the Chalmette house . . . , elevated it and did work to patch the roof."²²³ Nearly two years after receiving the reimbursements, the Nuñezes and twenty-six other plaintiffs sued Allstate "to recover unpaid Hurricane Katrina-related damages to their homes."²²⁴ Allstate removed the lawsuit to the United States District Court for the Eastern District of Louisiana, where the cases were severed.²²⁵ Six months later, the Nuñezes filed their first amended complaint, alleging that they only received "partial payment" from Allstate for "damage caused by wind and wind-driven rain."²²⁶ The Nuñezes based their claim for additional payments on their expert's report, which apparently outlined the efficient proximate cause of the homeowners' losses.²²⁷

213. *Id.* at 842-43.

214. *Id.* at 842.

215. *Id.* at 843 n.1.

216. *Id.*

217. *Id.* at 843.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* ("The Nuñezes furnished their expert report, from Mr. Steve Hitchcock, on October 8,

Allstate filed two motions—a motion to exclude the expert’s testimony and a motion for summary judgment.²²⁸ In their motion for summary judgment, Allstate argued that the Nuñezes did not satisfy their burden to produce evidence of “segregable wind damages.”²²⁹ Therefore, Allstate argued additional payment for alleged wind damage was unwarranted.²³⁰ Furthermore, Allstate asserted: “[T]he Nuñezes did not repair or replace their property.”²³¹ Consequently, the homeowners’ total recovery was limited to the destroyed house’s actual cash value, minus an offset for their recovery under the flood-insurance policy.²³² “Assuming an actual cash value of \$113,914 (the highest estimate) minus an offset of \$94,856.08 for the Nuñezes’ recovery under the flood policies, Allstate claimed that it could not owe more than \$19,057.92 for structural damages.”²³³ Of course, as reported above, Allstate had already transferred \$134,055.49 to the Nuñezes.²³⁴ The Eastern District of Louisiana granted Allstate’s motions.²³⁵ And, the Nuñezes filed a timely notice of appeal to the Fifth Circuit.²³⁶

Wiley is the final case in the additional-payments trilogy. Christopher M. Wiley is the plaintiff-insured in *Wiley*.²³⁷ When Hurricane Katrina arrived in August 2005, Wiley owned a house in Biloxi, Mississippi.²³⁸ Wiley’s house was destroyed and only the foundation’s slab remained.²³⁹ State Farm Fire and Casualty Company (State Farm) had insured the house under a homeowner’s insurance policy.²⁴⁰ The policy’s limit was \$444,000, and the contract “covered [Wiley’s] dwelling, a dwelling extension, personal property, and actual loss for sustained loss of use.”²⁴¹

Wiley filed a notice-of-loss claim with State Farm.²⁴² The insurer, however, never paid, citing the water-damage exclusion clause in the insurance contract.²⁴³ In October 2006, State Farm and Wiley entered the Mississippi Department of Insurance (MDI) Hurricane Katrina Mediation

2008.”). *But see id.* at 847 (discussing Allstate’s challenge to the testimony of Steve Hitchcock, in which Allstate asserted that “[Hitchcock] did not utilize any recognizable methodology in formulating his opinion that Allstate failed to determine the correct cause of damage Rather, his opinions relied on hearsay and Mr. Nuñez’s speculations as to the causes of damage”).

228. *Id.* at 843.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *See supra* text accompanying note 221.

235. *Nuñez*, 604 F.3d at 844.

236. *Id.*

237. *Wiley v. State Farm Fire & Cas. Co.*, 585 F.3d 206, 208 (5th Cir. Oct. 2010).

238. *Id.* at 209.

239. *Id.*

240. *Id.* at 208-09.

241. *Id.* at 209 n.2.

242. *Id.* at 208.

243. *Id.*

Program.²⁴⁴ Both Wiley and State Farm signed a settlement agreement (2006 Settlement); in exchange for \$80,235, Wiley released State Farm from all known-losses claims.²⁴⁵ More than one year after the 2006 Settlement, State Farm sent a letter (2007 Letter) to Wiley.²⁴⁶ Citing an agreement between State Farm and MDI, the 2007 Letter stated that “State Farm had re-evaluated Wiley’s claim and was prepared to offer him an additional \$26,798.13.”²⁴⁷ The 2007 Letter also contained a condition precedent: Wiley would have to sign a new release (2007 Release) and agree to “release[], acquit[], and forever discharge[] [State Farm] from any and all claims that [Wiley] has or could have asserted, now or in the future . . . arising out of or related to the damage or loss from Hurricane Katrina.”²⁴⁸

Wiley refused to sign the 2007 Release and commenced breach-of-contract actions against State Farm in the District Court for the Southern District of Mississippi.²⁴⁹ Citing the 2006 Settlement and the doctrine of release and settlement principles, State Farm filed a summary-judgment motion and asked the district court to dismiss Wiley’s causes and claims.²⁵⁰ The district judge did not grant State Farm’s motion immediately.²⁵¹ Instead, the Southern District of Mississippi gave Wiley an opportunity to support his theories of recovery in a detailed affidavit, outlining “any additional damage to the insured property that was unknown to the parties at the time the [2006 Settlement] was signed.”²⁵² In due course, Wiley submitted a motion for reconsideration, asserting “for the first time . . . that the 2007 Letter and 2007 Release constituted a waiver of the 2006 Settlement.”²⁵³

The district judge denied the motion and rejected Wiley’s argument.²⁵⁴ More specifically, the Southern District of Mississippi held that the 2006 Settlement barred Wiley’s lawsuit.²⁵⁵ To reach that conclusion, the judge found that the 2006 Settlement was a complete release of all Katrina-related, property-loss claims which were “known to the parties when the

244. *Id.*

245. *Id.*

246. *Id.* at 208-09.

247. *Id.* at 209. “In April 2007, after negotiations with Mississippi regulators, State Farm agreed to re-evaluate and offer additional compensation to Mississippi policy-holders.” *Id.* at 209 n.3 (citing Associated Press, *Katrina-related Re-evaluations Cost State Farm \$29.8 Million*, CHI. TRIB., Aug. 14, 2007, at B3).

248. *Id.* at 209.

249. *Id.*

250. *Id.* at 209-10.

251. *Id.* at 210.

252. See *Wiley v. State Farm Fire & Cas. Co.*, No. 1:08CV214-H50-RHW, 2009 WL 259615, at *3 (S.D. Miss. Feb. 3, 2009).

253. *Wiley*, 585 F.3d at 210.

254. *Wiley*, 2009 WL 259615, at *3.

255. *Id.*

Settlement Agreement was executed.”²⁵⁶ Wiley timely appealed to the Fifth Circuit.²⁵⁷

B. Fifth Circuit Panels’ “Additional Payment” Opinions in Trilogy I

Elsewhere, the author has written a fair amount about the definition of “coverage,” a “covered loss,” or “covered property” under property-insurance contracts.²⁵⁸ Put simply, definitions of coverage under, say, a homeowners’ insurance contract and a vehicle-liability insurance policy are quite different.²⁵⁹ Here, it is enough to stress: An insurer has a duty to pay or make reimbursements if a “peril insured against” or a “covered peril” in an insured’s property-insurance contract causes a loss of tangible or intangible property.²⁶⁰ Therefore, one’s having a healthy understanding of and respect for the doctrine of dominant or efficient proximate cause as well as the doctrine of concurrent causation is mandatory before determining whether a homeowners’ insurance policy covers a loss.²⁶¹

Without a doubt, the Supreme Courts of Louisiana and Mississippi have keen reverence for those causation doctrines. More than a half century ago, the Louisiana Supreme Court adopted the efficient proximate causation doctrine to decide covered- and excluded-perils disputes under property insurance contracts.²⁶² And a half century ago, the Mississippi Supreme Court declared: “If the nearest efficient cause of the loss is not a peril insured against, recovery may nevertheless be had if the dominant cause is a

256. *Id.*

257. *Wiley*, 585 F.3d at 210.

258. *See, e.g.*, 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, 613-14 nn.357-59 (2005) (discussing the difference between the definitions of coverage under property-insurance and liability-insurance contract and discussing the important distinctions between “covered” and “excluded” perils under property-insurance contracts).

259. *See id.* at 614.

260. *See id.*; *see also* *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 710 (Cal. 1989) (“Coverage [in a property policy] . . . is commonly provided by reference to causation, e.g., ‘loss caused by . . .’ certain enumerated perils.”).

261. *See* WILLY E. RICE, *CONSUMER LITIGATION & INSURANCE DEFENSE*, 197-98, 397, 407, 418-26, 467 (2d ed., Cognella Academic Press 2010) (presenting long discussions of the various doctrines—dominant causation, efficient proximate causation, and concurrent causation—and presenting a list of Texas cases and cases from other jurisdictions).

262. *See* *Roach-Strayhan-Holland Post v. Cont’l Ins. Co.*, 112 So. 2d 680, 683 (La. 1959) (“Moreover, since in a great number of factual situations it has been shown that wind is often not the sole contributing cause of the loss or damage, acceptance has been accorded the view that it is sufficient . . . that the wind was the proximate or efficient cause of the loss or damage, notwithstanding other factors contributing thereto. This is in line with the jurisprudence of our own State.”); *see also* *Lorio v. Aetna Ins. Co.*, 232 So. 2d 490, 493 (La. 1970) (stressing that “a review of the authorities on the subject reveals that courts of last resort including [the Supreme Court of Louisiana] have consistently interpreted the term ‘direct loss’, as used in a windstorm insurance policy, to be a loss proximately caused by the peril insured against [and concluding that the term has] . . . essentially the same meaning as ‘proximate cause’ applied in negligence cases”) (emphasis added).

risk or peril insured against.”²⁶³ Furthermore, during that same era, the Supreme Court of Mississippi fashioned another general rule: “[I]f the cause designated in the policy is the dominant and efficient cause of the loss the right of the insurer to recover will not be defeated [if] . . . there were contributing causes.”²⁶⁴ More recently, the Mississippi Supreme Court stressed another point respecting the application and effect of an anti-concurrent causation clause (ACC) in a property-insurance contract: If facts establish a truly concurrent cause—“i.e., wind and flood simultaneously converging and operating in conjunction to damage the property,” a court may then conclude that an “indivisible” loss occurred and apply an ACC clause.²⁶⁵

Like most residential property and casualty and indemnity insurers, Allstate sells “all risks” homeowners’ insurance contracts.²⁶⁶ In fact, “[a]

263. *Glens Falls Ins. Co. v. Linwood Elevator*, 130 So. 2d 262, 270 (Miss. 1961).

264. *Evana Plantation, Inc. v. Yorkshire Ins. Co.*, 58 So. 2d 797, 798 (Miss. 1952).

265. *See Corban v. U.S. Auto. Ass’n*, 20 So. 3d 601, 617-18 (Miss. 2009) (“After a thorough examination of Mississippi caselaw, the evidence . . . in this case, the briefs of the parties and amici, and the USAA policy . . . , this Court declares the [anti-concurrent causation] clause [is] inapplicable. We respectfully reject the proposition that, under [an anti-concurrent causation] clause, ‘indivisible damage caused by both excluded perils and covered perils or other causes is not covered.’ We neither agree nor find support for an analysis focusing on ‘damage’ rather than ‘loss’, or the premise that ‘storm surge’ flooding which inundates the same area that the wind, acting independently, previously damaged constitutes ‘indivisible damage’ or ‘the same damage.’”).

266. *Cf.* Brief of the Chehardy Representative Policyholders in Resp. to the Appeals of Defs.-Appellants and as Original Brief on Cross-Appeal at 1, *In re Katrina Canal Breach Litig.*, 495 F.3d 191 (5th Cir. 2007) (No. 07-30119), 2007 WL 4266578, at *1 [hereinafter *Chehardy Brief*]. In pertinent part, the well-documented and carefully researched brief read:

This appeal presents the question of whether property damages sustained by policyholders are covered by “all-risk” insurance policies issued by a number of insurance companies. . . .

[T]he All-Risk Homeowners Policies [were] sold by Defendants Lexington Insurance Company, The Standard Fire Insurance Company, Liberty Mutual Fire Insurance Company, Auto Club Family Insurance Company, Aegis Security Insurance Company, The American Insurance Company, Lafayette Insurance Company, Louisiana Citizen Property Insurance Corporation and The Hanover Insurance Company . . . , Allstate Indemnity Company and Allstate Insurance Company . . . , [and] Great Northern Insurance Company and Hanover Insurance Company (collectively “Insurance Company Defendants”)

Each of the Representative Policyholders . . . purchased an All-Risk Homeowners Policy from one of the Insurance Company Defendants which was in effect at the time Hurricane Katrina hit Southeast Louisiana. . . .

Upon proper and repeated demands by Representative Policyholders, the Insurance Company Defendants have refused to meet their obligations under the All-Risk Policies and refused to pay the full damages for Representative Policyholders’ homes being destroyed or damaged by the efficient proximate cause of windstorms, storm surge and/or negligence. . . .

Following the Insurance Companies’ refusal to pay for their losses, Representative Policyholders instituted the class action, seeking declaratory relief on behalf of the class that their losses were covered under the All-Risk Homeowners Policies they purchased. In their Amended and Restated Complaint Representative Policyholders alleged, *inter alia*, that:

(1) The first efficient proximate cause of the losses suffered by the class of Policyholders on August 29, 2005, was “windstorm,” a covered peril under all of the insurance policies purchased by the Policyholders, thereby rendering any subsequent impact from water released by the levee and/or levee wall failures irrelevant to coverage afforded by the insurance policies;

the end of August 2005, . . . Allstate Insurance Company and Allstate Indemnity Company . . . had in force more than 190,000 homeowners insurance policies in Louisiana.”²⁶⁷ And like most homeowners’ insurance contracts, Allstate’s contracts contain “covered perils” or “perils insured against” clauses.²⁶⁸ Briefly put, under the latter clauses, Allstate promises to pay for a covered loss or for damaged or destroyed covered property.²⁶⁹ In addition, Allstate promises to pay only when homeowners establish conclusively that a covered peril or a peril insured against was the efficient

(2) The second efficient proximate cause of the losses resulted from water entering the City of New Orleans and surrounding parishes on August 29, 2005, from the breaches in the levees and levee walls along the 17th Street Canal, London Avenue Canal, Industrial Canal, and elsewhere were acts of negligence, standard covered perils in the Insurance Company Defendants’ homeowners insurance policies;

(3) The third efficient proximate cause of the losses resulting from water entering the City of New Orleans and surrounding parishes on August 29, 2005, was “storm surge”, [sic] a known meteorological phenomenon that is not specifically excluded by any of the Insurance Company Defendants’ insurance policies, in contrast to other insurance policies available in the market, thereby rendering any damage caused by “storm surge” and resulting water pressure covered under the policies; [and],

(4) The breaking or failure of levees or boundaries of lakes, reservoirs, rivers, streams, or other bodies of water was a peril not specifically excluded by any of the Insurance Company Defendants’ insurance policies The Insurance Company Defendants filed Motions to Dismiss, arguing that their policies excluded the losses claimed by the Representative Policyholders and relying primarily upon the so-called “Water Damage Exclusions.”

Id. at ix, 1, 4-6.

267. See Brief of Allstate Ins. Co. & Allstate Indem. Co. as Amici Curiae in Support of Appellee and Affirmance of the District Ct. Ruling, *John v. Nat’l Sec. Fire & Cas. Co.*, 501 F.3d 443 (5th Cir. 2007) (No. 07-30237), 2007 WL 4556542, at *1 [hereinafter *Allstate Brief*].

268. See Brief of Farmers Ins. Co. Exch. et. al as Amici Curiae in Support of Defs.-Appellants at 13, *In re Katrina Canal Breach Litig.*, 495 F.3d 191 (5th Cir. 2007) (No. 07-30119), 2007 WL 4266568, at *13 [hereinafter *Farmers Ins. Amici Brief*].

269. Cf. *In re Katrina Canal Breaches Litig.*, 466 F. Supp. 2d 729, 779 (E.D. La. 2006). For example, the “Allstate Insurance Company Deluxe Homeowners Policy” states that “[i]f loss to covered property is caused by water or steam not otherwise excluded, we will cover the cost of tearing out and replacing any part of your dwelling necessary to repair the system or appliance.” *Farmers Ins. Amici Brief*, *supra* note 268, at 12 n.5. Further, Allstate “do[es] not cover . . . loss to covered property inside a building structure, caused by rain, snow, sleet, sand or dust unless the wind or hail first damages the roof or walls and the wind forces rain, snow, sleet, sand or dust through the damaged roof or wall.” *Id.* Allstate “will pay reasonable expenses you incur to remove debris of covered property damaged by a loss we cover. . . . [and] will pay for sudden and accidental direct physical loss to covered property from any cause while removed from a premises because of danger from a loss we cover.” *Id.* Allstate also:

will pay up to \$500 for service charges made by fire departments called to protect your property from a loss we cover at the residence premises. . . . [and] will reimburse you up to \$5,000 for the reasonable and necessary cost you incur for temporary reports to protect covered property from further imminent covered loss following a loss we cover. . . . [and] will pay up to \$5,000 for information leading to an arson conviction in connection with a fire loss to property covered under Section I of this policy.

Id. Finally, the Allstate policy states that it “will cover: a) the entire collapse of a covered building structure; b) the entire collapse of part of a covered building structure; and c) direct physical loss to covered property caused by (a) or (b) above.” *Id.*

proximate cause of a covered loss or destroyed/damaged covered property.²⁷⁰

But even more importantly, the same principle applies when homeowners submit claims for “additional payment.”²⁷¹ Allstate, State Farm, and other homeowners’ insurers have a contractual duty to pay additional proceeds for a destroyed or damaged covered property only if the insured proves that a covered peril was the efficient proximate cause of a new or an undercompensated prior loss.²⁷² Again, litigants in *Bradley*, *Nuñez*, and *Wiley* asked the Fifth Circuit to decide this question: Whether the property insurer had a contractual obligation to make an *additional payment* for a “prior covered, total property loss” or for a “new, covered property loss.”²⁷³ And, the covered property was either a structure or the contents of a structure.²⁷⁴ Generally, the quality of the panels’ analyses was mixed.

Now, reconsider the *Bradley* case. As stated earlier, the Bradleys’ property was insured under an Allstate homeowners’ policy and under Fidelity’s flood-insurance contract.²⁷⁵ And they asserted that the Eastern District of Louisiana did not evaluate whether their losses resulted from covered or excluded causes.²⁷⁶ In particular, they argued: (1) the wind and flood policies were mutually exclusive; (2) distinct coverages preclude double recovery for similar covered losses; and (3) a fact finder must segregate damages caused by wind and those caused by flood before determining whether there will be a double recovery.²⁷⁷ Of course, the district court addressed the double-recovery issue and granted summary judgment before reaching the causation issue.²⁷⁸

Writing for the Fifth Circuit panel in *Bradley*, Judge Carl Stewart wrote a lucid, well-researched, and thoughtful opinion. First, he observed: “Insureds are entitled to recover any *previously uncompensated losses* that are covered by their homeowners policy . . . which . . . do not exceed the value of their property.”²⁷⁹ But he also observed: “Because Louisiana’s double recovery bar prevents the insured from recovering in excess of

270. See *Farmers Ins. Amici Brief*, *supra* note 268, at 16.

271. See, e.g., *id.* at 12.

272. See, e.g., *id.* (“You may make claim for additional payment as described in paragraph ‘c’ and paragraph ‘d’ below if applicable, if you report or replace the damaged, destroyed or stolen *covered property* within 180 days of the actual cash value payment. . . . We have the option to take all or any part of the damaged or destroyed *covered property* upon replacement by us or payment of the agreed or appraised value.”).

273. See *id.*

274. See *id.*

275. *Bradley v. Allstate Ins. Co.*, 606 F.3d 215, 220 (5th Cir. May 2010).

276. *Id.* at 229.

277. *Id.* at 229-30.

278. *Id.* at 230.

279. *Id.* (emphasis added) (citing *Johnson v. State Farm Fire & Cas. Co.*, No. 07-1226, 2008 WL 2178059, at *2 (E.D. La. May 19, 2008)).

actual loss, a district court does not necessarily err by evaluating double recovery prior to the resolution of disputed issues of causation.”²⁸⁰ In the end, Judge Stewart applied the doctrine of ambiguity and concluded:

[T]he total loss provision in section 5(e) dictates that the Bradleys are entitled to recover the full policy limits for covered losses, subject to the prohibition against double recovery. Whether additional recovery . . . amounts to a double recovery depends on whether their actual loss is calculated based on rebuilding or replacement costs, or [actual cash value]. The appropriate measure of actual loss presents a question of fact . . . , because it turns on the contested question of whether the Bradleys will be rebuilding the property Upon remand, the fact-finder must determine whether to calculate the Bradleys’ actual loss according to the cost of rebuilding or replacing, or [actual cash value]. The fact-finder must additionally arrive at the proper figure for actual loss. As long as the Bradleys’ combined recovery under their homeowners and flood policies is less than their actual loss, then the double recovery rule does not preclude the Bradleys from receiving additional compensation under their homeowners policy.²⁸¹

Judge Stewart also crafted the opinion in *Nuñez* for a different panel.²⁸² And he began his analysis by examining the Allstate homeowners’ insurance contract.²⁸³ The relevant provisions stated:

5. How We Pay For A Loss

Under Coverage A—Dwelling Protection, Coverage B—Other Structures Protection and Coverage C—Personal Property Protection, payment for covered loss will be by one or more of the following methods:

280. *Id.* at 231 (“Where the value of the property in question has been conclusively established, a district court may find as a matter of law that the insured is limited to a specific recovery. . . . But where the insurer has not conclusively established the value of the property or the cost to rebuild—as here—the court cannot find as a matter of law that the insured is limited to a specific recovery based on the insurer’s asserted valuation of the property.” (internal citations omitted)).

281. *Id.* at 231-32 (“Without addressing the section 5(e) total loss provision, the district court held that the measure of the Bradleys’ recovery was the [actual cash value] under 5(b). The Bradleys argue that—contrary to the determination of the district court—section 5(e) of their homeowners policy is the controlling provision in the event of a total loss, and the total loss provision entitles them to the full policy limits of their homeowners policy. Allstate claims that the plain and unambiguous language of section 5(e) renders it inapplicable where the total loss was caused, in part, by a non-covered peril such as a flood. Allstate further contends that enforcing the Bradleys’ interpretation would lead to the absurd result of requiring Allstate to pay the limit of liability for a total loss regardless of how it was caused, so long as some portion was caused by a covered peril. The critical language of section 5(e) provides that ‘payment for covered loss will be by one or more of the following methods In the event of a total loss of your dwelling and all attached structures covered under Coverage A—Dwelling Protection, we will pay the limit of liability’ This key provision is ambiguous”).

282. *Nuñez v. Allstate Ins. Co.*, 604 F.3d 840, 842 (5th Cir. Apr. 2010).

283. *Id.* at 845.

. . . c) Building Structure Reimbursement . . . [W]e will make additional payment to reimburse you for cost in excess of actual cash value if you repair, rebuild or replace damaged, destroyed or stolen covered property within 180 days of the actual cash value payment . . .

Building Structure Reimbursement will not exceed the smallest of the following amounts:

- 1) the replacement cost of the part(s) of the building structure(s) for equivalent construction for similar use on the same premises;
- 2) the amount actually and necessarily spent to repair or replace the damaged building structure(s) with equivalent construction for similar use on the same residence premises;
- 3) the limit of liability applicable to the building structure(s) as shown on the Policy Declarations for Coverage . . . [I]f you replace the damaged building structure(s) at an address other than shown on the Policy Declarations through construction of a new structure or purchase of an existing structure, such replacement will not increase the amount payable under Building Structure Reimbursement described above.²⁸⁴

On appeal, the Nuñezes argued that the Eastern District of Louisiana's adverse summary judgment conflicted with settled Louisiana law.²⁸⁵ More specifically, they argued "that under Louisiana law, the insured must initially make a prima facie case of coverage, and the insurer then bears the burden of proving the applicability of an exclusionary clause within a policy by a preponderance of the evidence."²⁸⁶ They were correct. Again, the Nuñezes asserted that "Allstate had only made partial payment for the damage caused by wind and wind-driven rain, and . . . still owed additional . . . benefits for damage caused by wind."²⁸⁷ They also claimed that they should have received additional payment for loss contents in their house as well as additional living expenses.²⁸⁸

Reconsider the following words and phrases that appeared in the Nuñezes' property-insurance contract: "covered loss," "covered property," and "additional payment."²⁸⁹ As discussed above, a court must first determine whether a peril insured against was the efficient proximate cause of a covered loss before deciding whether a property insurer must pay or make additional payments.²⁹⁰ But, there is no evidence in *Nuñez*

284. *Id.*

285. *Id.* at 844-46 ("The Nuñezes claim that the district court's treatment of their case directly conflicts with this court's holding in *Dickerson v. Lexington Ins. Co.*").

286. *Id.* at 846.

287. *Id.* at 843.

288. *Id.*

289. *See supra* note 284 and accompanying text.

290. *See supra* note 284 and accompanying text.

documenting or suggesting that the Eastern District of Louisiana performed a careful and complete analysis to determine whether *wind*—a presumably covered peril—was the efficient proximate cause of structural damage, loss contents, and additional living expenses.²⁹¹

But even more importantly, such a cautious and attentive evaluation does not appear in Judge Stewart's opinion.²⁹² Without a doubt, evidence supported Judge Stewart's finding that the Nuñezes "waived their claims for loss of contents and additional living expenses because they failed to adequately brief the issues on appeal."²⁹³ But a section of the opinion is entitled, "Burden of Proof on Covered v. Excluded Losses."²⁹⁴ And under that section, the learned circuit judge wrote: "The Nuñezes argue that under Louisiana law the insured must initially make a *prima facie* case of coverage However, the Nuñezes have waived this issue on appeal because they never raised it before the district court."²⁹⁵

With all due respect, coverage was at the very core of the question before the district court. And a fair reading of the reported facts and the opinion reveals no credible evidence establishing that the Nuñezes waived that question. Consider what a different Fifth Circuit panel wrote in *Dickerson v. Lexington Insurance Co.* less than a year before the *Nuñez* decision: "Under Louisiana law, the insured must prove that the claim asserted is covered by his policy.²⁹⁶ Once the insured has done that, "the insurer [then] has the burden of demonstrating that the damage at issue is excluded from coverage."²⁹⁷ If the insurer meets the burden of proving the policy exclusion, the burden shifts back to the plaintiffs to prove the amount of segregable damage caused by the covered peril.²⁹⁸

Quite simply, there is no evidence in *Nuñez* that Allstate cited an exclusion clause in the contract and proved that exclusion clause applied. Yet, the opinion reads: "[T]he Nuñezes in fact conceded that Allstate met its burden merely by showing that the home flooded."²⁹⁹ Of course, the insurer's failure to identify and prove an exclusion by the preponderance of evidence was clearly insufficient, and it did not comport with Louisiana law.³⁰⁰ Also evidence of an exclusion clause—listing the excluded perils—does not appear in the case. In fact, a perils-insured-against provision does

291. See *Nuñez*, 604 F.3d at 845-46.

292. *Id.*

293. *Id.* at 843 n.2 (citing *Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004)).

294. *Id.* at 846.

295. *Id.*

296. *Dickerson v. Lexington Ins. Co.*, 556 F.3d 290, 295 (5th Cir. Jan. 2009).

297. *Id.*

298. *Id.* The panel was comprised of Circuit Judges Patrick E. Higginbotham, Carolyn D. King, and Jacques L. Wiener Jr. *Id.* at 292.

299. *Nuñez*, 604 F.3d at 846.

300. See *supra* note 298 and accompanying text.

not appear in the facts or opinion. For sure, the failure to cite and discuss specific covered-perils and excluded-perils provisions in the insurance contract are serious omissions in the opinion.

Moreover, those critical omissions lead one to ask whether the Allstate policy in *Nuñez* was an open-peril policy. If it was an open-peril policy, the Nuñezes' threshold burden would have been even lighter because Louisiana's law is clear: To collect payments for structural damage under an "open peril" policy, the insured must show that he had a contract with the insurer and that he suffered "an accidental direct physical loss to the insured property."³⁰¹ An insurer must then establish that an enumerated exclusion applies and defeat recovery.³⁰²

In *Nuñez*, the opinion states: "We . . . conclude that the Nuñezes waived their right to argue on appeal that the district court erred [respecting who had the burden] to segregate covered from excluded losses."³⁰³ But the analysis failed to discuss waiver clearly. Again, the Nuñezes' complaint stated clearly that a covered peril—*wind*—was also the efficient proximate cause of structural damage.³⁰⁴ Therefore, they stressed that Allstate had a duty to pay additional proceeds to cover the wind-produced losses.³⁰⁵ The opinion, however, devotes a considerable amount of ink and paper discussing the segregation of "covered and excluded losses," without clearly listing and discussing the enumerated exclusions—if any—in the insurance contract.³⁰⁶

Finally, as reported earlier, the Southern District of Mississippi declared that a 2006 Settlement Agreement between State Farm and Wiley completely released the insurer from all Katrina-related, property-loss claims which were "known to the parties when the Settlement Agreement was executed."³⁰⁷ Writing for the Fifth Circuit panel, Judge Wiener

301. See *Hyatt v. State Farm Ins. Co.*, No. 06-8792, 2008 WL 544182, at *2 (E.D. La. Feb. 25, 2008); see also *Ferguson v. State Farm Ins. Co.*, No. 06-3936, 2007 WL 1378507, at *2 (E.D. La. May 9, 2007) ("The defendant has conceded that the plaintiffs have met their threshold burden of proving an accidental direct physical loss to the dwelling and other structures under Coverage A, as plaintiffs are the named insured; the policy was in effect on the date of the loss; and the house was reduced to a slab as a result of Hurricane Katrina. Accordingly, the Court finds that the burden of proof is on the defendant to prove any *exclusion* for Coverage A, for the dwelling and other structures, by a preponderance of the evidence. Should the defendant meet their threshold burden of proving the exclusion, the burden will again shift back to the plaintiffs to prove they fall under an exception to the exclusion, by a preponderance of the evidence.").

302. See *Kodrin v. State Farm Fire & Cas. Co.*, Nos. 08-30092, 08-30169, 2009 WL 614521, at *4 (5th Cir. Mar. 11, 2009) (noting that the insured's home "was covered *unless* it was damaged by an enumerated exclusion, of which flooding was one").

303. *Nuñez*, 604 F.3d at 847.

304. *Id.* at 843.

305. *Id.*

306. *Id.* at 847.

307. *Wiley v. State Farm Fire & Cas. Co.*, No. 1:08CV214-HSO-RHW, 2009 WL 259615, at *3 (S.D. Miss. Feb. 3, 2009).

affirmed the district court's holding.³⁰⁸ The court of appeals' judge also concluded: (1) The 2007 Letter—containing State Farm's offer to pay additional proceeds—was not a modification of the 2006 Settlement nor a waiver of the insurer's right to enforce the settlement agreement; and (2) Wiley's equitable-estoppel argument would not be addressed “for the first time on appeal.”³⁰⁹

The author read the opinion in *Wiley* carefully. And, in light of Mississippi Supreme Court rulings, the author identified two critical issues that the Fifth Circuit panel did not address judiciously in *Wiley*. First, the 2006 Settlement Agreement was “a standard, one-page form with blank spaces for the parties' names.”³¹⁰ In fact, the insurance commissioner of Mississippi fashioned the settlement because the standardized form was entitled, “Mississippi Department of Insurance Hurricane Mediation Program Settlement Agreement.”³¹¹ It stated in relevant part:

This settlement amount is full, complete and total final payment by the insurance company to the insured(s) for the Katrina claim brought to the mediation. Both parties release any and all Katrina claims of any kind whatsoever against one another, except that if the insured(s) discovers additional insured damage that was not known to the parties prior to this mediation, the insured(s) may file a supplemental Katrina claim, which shall be treated as a new claim.³¹²

Now, consider what appears in the 2007 Letter. It read in pertinent part:

[State Farm] has completed its reevaluation of your claim pursuant to the agreement reached between State Farm and the Mississippi Insurance Department (“MID”). Based upon the information you have provided, our review of pertinent components of the claim file, and our agreement with the MID, State Farm is willing to offer you \$26,798.13 to conclude this disputed claim. You can accept or reject this settlement offer.

. . . .

If you reject the offer, you can request mediation or a non-binding arbitration of your claim through the Mississippi Insurance Department You can also do nothing. If you do not accept the offer from State Farm you retain all rights that you have, including the right to pursue litigation.³¹³

Assuming that State Farm's original payment was the actual “full, complete and total final payment” under the 2006 contract, Judge Wiener

308. *Wiley v. State Farm Fire & Cas. Co.*, 585 F.3d 206, 210 (5th Cir. Oct. 2009).

309. *Id.* at 213-14.

310. *Id.* at 211.

311. *Id.* at 210-11.

312. *Id.* at 211.

313. *Id.* at 211-12.

did not cite a single Mississippi case that gave State Farm the legal right to “reevaluate” Wiley’s original claim.³¹⁴ But assume that State Farm had some undisclosed, common-law contractual right to reevaluate Wiley’s original claim and to offer Wiley an additional payment of \$26,798.13, rather than what Wiley wanted for the same original claim. Even a conservative analysis of State Farm’s post-2006 conduct leads one to conclude that the property insurer’s reevaluation and adjusted payment were modifications under Mississippi’s principles of contract.³¹⁵

Again, on appeal Wiley argued that State Farm modified the 2006 settlement contract; therefore, the modification allowed him to present new evidence to justify an additional payment that exceeded State Farm’s revised offer.³¹⁶ Judge Wiener, however, did not provide an elaborate or cogent discussion of Wiley’s modification argument.³¹⁷ Instead, he discussed Wiley’s waiver argument and concluded that “[t]hese doctrines offer only cold comfort to Wiley.”³¹⁸ And how did the learned appellate-court judge reach that conclusion? He wrote: “In the 2007 Letter, State Farm’s offer to Wiley of an additional amount was plainly made ‘pursuant to the agreement reached between State Farm and the Mississippi Insurance Department (“MID”),’ not pursuant to the 2006 Settlement.”³¹⁹

Unquestionably, the judge’s explanation is curious because the appellate-court judge evidently forgot, overlooked, or ignored what he penned earlier in the opinion: “The 2006 Settlement [was entitled] ‘Mississippi Department of Insurance Hurricane Mediation Program Settlement Agreement.’”³²⁰ Even a conservative reading of the facts reveals that the MID fashioned or helped to fashion both the 2006 and 2007 agreements.³²¹ And the opinion does not cite any Mississippi rules that give State Farm a contractual right to execute a unilateral modification under the 2006 settlement contract and, yet, compel Wiley “[to release, acquit and forever discharge State Farm] from any and all [Katrina-related] claims” under the 2007 settlement contract.³²² Finally, in *Wiley*, the Fifth Circuit panel tells us:

314. *Id.*

315. *See* Fletcher v. U.S. Rest. Props., Inc., 881 So. 2d 333, 337 (Miss. Ct. App. 2004) (citing Knight v. Sheppard Bldg. Supply, Inc., 537 So. 2d 1355, 1359 (Miss. 1989) and citing Stinson v. Barksdale, 245 So. 2d 595, 597-98 (Miss. 1971) (“The subsequent actions of parties pursuant to a contract may support a finding that the original contract has been modified to an extent consistent with the subsequent course of conduct.”)).

316. *See Wiley*, 585 F.3d at 210-12.

317. *See id.* at 212-13.

318. *Id.* at 213.

319. *Id.*

320. *Id.* at 210-11 (emphasis omitted).

321. *See id.*

322. *Id.* at 211.

According to Wiley, the State Farm representative informed him that Mississippi law entitled State Farm to deny his entire claim because his home had been destroyed by the storm surge, an excluded peril under his policy.

....

Wiley contends that between . . . the 2006 Settlement and the 2007 Letter, he had learned from his neighbor, a civil engineer, that wind—and not solely storm surge—had caused part of the damage to his property. Wiley consequently refused to sign the 2007 Release and . . . [sued] State Farm, alleging breach of contract and tortious breach of contract.³²³

Responding to Wiley’s coverage and breach-of-contract arguments, Judge Wiener wrote: “In Wiley’s case, Katrina’s total destruction of his home, down to the slab, made impossible the discovery of any ‘additional insured damage.’”³²⁴ Here, it is sufficient to remind the Fifth Circuit that its conclusion does not comport with the Supreme Court of Mississippi’s analysis and conclusions. In *Corban v. United Services Automobile Association*, the Mississippi Supreme Court wrote:

“Loss to property can consist of many losses because property can consist of many elements, and ‘loss’ need not refer only to the totality of the damage and in fact should not when different forces have caused different damage.” The subject homeowner’s policy insures “for direct, physical loss” to property A hurricane includes a number of weather conditions, elements, and/or forces, at times acting dependently, at other times independently The subject homeowner’s policy does not expressly provide or exclude coverage for a hurricane. As such, Katrina was neither the covered nor excluded cause or event. Rather, the perils unleashed by Katrina were the covered or excluded causes or events. Courts and litigants likewise have conflated cause or event with covered and excluded perils, just as the terms “damage” and “loss” have been conflated. The argument of amicus Nationwide exemplifies the fallacy of the “hurricane-as-covered-event” proposition vis-a-vis the USAA policy.³²⁵

323. *Id.* at 209.

324. *Id.* at 212.

325. *Corban v. United Servs. Auto. Ass’n*, 20 So. 3d 601, 614 & n.21 (Miss. 2009) (emphasis omitted) (citations omitted) (quoting Appleman on Insurance § 192.03[H] (2009)).

IV. THIRD-PARTY LIABILITY & INDEMNITY CLAIMS—INJURY TO BOTH TANGIBLE PROPERTY INTERESTS AND LIVE PERSONS

A. Substantive Question: Whether Under Mississippi and Texas's Laws Commercial-General-Liability, Excess-Liability, and Professional-Liability Insurers Must Defend and Indemnify Insureds Against Third-Party Claims When a "Professional Services" Exclusion Clause Appears in Those Insurance Contracts

In a different time and place, the author researched and wrote extensively about professional-services-coverage clauses and about the disputes that such provisions generate between liability insurers and their insured professionals—lawyers, physicians, and other medical professionals.³²⁶ In particular, the author examined whether liability insurers have a duty to defend insured professionals against third-party claims and lawsuits when the insureds' allegedly intentional activities "aris[e] out of . . . professional services."³²⁷ Briefly put, a legal analysis revealed that federal and state courts are hopelessly divided over whether professional-service-coverage clauses require a defense, although an empirical analysis gave a plausible explanation of the judicial conflicts.³²⁸

During the 2009-2010 term, the Fifth Circuit decided a trilogy of cases that focused on a slightly different professional-services question: Whether liability insurers have a duty to defend professionals against third-party claims *and* a duty to indemnify if a professional-services-exclusion clause appears in the insurance contract.³²⁹ And as the author discovered in the prior study, the latter professional-services question also generates significant disagreement among the Fifth Circuit's panels.³³⁰ The following cases comprise Trilogy II: *QBE Insurance Corp. v. Brown & Mitchell, Inc.*,³³¹ *Willbros RPI, Inc. v. Continental Casualty Co.*,³³² and *Admiral Insurance Co. v. Ford*.³³³ After a brief review of the relevant insurance-related facts, underlying third-party lawsuits, and the district courts' rulings in each case, short discussions of the panels' opinions will follow.

326. See Willy E. Rice, *Insurance Contracts and Judicial Discord Over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments-1900-1997*, 47 AM. U. L. REV. 1131, 1173-80 (1998).

327. *Id.*

328. See generally *id.* at 1208-14 (discussing tabular material analyzing courts' awards of declaratory relief).

329. See *infra* Part IV.A.

330. See *supra* note 326.

331. See *infra* notes 334-54.

332. See *infra* notes 376-400.

333. See *infra* notes 355-75.

The pertinent facts in *QBE Insurance* are few and simple. Big Warrior Corporation (BWC)—a general contractor—secured a contract to install a sewer.³³⁴ Eleazar Casiano (Casiano) was one of BWC’s employees working at the project’s site.³³⁵ Brown & Mitchell, Inc. (BMI) was the project’s engineer.³³⁶ In the course of events, a trench collapsed on top of Casiano, and he died.³³⁷ In response, Casiano’s mother—Cilvia Casiano Tranqualino (Tranqualino)—commenced a wrongful-death action against BMI and others.³³⁸ Among other claims, the following allegations appeared in Tranqualino’s complaint:

Defendant, Brown & Mitchell, Inc., . . . was the engineering firm responsible for overseeing the forced main sewer line that was being installed As the engineering firm overseeing the project, Brown & Mitchell, Inc. was responsible for the ultimate design, construction and inspection of . . . safety issues associated with the trench At all times, Brown & Mitchell, Inc. owed a duty to Eleazar Casiano to perform its professional responsibilities as engineers in accordance with the appropriate standards Brown & Mitchell, Inc. acted negligently . . . in the performance of its responsibilities³³⁹

Before Tranqualino filed her third-party lawsuit, QBE Insurance Corporation (QBE) insured BMI under an excess-commercial-general-liability policy.³⁴⁰ If an “occurrence” was the efficient proximate cause of damaged property or a “bodily injury,” the insurer would pay.³⁴¹ The

334. *QBE Ins. Corp. v. Brown & Mitchell, Inc.*, 591 F.3d 439, 441 (5th Cir. Dec. 2009).

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* at 441 n.1 (emphasis omitted). In addition, the pleadings alleged that the engineering company’s negligence was based on one or a combination of the following actions or omissions:

- a. Failure to conduct a manual soil test;
- b. Allowing the trench to be dug with near vertical walls[;]
- c. Allowing the roadway to be undermined by the trench construction[;]
- d. Allowing excavated materials to be placed on the edge of the trench[;]
- e. Failing to insure that the sidewalls of the trench were shored with support walls[;]
- f. Failing to insure that a working trench box was in place for workers [sic] safety[;]
- g. Allowing a track hoe to operate along the trench while Mr. Casiano was in it[;]
- h. Enlisting Mr. Casiano to assist in the measuring of the trench from inside it[;]
- i. Failing to insure that a safe means of egress was available to Mr. Casiano[;]
- j. Failing to [give instructions about] the hazards of working in an unprotected trench[;]
- k. Failing to stop unsafe acts of the contractor[;]
- l. Contributing to the unsafe acts[; and,]
- m. Other acts of negligence to be shown at the trial of this matter.

Id. at 441–42.

340. *Id.* at 442.

341. *Id.*

policy defined an occurrence as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”³⁴² On the other hand, the liability insurance contract expressly excluded certain claims.³⁴³ More exactly, the professional-services-exclusion clause stated in relevant part: “This insurance does not apply to . . . ‘bodily injury’ or ‘property damage’ due to the rendering or failure to render any professional service. This includes but is not limited to . . . engineering services, including related supervisory or inspection services.”³⁴⁴

Citing the coverage clause in the insurance contract, BMI asked QBE to underwrite the engineering company’s legal defense.³⁴⁵ BMI asserted that the underlying wrongful-death lawsuit was an occurrence under the liability policy.³⁴⁶ QBE, however, refused to defend or allocate funds for a legal defense.³⁴⁷ From the insurer’s perspective, the underlying incident was not an occurrence under the liability-insurance contract; and alternatively, the professional-services-exclusion provision excluded coverage for BMI’s alleged misconduct.³⁴⁸

To determine whether its conclusions were correct, QBE filed a declaratory-judgment action in the United States District Court for the Southern District of Mississippi.³⁴⁹ Thereafter, both QBE and BMI filed competing motions for summary judgment.³⁵⁰ In time, the District Court for the Southern District of Mississippi granted QBE’s summary-judgment motion.³⁵¹ The district court found that the claims in Tranqualino’s complaint were intent-based rather than negligence-based allegations.³⁵² Consequently, the district-court judge found no “occurrence,” no coverage, and no insurer’s duty to defend under the third-party insurance contract.³⁵³ BMI appealed.³⁵⁴

The professional-services-exclusion provision that generated the dispute in *Admiral* almost mirrors the controversial exclusion clause in *QBE Insurance*.³⁵⁵ But first, consider the facts in *Admiral*. Randall K. Ford, d/b/a R.K. Ford and Associates (Ford), is an oil-and-gas consultant

342. *Id.*

343. *Id.*

344. *Id.*

345. *See id.*

346. *See id.*

347. *See id.*

348. *Id.* at 441.

349. *Id.* at 442.

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *See id.*; *Admiral Ins. Co. v. Ford*, 607 F.3d 420, 421-22 (5th Cir. May 2010).

firm that is located in Midland, Texas.³⁵⁶ Exco Resources, Inc. (Exco) is a “natural gas and oil company engaged in the exploration, exploitation, development and production of onshore natural gas and oil properties. [Exco’s] operations are focused in certain key natural gas and oil producing regions of the United States.”³⁵⁷

Exco retained Ford “to prepare a plan of operations to drill the Leon No. 2 Well,” and “to inspect, or direct the inspection of the drill string for any signs of wear on the pipe.”³⁵⁸ During the course of events, the well experienced a “blowout.”³⁵⁹ In the wake of the explosion and property loss, Exco filed a breach-of-contract action against Ford in a state court in Midland County, Texas.³⁶⁰ Briefly put, the third-party complaint alleged that Ford “failed to properly inspect the drill pipe for casing wear, . . . failed to instruct the mud logger to look for and report metal shavings, and . . . failed to use ‘ditch magnets’ while drilling the Leon No. 2 Well.”³⁶¹

During all relevant time periods, Admiral Insurance Company (Admiral) insured Ford under two liability-insurance contracts.³⁶² The Commercial General Liability (CGL) policy “provided occurrence-based coverage with a \$1 million limit per occurrence.”³⁶³ The professional liability (PL) policy was a “claims-made” insurance contract, covering “oil and gas consultant” operations with a \$50,000 limit per claim.³⁶⁴ More significant, a professional-services-exclusion clause appeared in the CGL policy.³⁶⁵ In pertinent part, the exclusion provision stated:

Description of Professional Services: . . . 1) [All operations of the insured]

. . . .

With respect to any professional services shown in the Schedule, this insurance does not apply to “bodily injury,” “property damage,” “personal injury,” or “advertising injury” due to the rendering or failure to render any professional service.³⁶⁶

356. R.K. FORD & ASSOCIATES, <http://www.rkford.com> (last visited Jan. 24, 2011) (“R.K. Ford & Associates . . . [employ] top quality, highly experienced professionals and [give] thorough attention to detail R.K. Ford & Associates excels in drilling, completions and workovers [in some] of the more difficult areas of the Permian Basin. Over 300 years of combined [drilling and completion] experience, has given us tremendous exposure in these areas.”).

357. See EXCO RESOURCES, INC., <http://www.excoresources.com> (last visited Jan. 4, 2010).

358. Brief of Appellees at 2, *Admiral Ins. Co. v. Ford*, 607 F.3d 420 (5th Cir. May 2010) (No. 09-50671), 2009 WL 6028009, at *2.

359. *Id.*

360. *Id.*

361. *Id.*

362. See *Admiral Ins. Co. v. Ford*, 607 F.3d 420, 421 (5th Cir. May 2010).

363. *Id.*

364. *Id.* at 421-22.

365. See *id.*

366. *Id.* at 422.

Adhering to the terms of the PL policy, Admiral transferred \$50,000 to Ford after Exco sued the oil-and-gas consultants.³⁶⁷ Later, Admiral commenced a declaratory-judgment lawsuit in the United States District Court for the Western District of Texas.³⁶⁸ Before that tribunal, Admiral asked the judge to declare whether the liability insurer had a contractual obligation to provide a legal defense or indemnify under either the CGL or the PL policy.³⁶⁹ Each litigant filed a motion for summary judgment.³⁷⁰ To justify its request, Admiral asserted that the CGL's professional-services-exclusion clause excluded Exco's lawsuit since all of the underlying third-party claims evolved from Ford's rendering or failure to render specialized or technical services.³⁷¹

In response, Ford argued that the professional-services-exclusion clause's umbrella covered or cast an enormous shadow over "all operations of the insured."³⁷² Therefore, the oil-and-gas consultants argued that the exclusion clause should have no effect, since its large umbrella destroyed any coverage under the CGL.³⁷³ Ultimately, the District Court for the Western District of Texas declared that Admiral had a contractual duty to defend Ford in the underlying lawsuit.³⁷⁴ Admiral timely appealed.³⁷⁵

Essentially, two major questions appear in *Willbros*.³⁷⁶ As mentioned earlier, one dispute concerns whether a professional-services-exclusion provision bars an insured from securing reimbursements and legal-defense funds under the terms of a liability-insurance contract.³⁷⁷ Therefore, at this juncture, a review of the relevant facts that spawn the exclusion controversy is warranted. First, Willbros RPI, Inc. (Willbros) is a subsidiary of Willbros Group, Inc. and "has provided services to the North American oil and gas pipeline industry for almost 100 years."³⁷⁸ More specifically, Willbros "is recognized as an industry leader . . . for project management, engineering, procurement and construction services."³⁷⁹

367. *Id.*

368. *Id.* at 421-22.

369. *Id.* at 422 & n.2 ("Although both parties address[ed] the duty to indemnify in their briefing, the indemnity issue [was] not before the court because the district court severed it from the instant appeal.").

370. *Id.* at 422.

371. *Id.* at 422-23.

372. *Id.* at 422.

373. *See id.*

374. *Id.*

375. *Id.*

376. *See Willbros RPI, Inc. v. Cont'l Cas. Co.*, 601 F.3d 306, 308 (5th Cir. Mar. 2010).

377. *Id.*

378. WILLBROS GROUP, INC., <http://www.willbros.com/Subsidiaries/Willbros-USA-Inc--181.html> (last visited on Jan. 24, 2011).

379. *Id.* ("Willbros maintains a staff of experienced management, construction, engineering and support personnel in the United States and provides these services through engineering offices located in Tulsa, Oklahoma and Salt Lake City (Murray), Utah, and also in Houston, Texas.").

Shell Pipeline Company, L.P. (Shell) engaged Willbros—as general contractor—to erect seventy-five miles of pipeline (the Bengal project).³⁸⁰ Willbros employed Harding Road Boring, Inc. (Harding)—as subcontractor—to carry out directional drilling.³⁸¹ In turn, Harding consummated even more agreements with other contractors for various jobs.³⁸² ExxonMobil Pipeline Company (EMPCo) owned adjacent or nearby pipelines.³⁸³ Thus, during the construction of the Bengal project, at least one of EMPCo’s pipelines was damaged.³⁸⁴ EMPCo and Exxon Mobile Corporation (collectively Exxon) filed a lawsuit against Shell, Willbros, Harding, and others.³⁸⁵ Exxon alleged that Willbros negligently failed to “analyze, review, supervise, construct, operate, and monitor the work so that EMPCo’s pipelines would not be damaged.”³⁸⁶

Before the Bengal project began, the principal and various subcontractors consummated various indemnity agreements among themselves.³⁸⁷ And at that time, Continental Casualty Company (CCC) insured Harding under a package liability-insurance contract.³⁸⁸ More relevant, CCC’s policy contained a “blanket” additional-insured endorsement, which covered “generically . . . any person or organization with whom Harding had agreed to add as an additional insured.”³⁸⁹ Willbros qualified as an “additional insured” under a written agreement that Harding and Willbros’s predecessor signed.³⁹⁰

CCC’s liability-insurance contract also contained a professional-services-exclusion clause. It read in pertinent part:

The insurance provided to the additional insured does not apply to . . . “property damage” . . . arising out of an architect’s, engineer’s, or

380. *Willbros*, 601 F.3d at 308.

381. *Id.*

382. *Id.*

383. *See id.*

384. *Id.*

385. *Id.*

386. *Id.*

387. *See id.*

388. *Id.* In this per curiam opinion, it appears that the panel mistakenly substituted CNA for CCC. *See id.* We are told: “Willbros . . . appeals . . . the district court’s grant of summary judgment . . . against Continental Casualty Company (‘CNA’).” *Id.* Clearly, Continental Casualty Company (CCC) is the defending insurer. *See id.* Therefore, without knowing more, the author substituted CCC for CNA. *See id.*

389. *Id.*

390. *Id.* at 308 n.1 (“Prior to the events giving rise to this suit, Harding and [Rogers & Phillips, Inc., a/k/a RPI] entered into a Master Service Agreement (‘MSA’) under which RPI, as contractor, routinely awarded, and Harding routinely accepted, subcontractor work. Among other things, the MSA required Harding to carry liability insurance and to add RPI as an additional insured under all such policies. The MSA states that it is ‘binding upon and insure [sic] to the benefit of the parties hereto and their respective successors and assigns.’ The district court found, and the parties do not dispute, that Willbros, as successor to RPI, succeeded to all rights and benefits previously enjoyed by RPI under the MSA.”).

surveyor's rendering of or failure to render any profession services including:

- a. The preparing, approving, or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and
- b. Supervisory, or inspection activities performed as part of any related architectural or engineering activities.³⁹¹

Citing the exclusion clause, CCC refused to defend Willbros and Shell. Additionally, the liability insurer refused to indemnify Willbros.³⁹² Still, under a reservation of rights, CCC "offered to pay fifty percent of Willbros's defense fees and costs."³⁹³ CCC, however, did not offer to pay Shell's expenses.³⁹⁴ Eventually, Willbros filed a declaratory-judgment suit against CCC, asking the United States District Court for the Southern District of Texas to declare that CCC was one hundred percent liable for Willbros's, as well as Shell's, defense costs and reimbursements.³⁹⁵ Again, Exxon's amended complaint read in pertinent part:

After having an opportunity to review the drilling profile, [Willbros] signed off and approved the plans The process of drilling began and the drill bore damaged EMPCo's pipelines. [Willbros] owed a duty to use ordinary care to analyze, review, supervise, construct, operate, and monitor the work so that EMPCo's pipelines would not be damaged.³⁹⁶

After considering CCC and Willbros's cross-motions for summary judgment, the district court rejected CCC's contention that the professional-services-exclusion clause allowed the insurer to deny coverage.³⁹⁷ The District Court for the Southern District of Texas found that non-professional negligence formed the basis of the complaint in the underlying lawsuit.³⁹⁸ CCC appealed.³⁹⁹

To repeat, the litigants in *Admiral*, *QBE Insurance*, and *Willbros* asked the Fifth Circuit to decide whether district courts' adverse summary

391. *Id.* at 310 (emphasis added).

392. *Id.* at 308.

393. *Id.*

394. *Id.*

395. *Id.* at 308-09. CCC filed a counter-suit in response:

seeking a declaration that: (1) it [had] no duty to defend or indemnify Willbros or Shell, and (2) if an obligation to defend [was] owed, it [had] no duty to defend beyond fifty percent of defense costs that it [had] already voluntarily offered to pay under a reservation of rights.

Id. at 309.

396. *Id.* at 310.

397. *Id.* at 309.

398. *Id.*

399. *Id.*

judgments—involving the same substantive question—were proper.⁴⁰⁰ Three different panels, however, delivered split decisions. For some, it is quite reasonable to expect cases presenting identical appellate questions to have similar outcomes. Of course, such an expectation is asking a bit much, especially if very different facts, customary practices, and circumstances surround each controversy. On the other hand, it is not unreasonable to expect an en banc appellate court as well as its panels to study, weigh, and apply settled legal principles consistently. For sure, the analyses in *QBE Insurance* and *Willbros* met those expectations—even though the insurer prevailed in the former case and the insured was successful in the latter. The analysis in *Admiral*, however, did not meet those minimum expectations. Thus, before reviewing the panels' analyses and conclusions in the three cases, a review of duty-to-defend rules in Texas is warranted.

Forty-five years ago, the Texas Supreme Court decided *Heyden Newport Chemical Corp. v. Southern General Insurance Co.* and embraced the “eight corners” doctrine.⁴⁰¹ Since *Heyden*, the same supreme court has invested considerable judicial resources to fashion a body of rules to make the eight corners doctrine more complete. More specifically, the Texas Supreme Court has reiterated in numerous decisions that courts must apply the eight corners doctrine to decide whether a liability insurer has a duty to defend an insured against third-party claims or lawsuits.⁴⁰² A tribunal must compare the allegations within the four corners of a third-party complaint with the coverage outlined within the four corners of a liability insurance contract.⁴⁰³ And if a judge discovers facts in the complaint that are within the scope of the coverage clauses, an insurer must defend the insured against the third-party claim or action.⁴⁰⁴

Furthermore, the Supreme Court of Texas has been exceedingly clear about another matter: “The duty to defend does not depend on what *the facts are*, or what might be determined finally by the trier of the facts. It depends *only on what the facts are alleged to be.*”⁴⁰⁵ In addition, the Texas Supreme Court has instructed lower courts to focus their investigations and

400. See *infra* notes 410, 434, 450 and accompanying text.

401. See *Heyden Newport Chem. Corp. v. S. Gen. Ins. Co.*, 387 S.W.2d 22, 26 (Tex. 1965) (“Where the complaint does not state facts sufficient to clearly bring the case within or without the coverage, the general rule is that the insurer is obligated to defend if there is, potentially, a case under the complaint within the coverage of the policy.”).

402. See, e.g., *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002); *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821 (Tex. 1997).

403. See *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 654-55 (Tex. 2009).

404. See *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997); see also *King*, 85 S.W.3d at 187 (reiterating that only the allegations in third-party pleadings and the language in an insurance contract will determine whether a liability insurer has a contractual duty to defend).

405. *Argonaut Sw. Ins. Co. v. Maupin*, 500 S.W.2d 633, 636 (Tex. 1973) (emphasis added).

analyses on the third-party complaint's "factual allegations" rather than "legal theories" before deciding whether an insurer has a duty to defend.⁴⁰⁶ Also, the factual allegations need only support a claim or a lawsuit that is *potentially* covered under the liability-insurance contract.⁴⁰⁷ But even more importantly, closely related to the rules just stated, the Texas Supreme Court has issued two superseding principles: (1) Texas's courts must interpret the allegations in a third-party complaint liberally, in favor of the insured,⁴⁰⁸ and (2) if a court finds "any doubt" after performing an eight-corners analysis, the court must resolve all uncertainty in favor of the insured and order the insurer to defend the insured.⁴⁰⁹

Again, in *Admiral*, the liability insurer appealed the district court's adverse summary judgment.⁴¹⁰ The District Court for the Western District of Texas concluded: "[T]he professional services exclusion [is] illusory because it defined professional services as all operations of the insured. The court found that this broad description of professional services obliterated the entire insurance policy, and gave the exclusion no effect."⁴¹¹ A Fifth Circuit panel, however, disagreed, reversed the district court's ruling, and remanded the case.⁴¹²

Why did the panel decide in favor of *Admiral* rather than *Ford* in light of Texas duty-to-defend rules? A careful review of the panel's opinion in *Admiral* led the author to this conclusion: Either (1) the *Admiral* panel considered the full array of Texas's duty-to-defend rules and decided to dismiss ninety-nine percent of them because those rules were irrelevant or inapplicable; or (2) the panel intentionally overlooked the overwhelming majority of Texas's duty-to-defend cases and principles.⁴¹³ Regardless of the true explanation, the panel's failure to consider and apply key Texas

406. See, e.g., *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 495 (Tex. 2008) ("It is the factual allegations instead of the legal theories alleged which determine the existence of a duty to defend."); *Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d at 141 (emphasizing that focus must be put on the petition's factual allegations and not on the legal theories alleged).

407. See *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 310 (Tex. 2006) (emphasis added).

408. See *Zurich Am. Ins. Co.*, 268 S.W.3d at 491 (emphasis added).

409. See *Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d at 141; *King*, 85 S.W.3d at 187 (reiterating that "any doubt" vis-a-vis whether an insurer has a duty to defend must be resolved in favor of such duty).

410. *Admiral Ins. Co. v. Ford*, 607 F.3d 420, 422 (5th Cir. May 2010).

411. *Id.*

412. *Id.*

413. See *id.* at 424-45. The panel cited just two Texas Supreme Court duty-to-defend cases and two duty-to-defend rules appearing in one of the cases. See *id.* (citing *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 202 (Tex. 2004) ("In determining the scope of coverage, we examine the policy as a whole to ascertain the true intent of the parties."); and *Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d at 141-42 (reiterating that a court must focus on the factual allegations in the underlying pleading rather than the legal theories alleged and concluding that the insurer has a duty to defend the insured in the underlying lawsuit if the pleading contains allegations that—when fairly and reasonably construed—state a cause of action that is potentially covered under the liability insurance contract)).

rules produced a less-than-stellar analysis which does little to guide future panels.

To determine whether the author's conclusion is warranted, we should first consider the third-party allegations in *Admiral*. In relevant part, Exco's complaint read:

Ford breached the contract . . . by failing to "properly inspect the drill pipe for casing wear as it was pulled out of the hole," [by failing to] "instruct the mud logger to look for and report metal shavings," and [by failing to] "use 'ditch magnets,' a device that detects and segregates metal from the mud."⁴¹⁴

Exco's amended complaint also stated: "Not all operations of Ford were professional in nature. While several of the above-described omissions made by Ford required the use of Ford's specialized training, certain of the omissions and failures to act were done with no necessary professional knowledge and were outside of Ford's professional capacity."⁴¹⁵

Again, under the terms of the liability insurance contract, *Admiral* had no duty to defend Ford if Exco's losses evolved from Ford's rendering or failure to render professional services. Therefore, writing for the *Admiral* panel, Judge Emilio Garza immediately devoted an unnecessarily substantial amount of time and resources trying to define professional services.⁴¹⁶ In the end, the appellate judge did what should have occurred at the outset. The learned judge adopted the definition of professional services under Texas law.⁴¹⁷ But, to reiterate, the Texas Supreme Court has adopted five easy-to-apply doctrines to help settle disputes surrounding

414. *Admiral*, 607 F.3d at 425 (quoting the case's Fourth Amended Petition).

415. *Id.* The panel concluded that this assertion was a "self-serving" conclusion of law rather a factual allegation. *Id.* The observation is true. But a poorly worded pleading should not be surprising or the focus of a panel's, arguably, harsh criticism. Third-party pleadings are designed to be "self-serving" in order to increase insureds and insurers' likelihood of settling a dispute rather than litigating a full-blown trial. *See Burlington Ins. Co. v. Tex. Krishnas, Inc.*, 143 S.W.3d 226, 232 (Tex. App.—Eastland 2004, no pet.). The *Burlington* court stated:

At least some of the allegations, when fairly and reasonably construed, without an eye toward the truth or falsity of those allegations, state causes of action that are potentially covered by the policy. The "vague, broadly worded" pleadings containing a "mishmash of legal theories and factual allegations" might very well be the result of very careful, as opposed to very careless, pleading practice. [But if the third parties] in the underlying lawsuits have alleged at least some claims which are potentially covered by the policy, [an insurer] must provide . . . a defense.

Id. (quoting *Stumph v. Dallas Fire Ins. Co.*, 34 S.W.3d 722, 728 (Tex. App.—Austin 2000, no pet.)).

416. *Admiral*, 607 F.3d at 423-24. Circuit judges E. Grady Jolly and Emilio Garza as well as designated district judge Keith Starrett—from the Southern District of Mississippi—comprised the panel. *See id.* at 421.

417. *Id.* at 425 ("To qualify as a professional service, the task must arise out of acts particular to the individual's specialized vocation, [and] . . . it must be necessary for the professional to use his specialized knowledge or training.").

controversial words and phrases in insurance contracts.⁴¹⁸ Those doctrines are the traditional rules of contract interpretation as well as the doctrines of adhesion, ambiguity, plain meaning, and reasonable expectation.⁴¹⁹ Therefore, since the insurance contract in *Admiral* did not define professional services, the circuit judge's application of the doctrine of ambiguity would have resolved that matter quickly.⁴²⁰

But Judge Garza and the panel failed to do what Texas law requires: They did not interpret the allegations in Exco's complaint *liberally* in favor of Ford.⁴²¹ The judge's own words support that conclusion.⁴²² Judge Garza wrote:

We need not accept Exco's legal characterization, only its factual allegations. Indeed, whether . . . Ford's alleged operations were professional in nature is the very question we must answer Aside from Exco's bald statement that certain (unspecified) acts were non-professional, the only arguably non-professional conduct alleged was failing to look for metal shavings or to use a magnet to detect shavings in mud. The actual performance of these acts is perhaps akin to conduct that we have found to be non-professional.⁴²³

To repeat, the Texas Supreme Court has stressed: Courts must focus on the factual allegations in a third-party complaint and construe the allegations "fairly and reasonably."⁴²⁴ Now, it certainly appears that Judge Garza performed a fair and reasonable *de novo* review of Exco's complaint.⁴²⁵ And what did the circuit judge discover? He found *doubt*: The third-party complaint outlined property damages stemming from Ford's professional conduct and, arguably, from Ford's non-professional conduct.⁴²⁶ Consequently, a fair and reasonable assessment would allow

418. Cf. Willy E. Rice, *The Court of Appeals for the Fifth Circuit 2004-2005—Disposition of Insurance Decisions: A Survey and Statistical Review*, 38 TEX. TECH L. REV. 821, 855 nn.278-80 (2006) (outlining the five doctrines and discussing predictable outcomes in declaratory-judgment trials when courts apply the various doctrines).

419. *Id.*

420. *Id.*

421. See *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 491 (Tex. 2008) (emphasis added).

422. See *Admiral*, 607 F.3d at 425-26.

423. *Id.*

424. *Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 142 (Tex. 1997) (declaring that a liability insurer has a duty to defend if the underlying petition contains allegations which are construed fairly and reasonably and state a cause of action that is potentially covered under the insurance contract).

425. *Admiral*, 607 F.3d at 422 ("This [c]ourt reviews the district court's grant of summary judgment *de novo*." (citing *Am. Nat'l Gen. Ins. Co. v. Ryan*, 274 F.3d 319, 323 (5th Cir. 2001))).

426. *Id.* at 426. The following words and phrases are synonyms: "arguable," "doubtful," and "in doubt" are synonyms. See *Roget's International Thesaurus*, 514.16 (4th ed. 1977). Additionally, "perhaps," "possibly," and "potentially" are used interchangeably. *Id.* 509.1, .6, .9.

one to conclude that Exco filed a mixed-claims complaint—one containing both excluded and covered third-party claims.⁴²⁷

To be sure, Texas courts have issued numerous opinions requiring insurers to defend insureds against a third-party complainant's "entire suit" either (1) when *doubt* appears in a third-party complaint or (2) when the underlying complaint contains mixed claims or causes—some covered and some excluded under the policy.⁴²⁸ To illustrate, consider the Texas Supreme Court's conclusion in *Merchants Fast Motor Lines, Inc.*:

When applying the eight corners rule, [courts must] give the allegations in the petition a liberal interpretation. . . . "Where the complaint does not state facts sufficient to clearly bring the case within or without the coverage, . . . the insurer is obligated to defend if there is, potentially, a case under the complaint within the coverage of the policy. Stated

427. See *Admiral*, 607 F.3d at 424. Of course, Ford presented that very argument. See *id.* at 423. But the panel dismissed Ford's mixed-complaint argument, read some extrinsic allegations into the third-party complaint, and presented a significant amount of confusing dicta. See *id.* To prove the point, consider Judge Garza's words:

[F]ailing to look for metal shavings or to use a magnet to detect shavings in mud . . . is perhaps akin to conduct that we have found to be non-professional. But Exco is not suing Ford because Ford was told to watch for pipe wear and metal shavings and failed to do so. Rather, the complaint is that Ford failed to act upon its specialized knowledge that those tasks needed to be performed (i.e., Ford failed to instruct the mud logger to look for shavings). Indeed, the specific failures are listed as sub-parts of a general failure "to perform adequate and competent drilling operations." In other words, the allegations are not that Ford incorrectly performed some non-professional activity, but that Ford failed to properly implement a plan to drill a well over 16,000 feet deep.

Ultimately, the underlying suit alleges the existence of and failure to fulfill a contract, the very subject of which was Ford's expertise in drilling operations. Ford essentially argues that a claim that a party caused injury by negligently performing its professional services is not covered by a professional services exclusion because some of the breaching conduct was arguably non-technical in nature.

Id. at 426. Cf. *Burlington N. & Santa Fe Ry. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. 08-06-00022-CV, 2009 WL 4653406, at *5 (Tex. App.—El Paso Dec. 9, 2009, pet. granted) ("National Union attempts to demonstrate that BNSF failed to establish its right to coverage by citing to several pieces of extrinsic evidence. We cannot consider such evidence under the eight-corners rule. The Texas Supreme Court has continually, and recently, declined to create an exception to the eight-corners rule which would allow consideration of extrinsic evidence in determining whether an insurer owes a duty to defend. Therefore, our analysis will focus exclusively on the language of the policy and the allegations in the petitions.").

428. See, e.g., *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 491, 496-96 ("If a complaint potentially includes a covered claim, the insurer must defend the entire suit. . . . The duty to defend is not negated by the inclusion of claims that are not covered; rather, it is triggered by the inclusion of claims that might be covered."); *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 201 (Tex. 2004) (concluding that an "insurer is obligated to defend a suit if the facts alleged in the pleadings would give rise to any claim within the coverage of the policy"); *Burlington N. & Santa Fe Ry. Co.*, 2009 WL 4653406, at *1, *6 (citing *Zurich* and concluding that the insurer had duty to defend the insured against the entire suit that contained both covered and excluded allegations); *Gehan Homes, Ltd. v. Emp'rs Mut. Cas. Co.*, 146 S.W.3d 833, 838 (Tex. App.—Dallas 2004, pet. denied) ("A duty to defend any of the claims against an insured requires the insurer to defend the entire suit."); *St. Paul Ins. Co. v. Tex. Dep't of Transp.*, 999 S.W.2d 881, 884 (Tex. App.—Austin 1999, pet. denied) (reiterating that if an insurer owes a duty to defend any portion of the suit, the insurer must defend the entire suit).

differently, in case of doubt [about] . . . whether . . . the allegations [in] a complaint . . . state a cause of action [sufficiently to compel a legal defense under] . . . a liability policy . . . , such doubt will be resolved in insured's favor."⁴²⁹

Even more significantly, two years ago, a different Fifth Circuit panel cited and embraced the Texas Supreme Court's ruling in *Merchants Fast Motor Lines, Inc.*⁴³⁰

Again, the *Admiral* panel conducted a "fair and reasonable" examination of the third-party complaint and found doubt regarding the types of allegations appearing in the complaint.⁴³¹ Consequently, uncertainty supported Ford's summary-judgment argument: The oil-and-gas company's losses originated from Ford's professional and nonprofessional actions or omissions—excluded and covered activities, respectively.⁴³² And in light of the panel's "fair and reasonable" finding, the panel should have applied the rule in *Merchants Fast Motor Lines, Inc.* and resolved the summary-judgment dispute in favor of Ford. The panel did not; thus, the analysis and outcome in *Admiral* are seriously flawed, as they are not based on Texas's settled duty-to-defend principles.⁴³³

In contrast, the analysis and conclusion in *QBE Insurance* are sound because both are based on Mississippi's settled duty-to-defend rules.⁴³⁴ Again, Casiano was BWC's employee, working on a project.⁴³⁵ BMI was

429. *Nat. Union Fire v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997); *see also Zurich*, 268 S.W.3d at 491 (reiterating that courts must "resolve all doubts regarding the duty to defend in favor of the duty"); *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 643 (Tex. 2005) ("To determine an insurer's duty to defend, we look at the allegations in the pleadings and the insurance policy's language [I]n the event of ambiguity, we construe the pleadings liberally, resolving any doubt in favor of coverage.").

430. *See Gore Design Completions, Ltd. v. Hartford Fire Ins. Co.*, 538 F.3d 365, 368-372 (5th Cir. 2008) (interpreting a professional-services-exclusion clause, embracing Texas Supreme Court's ruling in *Merchants Fast Motor Lines*, reiterating that "doubts are resolved" in favor the insured, finding that the third-party complaint "[did] not unequivocally . . . blame . . . the engineering services," and concluding that "the exclusion [did] not negate the [liability insurer's] duty to defend").

431. *Admiral*, 607 F.3d at 426.

432. *Id.*

433. *See supra* note 429 and accompanying text.

434. *QBE Ins. Corp. v. Brown & Mitchell, Inc.*, 591 F.3d 439, 443 (5th Cir. Dec. 2009); *see also U.S. Fidelity & Guar. Co. v. Omnibank*, 812 So. 2d 196, 200 (Miss. 2002) (concluding that whether a liability carrier has a duty to defend depends on the policy language and the allegations of the complaint); *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 403 n.9 (5th Cir. 2008) (citing *Ingalls Shipbuilding v. Fed. Ins. Co.*, 410 F.3d 214, 225 (5th Cir. 2005)) (explaining that analysis under the "eight-corners" test determines the duty to defend); *Am. Guar. & Liab. Ins. Co. v. 1906 Co.*, 273 F.3d 605, 610 (5th Cir. 2001) (embracing Mississippi's rule and concluding that an insurer has a duty to defend if a third-party complaint states a claim that is "within or arguably within the scope of coverage provided by the policy"); *Burton v. Choctaw Cnty.*, 730 So. 2d 1, 8 (Miss. 1997) (citing *Nationwide Mut. Ins. Co. v. Garriga*, 636 So. 2d 658, 662 (Miss. 1994)) (concluding that "the language in insurance contracts, especially exclusionary clauses, [must] be construed strongly against the drafter").

435. *QBE Insurance*, 591 F.3d at 441.

the project's engineer.⁴³⁶ A collapsed trench killed Casiano at the work site.⁴³⁷ Tranqualino, Casiano's mother, commenced a wrongful-death action against BMI and others.⁴³⁸ The District Court for the Southern District of Mississippi, however, concluded that QBE had no duty to defend BMI against the wrongful-death lawsuit.⁴³⁹ On appeal, BMI argued that the district court erred.⁴⁴⁰ But, QBE argued on appeal that BMI's conduct was not an "occurrence" or, alternatively the activities surrounding the collapsed ditch were excluded events under the liability-insurance contract's professional-services-exclusion clause.⁴⁴¹

Judge Jolly conducted a *de novo* review of the summary judgment and wrote the opinion for the *QBE* panel.⁴⁴² At the outset, Judge Jolly reviewed the insurance contract and found that it did not cover "bodily injuries arising from rendition of or failure to render professional services," including "engineering services" or "related supervisory or inspection services."⁴⁴³ He also discovered that the liability insurance contract did not define "professional services" or "engineering services."⁴⁴⁴ But, he did not conduct an elaborate and, arguably, an unnecessary analysis just to uncover a legal definition of professional services.⁴⁴⁵ The judge simply applied the definition that Mississippi's courts use: "[A] 'professional service' involves the application of special skill, knowledge and education arising out of a vocation, calling, occupation or employment."⁴⁴⁶

Tranqualino's complaint alleged: For Casiano's benefit or well-being, BMI had "a duty . . . to perform its professional responsibilities as engineers" according to prevailing standards, and BMI breached those responsibilities.⁴⁴⁷ Therefore, to determine whether the professional-services-exclusion clause excluded Tranqualino's allegation, Judge Jolly applied Mississippi's eight-corners test and examined the allegations in light of the exclusion clause.⁴⁴⁸ The circuit judge's efforts and application of settled rules produced a brief, cogent, and lucid analysis, which resulted in a "fair and reasonable" conclusion. In relevant part, Judge Jolly wrote the following:

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.* at 442.

440. *Id.*

441. *Id.*

442. *Id.* at 441. The panel comprised Circuit Judges Rhesa H. Barksdale, E. Grady Jolly, and Jacques Wiener. *Id.*

443. *Id.* at 443.

444. *Id.*

445. *Id.*

446. *Id.* (citing *Burton v. Choctaw Cnty.*, 730 So. 2d 1, 5-6 (Miss. 1997), and *Titan Indem. Co. v. Williams*, 743 So. 2d 1020, 1026 (Miss. Ct. App. 1999)).

447. *Id.*

448. *Id.*

[Tranqualino's complaint explicitly attributes] the accident to a breach of BMI's "professional responsibilities" as the "engineering firm" on the site. It asserts that, as the engineering firm, BMI did and did not do certain things; as the engineering firm, BMI owed a professional responsibility to Casiano; and, as the engineering firm, it breached that professional responsibility. . . . In the light of the allegations in Tranqualino's complaint, the only way to find coverage under this policy language would be to deem the exclusion completely meaningless. . . . In sum, even studiously construing the [insurance contract] in favor of BMI, the allegations in the complaint are precisely the sort of potential liability the professional services exclusion is designed to excise from coverage. BMI's attempt to introduce true facts to overcome this problem is unavailing. As such, QBE has no duty to defend. . . . Accordingly, the district court's judgment is affirmed.⁴⁴⁹

Willbros is the last case in *Trilogy II*. And as stated earlier, Exxon sued Shell, Willbros, Harding, and others asserting that the latter deviated from their professional duties and damaged Exxon's pipeline.⁴⁵⁰ Willbros's liability insurer, CCC, refused to defend or indemnify, asserting the insurance contract's professional-services-exclusion provision did not cover the third-party allegation.⁴⁵¹ The District Court for the Southern District of Texas embraced Willbros's argument, finding that professional negligence—excluded conduct under the policy—was not the foundation of Exxon's complaint.⁴⁵²

On appeal, the question was whether the language in the professional-services-exclusion clause relieved CCC of its alleged duty to defend and indemnify.⁴⁵³ Once more, Exxon alleged that Willbros negligently failed to "analyze, review, supervise, construct, operate, and monitor the work so that EMPCo's pipelines would not be damaged."⁴⁵⁴ After reviewing the facts in Exxon's complaint "fairly and reasonably" and applying Texas's duty-to-defend rules, the panel issued a short, yet, cogent and lucid per curiam opinion.⁴⁵⁵

First, citing *Heyden* and *King*, the panel stressed that third-party allegations must be viewed in light of liability insurance contracts' coverage provisions before determining whether a professional-services-

449. *Id.* at 444-45.

450. *Willbros RPI, Inc. v. Cont'l Cas. Co.*, 601 F.3d 306, 308 (5th Cir. Mar. 2010).

451. *Id.*

452. *Id.* at 309.

453. *Id.* ("[CCC] contends that the professional services exclusion in its policy bars coverage of Willbros's defense in the underlying lawsuit. According to [CCC], the exclusion applies because the property damage in question arose out of errors in the preparation and/or approval of the surveyor's plans. [CCC] maintains that the preparation and approval of plans qualifies as a professional service and that the damage alleged in the complaint would not have occurred but for the performance of these activities.").

454. *Id.* at 308.

455. *Id.* Circuit Judges Jennifer Elrod, Emilio Garza, and Jacques Wiener comprised the panel. *Id.*

exclusion clause applies.⁴⁵⁶ Even more importantly, the panel emphasized that it had an obligation to construe the allegations in Exxon's complaint "liberally."⁴⁵⁷ Stated another way, the panel reviewed the allegation without being concerned about (1) whether Exxon's claims were true or false, (2) whether Exxon and Willbros knew or believed the facts were true facts, or (3) whether true facts were based on an exhaustive legal analysis.⁴⁵⁸

After examining the insurance contracts and the underlying pleading, the *Willbros* panel found the following: The allegations included "conduct that arguably qualifie[d] as professional service under the terms of the exclusion (e.g., approval of the plans)."⁴⁵⁹ But the allegations also contained "conduct that clearly [did] not fit within the exclusion (e.g., drilling, constructing, operating)."⁴⁶⁰ To help ensure that its conclusion was "fair and reasonable," the panel considered and applied two previously discussed duty-to-defend rules: Under Texas law, "[a] liability insurer is obligated to defend a suit if the facts alleged in the pleadings would give rise to any claim within the coverage of the policy";⁴⁶¹ and, courts must read third-party allegations liberally and resolve any doubt in favor of the insured.⁴⁶² In the end, the *Willbros* panel applied those rules and declared that CCC had a duty to defend Willbros against Exxon's suit.⁴⁶³

456. *Id.* at 309 (citing *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002), and *Heyden Newport Chem. Corp. v. S. Gen. Ins. Co.*, 387 S.W.2d 22, 24 (Tex. 1965)) (reiterating that the "eight corners" doctrine requires a court to examine the liability insurance policy and third-party pleadings in the underlying suit to determine whether an insurer must defend the insured).

457. *Id.* at 310.

458. *Id.* at 309-10 (citing *Duncanville Diagnostic Ctr., Inc. v. Atl. Lloyd's Ins. Co. of Tex.*, 875 S.W.2d 788, 789 (Tex. App.—Eastland 1994, writ denied) (reiterating that courts must apply the "eight corners" rule and construe third-party allegations liberally "without reference to their truth or falsity, to what the parties know or believe to be the true facts, or to a legal determination of the true facts")).

459. *Id.* at 310.

460. *Id.* Exxon alleged that "defendants . . . approved the plans," "the drill bore damaged EMPCo's pipelines," and "[d]efendants owed a duty to use ordinary care to analyze, review, supervise, construct, operate, and monitor the work." *Id.*

461. *Id.* (citing *Nat. Union Fire v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997)).

462. *Id.*; see also *Essex Ins. Co. v. Hines*, 358 F. App'x 596, 598 (5th Cir. Jan. 2010) (per curiam) (citing Texas's eight-corners doctrine and declaring that "an interpretation favoring coverage will be adopted even if an interpretation militating against coverage is *more* reasonable" if the language in a liability insurance contract has "two or more reasonable interpretations").

463. *Willbros*, 601 F.3d at 310-12 ("[W]e hold that the district court correctly determined that the professional services exclusion does not provide a basis for [CCC] to deny coverage.").

B. Substantive Question: Whether Under Texas's Law "Cooperative" and "Non-cooperative" Liability Insurers Have a Duty to Defend and/or Reimburse an Insured on a "Pro Rata Basis" After Third-Party Complainants Commence a Personal-Injury or a Property-Damage Suit Against the Insured

In a 2005 review, the author reviewed the Fifth Circuit opinion in *American Indemnity Lloyds v. Travelers Property & Casualty Insurance Co.*⁴⁶⁴ The central question in that case was whether Texas law required two liability insurers to pay proportionate shares to settle or defend an insured against a third-party suit when both insurance contracts contained an "other insurance" clause.⁴⁶⁵ In that 2005 review, the author criticized the Fifth Circuit panel because the panel did not research carefully Texas cases and apply "on point" rules to resolve the controversy.⁴⁶⁶ Instead, the *American Indemnity* panel conducted an unnecessary "Erie guess" to answer the pro rata share or other-insurance dispute.⁴⁶⁷

During the 2009-2010 term, different panels decided collectively a third trilogy of cases (Trilogy III)—*Trinity Universal Insurance Co. v. Employers Mutual Casualty Co.*,⁴⁶⁸ *Travelers Lloyds Insurance Co. v. Pacific Employers Insurance Co.*,⁴⁶⁹ and *Willbros*.⁴⁷⁰ Generally, the controversy in *American Indemnity* was similar to the other-insurance dispute in these more recent cases. More specifically, the question in *Travelers*, *Trinity*, and *Willbros* is whether two liability insurers have a duty to pay pro rata shares of the defense costs when both insurance contracts contain an other-insurance clause.⁴⁷¹

Furthermore, although the outcomes in the current pro rata cases are essentially the same, the *Travelers* and *Willbros* panels applied the Texas Supreme Court's analysis and ruling in *Hardware Dealers Mutual Fire*

464. See *infra* note 465; *Am. Indem. Lloyds v. Travelers Prop. & Cas. Ins. Co.*, 335 F.3d 429 (5th Cir. 2003).

465. 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, 950-58 (2005).

466. *Id.* at 956 ("[T]he Fifth Circuit's elaborate analysis in *American Indemnity* was unnecessary and an inefficient use of very limited judicial resources. But more important, the appellate court's holding needlessly introduced confusion into Texas's law.")

467. *Am. Indem. Lloyds*, 335 F.3d at 435; see also *Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992) (concluding that "it is the duty of the federal court to determine as best it can, what the highest court of the state would decide"); *Tex. Emp'rs Ins. Ass'n v. Underwriting Members of Lloyds*, 836 F. Supp. 398, 406 (S.D. Tex. 1993) ("Without a Texas case resolving the issue . . . , the [c]ourt is required to follow the rule which it believes the Texas Supreme Court would adopt. In making this *Erie* "guess," the [c]ourt may consider all available legal sources, including Restatements of Law, treatises, law review commentaries, decisions from other jurisdictions whose doctrinal approach is substantially the same, and the "majority rule." (internal citations omitted)).

468. *Trinity Universal Ins. Co. v. Emp'rs Mut. Cas. Co.*, 592 F.3d 687 (5th Cir. Jan. 2010).

469. *Travelers Lloyds Ins. Co. v. Pac. Emp'rs Ins. Co.*, 602 F.3d 677 (5th Cir. Apr. 2010).

470. *Willbros RPI, Inc. v. Cont'l Cas. Co.*, 601 F.3d 306 (5th Cir. Mar. 2010).

471. See *supra* and *infra* Part IV.B.

Insurance Co. v. Farmers Insurance Exchange to decide the respective controversies.⁴⁷² The *Trinity* panel, however, did not apply or even cite the ruling in *Hardware Dealers*.⁴⁷³ Instead, the latter panel reviewed the Texas Supreme Court's ruling in *Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co.*⁴⁷⁴ The question in *Mid-Continent* was whether one liability insurer could receive a pro rata contribution from the other insurer after the former insurer paid more than it should to indemnify an insured.⁴⁷⁵ The *Trinity* panel concluded, however, that the analysis and holding in *Mid-Continent* could not be employed to resolve the pro rata quarrel in *Trinity*.⁴⁷⁶ In the end, the *Trinity* panel fashioned a somewhat questionable analysis to reach its conclusion.⁴⁷⁷ Therefore, to appreciate and understand fully the Fifth Circuit panels' analyses and conclusions, a short review of Texas's other-insurance doctrine is warranted.

First, consider the facts and disagreement in *Traders & General Insurance Co. v. Hicks Rubber Co.*, which the Texas Supreme Court decided nearly seventy years ago.⁴⁷⁸ During the early 1940s, Hicks Rubber Company was conducting business in Waco, Texas.⁴⁷⁹ Traders & General Insurance (Traders) and Employers Casualty Company (Employers) insured Hicks under two public-liability insurance contracts.⁴⁸⁰ Under Traders' policy, the insurer promised to pay if Hicks operated its vehicles and injured a third party.⁴⁸¹ Employers' policy promised to pay if a third party was injured in Hicks's building or on adjacent sidewalks.⁴⁸² In addition, under each liability insurance contract, the insurer had several other duties: (1) a duty to defend Hicks in underlying lawsuits, (2) a duty to settle claims in a timely manner, and (3) a duty to reimburse/indemnify Hicks for out-of-pocket expenses when Hicks settled a third-party claim or lawsuit.⁴⁸³

472. See *supra* and *infra* Part IV.B.

473. See *infra* notes 608-22.

474. See *infra* notes 608-22.

475. *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 768-69, 772 (Tex. 2007).

476. *Trinity Universal Ins. Co. v. Emp'rs Mut. Cas. Co.*, 592 F.3d 687, 695 (5th Cir. Jan. 2010).

477. See *infra* notes 609-11 and accompanying text.

478. *Traders & Gen. Ins. Co. v. Hicks Rubber Co.*, 169 S.W.2d 142, 144 (Tex. 1943).

479. *Id.* at 144.

480. *Id.*

481. *Id.*

482. *Id.*

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

But even more importantly, Employers and Traders' insurance contracts contained other-insurance clauses.⁴⁸⁴ Employers' policy stated: "If the Assured has other insurance covering a loss or expense covered hereby, the Company shall be liable only for the proportion of such loss or expense which the sum hereby insured bears to the whole amount of valid and collectible insurance."⁴⁸⁵ And, Traders' insurance contract read:

If the Named Insured has other insurance against a loss covered by the policy, the Company, as respects the Named Insured, shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability expressed in the Declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss.⁴⁸⁶

One of Hicks's employees injured a pedestrian while both insurance policies were current.⁴⁸⁷ The third-party victim sued and a jury awarded a \$10,000 judgment against Hicks.⁴⁸⁸ Unquestionably, both liability-insurance contracts covered the third-party claims.⁴⁸⁹ And, in due course, Traders and Employers satisfied the third party's judgment; but Traders paid more than its two-thirds proportionate share.⁴⁹⁰ Consequently, Travelers commenced an equitable-contribution action against Employers to recoup the excess payment.⁴⁹¹

The Texas Supreme Court considered several settled principles before deciding whether Travelers had a right to receive contribution from Employers.⁴⁹² First, one general rule states: "[I]f two or more insurers bind themselves to pay the entire loss insured against, and one insurer pays the whole loss, the [latter] has a right of action against [the] coinsurer, or coinsurers, for a ratable proportion of the amount paid."⁴⁹³ The nonparticipating insurer must reimburse the participating insurer for any pro rata delinquencies because the insurer who satisfied a third-party judgment

484. *Id.*

485. *Id.*

486. *Id.*

487. *Id.* The employees unloaded tires from a truck allegedly negligently. *Id.* Put simply, they tossed tires—across the adjacent sidewalk—from a truck into a chute inside of Hick's warehouse. *Id.* A tire struck Mrs. J. W. Harper as she walked past the truck. *Id.* Her injury was severe. *See id.*

488. *Id.* ("Mr. J. W. Harper, the husband of Mrs. J. W. Harper, filed [a suit against Hicks] in the District Court of McLennan County, Texas [He sued] to recover damages resulting from [his wife's] personal injuries."). The court of appeals later affirmed this judgment. *Id.* at 143.

489. *Id.* at 144-45.

490. *Id.* at 147-48.

491. *Id.* at 148 ("When Employers refused to further assist in the defense of the Harper suit, Traders shouldered the entire burden, including the appeals to the Court of Civil Appeals and to this court. In so doing it paid out more than two-thirds of the costs and expenses incurred. Traders sues Employers to make it pay its proportionate one-third of such costs and expenses.").

492. *Id.*

493. *Id.*

on behalf of an insured has paid the other insurer's debt which was "equally and concurrently due."⁴⁹⁴

But, courts in Texas have also embraced an equally important and competing rule: "[I]f each of several insurers contracts to pay [a] proportion of [a] loss . . . , [neither insurer has a right to receive a] contribution from the others, nor will the payment of the whole loss by any of them discharge the liability of the others."⁴⁹⁵ In light of the reported facts in *Traders & General Insurance*, the Texas Supreme Court applied the second general principle since "the contracts [were] several, and independent of each other."⁴⁹⁶ Or stated differently, the *Traders & General Insurance* court concluded: Other-insurance clauses in both contracts required each insurer to pay a proportion of the loss to cover the third-party injuries.⁴⁹⁷ Therefore, Traders could not obtain a contribution from Employers.⁴⁹⁸

Twenty-six years after deciding *Traders & General Insurance*, the Texas Supreme Court decided *Hardware Dealers*.⁴⁹⁹ The facts in the latter case are simple. John Hyde purchased a standard Texas automobile insurance contract from Farmers Insurance Exchange (Farmers).⁵⁰⁰ The insurance contract contained a drive-other-car clause, covering the "named insured and his family [while either drove] . . . an automobile which the insured did not own."⁵⁰¹ Anita Hyde, John Hyde's daughter, was covered under the auto policy.⁵⁰² During the same period, Hardware Dealers Mutual Fire Insurance Company (Hardware) insured Frizzell Pontiac under an auto-garage liability policy.⁵⁰³

One fateful day, Anita Hyde visited Frizzell Pontiac to purchase a new auto.⁵⁰⁴ Therefore, with Frizzell's permission, she took a new Pontiac on a test drive.⁵⁰⁵ During the test, the Pontiac collided with another auto.⁵⁰⁶ Hugo Teste drove the other car; he sued Anita Hyde.⁵⁰⁷ While the third-

494. *Id.*

495. *Id.*

496. *Id.*

497. *Id.* at 147.

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

499. See *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 583 (Tex. 1969).

500. *Id.* at 584. The auto policy covered a 1966 Ford truck, with these policy limits: \$10,000 personal-injury coverage per person, \$20,000 coverage per accident, and \$5,000 coverage for property damage. *Id.*

501. *Id.*

502. *Id.*

503. *Id.* at 584-85 ("[The] policy insured any person against claims for bodily injury or property injury while permissively using an auto belonging to Frizzell. The policy limits were \$500,000, \$1,000,000, and \$50,000.").

504. *Id.* at 584.

505. *Id.*

506. *Id.*

507. *Id.*

party suit was pending, Farmers commenced a declaratory-judgment suit against Hardware, asking the court to determine the extent of Farmers and Hardware's liability under the standard-auto and auto-garage insurance contracts, respectively.⁵⁰⁸ Additionally, Farmers asked the court to decide whether both insurers had a duty to defend Anita Hyde against the pending underlying lawsuit.⁵⁰⁹

To complicate matters, Farmers' as well as Hardware's insurance contract contained an other-insurance clause.⁵¹⁰ In pertinent part, Farmers' policy stated:

Other insurance. If the insured has other insurance against a loss covered by . . . this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limits of liability of all valid and collectible insurance against such loss; provided, [h]owever, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance.⁵¹¹

On the other hand, a special endorsement was attached to Hardware's insurance contract, and it "contained a non-liability or [an] escape clause. The purpose of the clause was to exclude from coverage permissive users of Frizzell Pontiac's automobile who were covered by other insurance."⁵¹² The endorsement read in relevant part:

[T]he insurance under this policy shall not apply to any loss with respect to which the insured has other valid and collectible insurance unless the total amount of the loss exceeds the sum of the limits of liability of all other policies affording such other insurance and the company shall then be liable . . . only for the *excess*.⁵¹³

Eventually, the case reached the Texas Supreme Court. Finding that the two other-insurance clauses conflicted, the supreme court fashioned this rule:

When, from the point of view of the insured, she has coverage from either one of two policies but for the other, and each contains a provision which

508. *Id.* at 583-84.

509. *Id.* at 584.

510. *Id.*

511. *Id.* (emphasis omitted).

512. *Id.* at 585.

513. *Id.* (emphasis added).

is reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance, there is a conflict in the provisions.⁵¹⁴

And if there is a conflict, “liability [must be] equally prorated between the two [insurers] and each has an obligation to defend the insured.”⁵¹⁵

Finally, thirty-eight years after deciding *Hardware Dealers*, the Texas Supreme Court decided *Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co.*⁵¹⁶ The few pertinent facts of *Mid-Continent* are not complicated: Kinsel Industries was the general contractor on a State of Texas highway project.⁵¹⁷ Crabtree Barricades was Kinsel Industries’ subcontractor, who was responsible for managing signs and dividers.⁵¹⁸ Kinsel Industries purchased liability insurance contracts from Mid-Continent Insurance Company (Mid-Continent) and Liberty Mutual Insurance Company (Liberty).⁵¹⁹ Both Mid-Continent and Liberty’s insurance policies contained an other-insurance clause.⁵²⁰

An automobile accident occurred in the construction zone of the State of Texas highway project.⁵²¹ Driving on a narrowed lane, Tony Cooper

514. *Id.* at 589.

515. *Id.* at 590 (“The judgments of the courts below are reversed and judgment is rendered declaring that the liability of Hardware and Farmers is pro rata up to the minimum limits of the financial responsibility law and that each has an obligation to defend Anita Hyde.”).

516. *See* *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 768 (Tex. 2007).

517. *Id.* at 769.

518. *Id.*

519. *Id.* at 769 (“Kinsel was the named insured under Liberty Mutual Insurance Company’s \$1 million comprehensive general liability policy. Liberty Mutual also provided Kinsel with \$10 million in excess liability insurance. Crabtree was the named insured under Mid-Continent Insurance Company’s \$1 million CGL policy. Mid-Continent’s policy identified Kinsel as an additional insured for liability arising from Crabtree’s work. Kinsel, therefore, was a covered insured under two CGL policies, both of which provided Kinsel with \$1 million in indemnity coverage for the underlying suit.”).

520. *Id.* at 769 (“The CGL policies contained identical ‘other insurance’ clauses providing for equal or pro rata sharing up to the co-insurers’ respective policy limits if the loss is covered by other primary insurance . . .”). The other-insurance clause stated in relevant part:

If other valid and collective insurance is available to the insured for a loss we cover under Coverages A [“Bodily Injury and Property Damage Liability”] or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

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

. . . .

c. Method of Sharing

If all of the other insurance permits contribution by equal shares, . . . each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

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

Id.

521. *Id.*

drove his car across the median into oncoming traffic.⁵²² Cooper's car collided with James Boutin's car.⁵²³ The occupants in the latter car—Boutin's family members—were severely injured.⁵²⁴ The family sued Cooper, the State of Texas, Kinsel, and Crabtree.⁵²⁵ Both insurers assumed responsibility for a pro rata share of Kinsel Industries' liability stemming from the car accident.⁵²⁶ Liberty agreed to settle for \$1.5 million.⁵²⁷ Mid-Continent, however, contributed only \$150,000, leaving Liberty to pay the balance.⁵²⁸

Liberty filed a suit against Mid-Continent in a Texas state court, wanting to recover excess funds—beyond its pro rata share—that Liberty spent to settle the underlying lawsuit.⁵²⁹ Mid-Continent removed the case to a federal district court, which declared that the subrogation clause in Liberty's policy allowed the insurer to recover the excess funds from Mid-Continent.⁵³⁰ Mid-Continent appealed, and the Fifth Circuit certified the pro rata question to the Texas Supreme Court.⁵³¹

The Texas Supreme Court rejected Liberty's contribution claim, finding that Liberty did not have a right of subrogation because Kinsel was fully indemnified.⁵³² To reach that conclusion, the Supreme Court of Texas cited *Hicks Rubber* and its ruling in that case: “[A] co-insurer [who pays] more than its proportionate share [may not] recover the excess from the

522. *Id.*

523. *Id.* at 769.

524. *Id.*

525. *Id.*

526. *Id.*

527. *Id.*

528. *Id.*

529. *Id.*

530. *Id.*

531. *See Liberty Mut. Ins. Co. v. Mid-Continent Ins. Co.*, 405 F.3d 296, 310 (5th Cir. 2005). The Fifth Circuit certified the following question of law to the Supreme Court of Texas:

Two insurers, providing the same insured, applicable primary insurance liability coverage under policies with \$1 million limits and standard provisions (one insurer also providing the insured coverage under a \$10 million *excess policy*), cooperatively assume defense of the suit against their common insured, admitting coverage. The insurer also issuing the excess policy procures an offer to settle for the reasonable amount of \$1.5 million and demands that the other insurer contribute its proportionate part of that settlement, but the other insurer, unreasonably valuing the case at no more than \$300,000, contributes only \$150,000, although it could contribute as much as \$700,000 without exceeding its remaining available policy limits. As a result, the case settles (without an actual trial) for \$1.5 million funded \$1.35 million by the insurer which also issued the excess policy and \$150,000 by the other insurer. In that situation is any actionable duty owed (directly or by subrogation to the insured's rights) to the insurer paying the \$1.35 million by the underpaying insurer to reimburse the former respecting its payment of more than its proportionate part of the settlement?

Id. (emphasis added).

532. *See Mid-Continent*, 236 S.W.3d at 768, 772.

other co-insurers.”⁵³³ To explain its ruling more fully, the *Mid-Continent* court also stated:

The effect of the pro rata clause precludes a direct claim for contribution among insurers because the clause makes the contracts several and independent of each other. With independent contractual obligations, the co-insurers do not meet the common obligation requirement of a contribution claim—each co-insurer contractually agreed with the insured to pay only its pro rata share of a covered loss; the co-insurers did not contractually agree to pay each other’s pro rata share.⁵³⁴

In light of the Texas Supreme Court decision in *Mid-Continent*, the Fifth Circuit reversed the district court’s judgment and remanded the case, instructing the lower court to enter a take-nothing judgment against Liberty.⁵³⁵

Now, with those Texas principals in mind, consider the Fifth Circuit panels’ other-insurance or pro rata opinions in the third trilogy. First, the underlying controversy in *Travelers* occurred between Best Buy Stores, Inc. (Best Buy) and one its consumers—Scott Schneider (Schneider).⁵³⁶ The Centre at Bunker Hill, Ltd. (The Centre) owned a shopping mall in Houston, Texas, and a Best Buy store was located in the complex.⁵³⁷ Schneider visited Best Buy to purchase speakers.⁵³⁸ He was confined to a wheelchair.⁵³⁹ As he was leaving the store, his wheelchair overturned.⁵⁴⁰ Alleging that his femur and hips were severely injured, Schneider and members of his nuclear family commenced a negligence action against The Centre, Best Buy, and others in a Texas state court.⁵⁴¹

When the accident occurred, Travelers Lloyds Insurance Company (Travelers) insured The Centre under a comprehensive general liability policy.⁵⁴² And Pacific Employers Insurance Company (Pacific) insured Best Buy under a one-year “excess commercial general liability policy.”⁵⁴³ Asserting that The Centre was an “additional insured” under the Pacific policy, Travelers asked Best Buy and Pacific to help defend and indemnify

533. *Id.* at 772 (citing *Traders & Gen. Ins. Co. v. Hicks Rubber Co.*, 169 S.W.2d 142, 148 (Tex. 1943)) (“[A] direct claim for contribution between co-insurers disappears when the insurance policies contain ‘other insurance’ or ‘pro rata’ clauses.”).

534. *Id.* at 772 (citation omitted).

535. *See Liberty Mut. Ins. Co. v. Mid-Continent Ins. Co.*, 508 F.3d 261, 262-63 (5th Cir. 2007) (*per curiam*).

536. *Travelers Lloyds Ins. Co. v. Pac. Emp’rs Ins. Co.*, 602 F.3d 677, 680 (5th Cir. Apr. 2010).

537. *Id.* at 679.

538. *Id.* at 680.

539. *Id.*

540. *Id.*

541. *Id.*

542. *Id.*

543. *Id.*

The Centre.⁵⁴⁴ Pacific and Best Buy refused to participate.⁵⁴⁵ Therefore, Travelers settled the Schneiders' underlying lawsuit, paying \$250,000 and incurring approximately \$273,000 in defense costs.⁵⁴⁶

Later, Travelers filed a declaratory-judgment action in the District Court for the Southern District of Texas, asking the court to declare whether Pacific and Best Buy had a duty to defend The Centre against claims in the underlying action, and whether Pacific had a duty to indemnify or reimburse Travelers for a portion of the \$273,000.⁵⁴⁷ After each party filed summary-judgment motions, the district court granted Travelers' motion but denied Pacific's.⁵⁴⁸ The district court declared: (1) The Centre was an "additional insured" under Pacific's liability-insurance contract; (2) Pacific's insurance contract was the "primary" policy, which allowed Travelers, a subrogee, to recover settlement expenditures from Pacific; and (3) Travelers could recover insurance-defense expenditures from the primary insurer.⁵⁴⁹ Pacific appealed.⁵⁵⁰

On appeal, Judge Owen wrote the opinion for the *Travelers* panel.⁵⁵¹ At the outset, Judge Owen addressed the question of whether The Centre was an "additional insured" under Pacific's insurance contract.⁵⁵² Therefore, she carefully examined the indemnity clause in The Centre and Best Buy's lease as well as the pertinent provisions in the two liability insurance contracts.⁵⁵³ Later, she examined those instruments in light of Texas's settled principles.⁵⁵⁴ In the end, Judge Owen crafted a sound opinion.⁵⁵⁵ Answering the first question, the circuit judge embraced the district court's conclusion: The Centre was an additional insured under Pacific's policy because the lease/indemnity contract required Best Buy (tenant) to purchase insurance for The Centre (landlord).⁵⁵⁶

Before the Fifth Circuit panel, Pacific also asserted: Assuming that The Centre was an "additional insured" under Pacific's insurance contract,

544. *Id.*

545. *Id.*

546. *Id.*

547. *Id.* at 680-81.

548. *Id.* at 681.

549. *Id.*

550. *Id.*

551. *Id.* at 679. The panel comprised Circuit Judges Emilio Garza, Priscilla Owen, and Carl Stewart. *Id.*

552. *Id.*

553. *Id.* at 680-81.

554. *Id.* at 681 ("The Texas Supreme Court has considered an 'additional insured' provision similar to the one contained in Best Buy's lease with The Centre. . . . [In that case, the supreme court] held that this 'brief statement' requiring Triple S to include ATOFINA as an additional insured was 'clear enough' and sufficient 'to extend insured status to ATOFINA for its own negligence.' The lease between Best Buy and The Centre similarly required Best Buy to 'name . . . Landlord [The Centre] as additional insured.'").

555. *Id.* at 681-84.

556. *Id.* at 683-84.

Pacific was the “excess” carrier rather than the “primary” insurer.⁵⁵⁷ To address that “priority of coverage” question, Judge Owen examined the other-insurance clauses in Travelers and Pacific’s liability-insurance contracts.⁵⁵⁸ And after considering her de novo findings in light of Texas’s rules, she rejected Pacific’s argument.⁵⁵⁹ More specifically, Judge Owen concluded that Texas law did not support Pacific’s position, stressing that a self-insurer does not provide “other insurance,” and a self-insurer does not provide “valid and collectible insurance” within the meaning of an other-insurance clause.⁵⁶⁰

Finally, Judge Owen considered the question of whether Travelers, Pacific, or both insurers have a duty to defend and indemnify when their respective liability-insurance contracts contained competing other-insurance clauses.⁵⁶¹ The judge’s de novo review of those provisions revealed a conflict.⁵⁶² Therefore, Judge Owen cited the Texas Supreme Court’s ruling in *Hardware Dealers* and concluded that the conflicting other-insurance

557. *Id.* at 684 (“We [must] consider Pacific’s argument that the coverage it provided to The Centre as an additional insured should be treated as a pure excess insurance policy . . . because the lease permitted Best Buy to self-insure all or part of its insurance obligation to The Centre, and Best Buy did in fact self-insure up to the amount of \$200,000.”).

558. *Id.* (“Because The Centre is an additional insured under the Pacific policy, the priority of coverage between the Pacific policy and the Travelers policy must be determined. Both policies contain ‘Other Insurance’ provisions.”). The Pacific policy’s “other insurance” clause reads: “If other insurance is available to the insured for a loss we cover under this policy, this insurance is excess over that other insurance, unless that insurance is written specifically to apply in excess of the Limits shown in the Declarations.” *Id.* The Travelers policy’s other-insurance clause reads:

If other valid and collectible insurance is available to the insured for a loss we cover under Coverage A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. . . .

b. Excess Insurance:

This insurance is excess over any of the other insurance; whether primary, excess, contingent, or on any other basis:

. . . .

(4) That is valid and collectible insurance available to you [The Centre] if you are added as an additional insured under any other policy.

Id.

559. *Id.*

560. *Id.* (“Best Buy’s retention of the first \$200,000 of liability under the Pacific policy does not constitute ‘other valid and collectible . . . insurance available to [The Centre]’ within the meaning of the Travelers policy.”).

561. *Id.*

562. *Id.* at 686 (“[T]he ‘other insurance’ clauses in the Travelers and Pacific policies could reasonably be construed to conflict. The Travelers policy states unequivocally that it is ‘excess over any of the other insurance[,] whether primary, excess, contingent, or on any other basis,’ including specifically insurance available to The Centre as an additional insured under another policy. The Pacific policy expresses an intent that it [will be excess insurance] over other insurance ‘unless that insurance is written specifically to apply in excess of the Limits shown in the Declarations.’ . . . The Pacific policy seems to contemplate that ‘other insurance’ means true ‘excess’ or umbrella insurance.”).

clauses could not be harmonized.⁵⁶³ In due course, the circuit judge declared: “The Centre has coverage under both the Travelers and Pacific policies. . . . [Because] the ‘other insurance’ provisions conflict, each insurer must share in the costs of underlying litigation against The Centre.”⁵⁶⁴

The phrase—“share in the costs of underlying litigation”—is arguably a weak link in Judge Owen’s otherwise careful and thoughtful analysis. Put simply, it is not clear whether the phrase refers *only* to Pacific’s duty to defend or to Pacific’s duty to defend *and* indemnify. Certainly, the confusion is a significant problem because, under Texas’s law, a duty to defend is very different from a duty to indemnify.⁵⁶⁵ Moreover, the same confusion is highlighted in Judge Owen’s final pro rata finding and conclusion. Once more, citing *Hardware Dealers*, the circuit judge wrote:

The remaining question is how [to apportion the cost of the settlement] between Travelers and Pacific. Under Texas law, coverage should be prorated between the two insurers proportionate to the coverage [provided under] each policy. . . . Since each provided an equal amount of coverage, each should share equally in the cost to defend and settle all claims. . . . Accordingly, the costs above that self-retention should be pro-rated.⁵⁶⁶

But to reiterate, the only question in *Hardware Dealers* was whether each insurer was obligated to share the cost of defending the insured.⁵⁶⁷ And, the Texas Supreme Court declared that “[t]he liability [was] equally prorated between the two [insurers] and each [had] an obligation to defend the insured.”⁵⁶⁸ The *Hardware Dealers* court, however, did not address another multi-prong question: whether the two insurers had a duty to pay pro-rated shares to cover settlement, reimbursement, indemnification, or combination of those costs.⁵⁶⁹ Therefore, in *Travelers*, Judge Owen

563. *Id.* at 687 (citing *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 585-87 (Tex. 1969) (noting that a court must consider “whether the clauses conflict or can be harmonized”).

564. *Id.*

565. See *Trinity Universal Ins. Co. v. Emp’rs Mut. Cas. Co.*, 592 F.3d 687, 694 (5th Cir. Jan. 2010) (“Texas courts have repeatedly affirmed that an insurer’s duty to defend is separate from and broader than its duty to indemnify.”).

566. *Travelers*, 602 F.3d at 687.

567. See *Hardware Dealers*, 444 S.W.2d at 590.

568. *Id.*

569. *Id.* Again, the following is worth stressing: Under Texas law, duty-to-defend, duty-to-indemnify, and duty-to-settle principles are not the same. In particular, under Texas’s *Stower’s* doctrine, a liability insurer is liable for the entire amount of a third-party judgment—including that part exceeding the insured’s policy limits—if the insurer negligently fails to accept a reasonable settlement offer. See *G. A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544, 548 (Tex. Comm’n App. 1929). And, to repeat, the duty to defend and the duty to indemnify “are distinct and separate duties.” See *Utica Nat’l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004). Under Texas’s “eight corners” rule, a liability insurer has a duty to defend when the allegations within the four corners of a third-party complaint are potentially covered within the four corners of the liability insurance. See *Nat’l*

arguably applied the pro rata or other-insurance holding in *Hardware Dealers* beyond its intended scope.⁵⁷⁰

As reported earlier, the *Willbros* panel issued a per curiam opinion.⁵⁷¹ Also, it is worth repeating at this point that Exxon sued Shell, Willbros, and Harding—the principal, the general contractor, and the subcontractor—after those persons damaged Exxon’s pipeline.⁵⁷² When the destruction occurred, CCC’s policy covered Willbros as an additional insured.⁵⁷³ But, Willbros’s own insurer—Lexington Insurance Company (Lexington)—also insured the general contractor under a commercial general liability policy (the Lexington Policy).⁵⁷⁴ Consequently, Willbros timely informed Lexington about Exxon’s lawsuit, and Lexington began to pay defense costs under a reservation of rights.⁵⁷⁵

CCC, therefore, filed a declaratory judgment action in the United States District Court for the Southern District of Texas, asking the court to declare (1) whether CCC had a duty to defend or indemnify Willbros, and (2) whether CCC’s or Lexington’s liability-insurance contract was the primary-insurance or excess-insurance policy, assuming that CCC had a duty to defend and indemnify.⁵⁷⁶ Willbros also filed a declaratory-judgment action against CCC, asking the court to declare whether CCC’s policy required the insurer to defend and indemnify Willbros one hundred percent.⁵⁷⁷ On cross motions for summary judgment, the district court found that CCC had a duty to defend Willbros.⁵⁷⁸

But the District Court for the Southern District of Texas declared that the duty did not begin until the Lexington Policy had been exhausted.⁵⁷⁹ Stated slightly differently, the district court concluded that the insurance contracts’ respective other-insurance clauses did not conflict.⁵⁸⁰ Therefore, Lexington’s and CCC’s insurance contracts provided primary and excess coverage, respectively.⁵⁸¹ In addition, citing Texas law, the federal district

Union Fire Ins. Co. v. Merchs. Fast Motor Lines, 939 S.W.2d 139, 141 (Tex. 1997). On the other hand, the Texas Supreme Court recently issued its opinion in *D.R. Horton-Texas, Ltd. v. Markel Intern. Ins. Co.*, and it reiterated settled duty-to-indemnify doctrine: “[An] insurer’s duty to indemnify depends on the facts proven and whether the damages caused by the actions or omissions proven are covered by the terms of the policy. Evidence is usually necessary in the coverage litigation to establish or refute an insurer’s duty to indemnify.” 300 S.W.3d 740, 744 (Tex. 2009).

570. *Travelers*, 602 F.3d at 687.

571. *Willbros RPI, Inc. v. Cont’l Cas. Co.*, 601 F.3d 306, 308 (5th Cir. Mar. 2010).

572. *Id.*

573. *Id.*

574. *Id.*

575. *Id.*

576. *Id.* at 309. CCC asserted that “it [has] no duty to defend beyond fifty percent of defense costs that it has already voluntarily offered to pay under a reservation of rights.” *Id.*

577. *Id.* at 308-09.

578. *Id.* at 309.

579. *Id.*

580. *Id.* at 312.

581. *Id.* at 309.

court stressed: “[T]he duty to defend and the duty to indemnify are separate and distinct obligations [T]he latter does not arise until the insured has been adjudicated”⁵⁸² Consequently, since the underlying litigation was ongoing when the court issued its decision, the district court determined that Willbros’s indemnity claims were non-justiciable.⁵⁸³ The adverse rulings were appealed.⁵⁸⁴

Before the Fifth Circuit panel, Willbros challenged the district court’s findings: (1) that the two other-insurance provisions did not conflict, and (2) CCC’s liability for defense costs did not begin until the proceeds under the Lexington Policy had been exhausted.⁵⁸⁵ Willbros asserted, however, that the policies conflicted because it was impossible to determine the types of coverage under the two insurance contracts.⁵⁸⁶ Thus, citing the Texas Supreme Court decision in *Hardware Dealers*, Willbros argued that Lexington and CCC must pay pro rata shares to cover defense costs.⁵⁸⁷

To determine if Lexington’s or Willbros’s theory was correct, the panel examined the other-insurance clauses. Lexington’s clause promised pro rata coverage.⁵⁸⁸ CCC’s clause promised excess coverage.⁵⁸⁹ And after considering and applying a previous panel’s ruling in *Royal Insurance Co. of America v. Hartford Underwriters Insurance Co.*, the *Willbros* panel found that Lexington’s and CCC’s other-insurance provisions conflicted.⁵⁹⁰ Ultimately, the panel declared that the insurers’ liability for defense costs must be apportioned on a pro rata basis.⁵⁹¹ The *Willbros* panel also

582. *Id.*

583. *Id.* at 309.

584. *Id.*

585. *Id.* at 312.

586. *Id.*

587. *Id.* at 312 (citing *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 585-87 (Tex. 1969)).

588. *Id.* at 312. Lexington’s policy contained the following other-insurance provision:

a. Primary Insurance

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

b. Excess Insurance

This insurance is excess over: Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

Id. at 312 n.3.

589. *Id.* at 312. CCC’s liability-insurance contract contained the following other-insurance provision: “This insurance is excess over any other insurance naming the additional insured as an insured whether primary, excess, contingent or on any other basis unless a written contract or written agreement specifically requires that this insurance be either primary or primary and noncontributing.” *Id.* at 312 n.4.

590. *Id.* at 313 (citing *Royal Ins. Co. of Am. v. Hartford Underwriters Ins. Co.*, 391 F.3d 639, 644 (5th Cir. 2004)).

591. *Id.* at 312-13 (“Although the district court’s interpretation—that the policies are not in conflict because Lexington’s ‘Other Insurance’ clause, by its own terms, is primary, while [CCC’s] ‘Other

concluded that the duty to indemnify was not ripe when the district court issued its summary judgment.⁵⁹² The panel found, therefore, that the district court did not err when the latter court did not address or embrace Willbros's argument—the general contractor should receive one hundred percent indemnity under the CCC's insurance contract.⁵⁹³

The final pro rata or other-insurance dispute between two liability insurers appears in *Trinity*.⁵⁹⁴ The insured in the case was Lacy Masonry, Inc. (Lacy).⁵⁹⁵ Briefly put, McKenna Memorial Hospital (McKenna) is located in New Braunfels, Texas.⁵⁹⁶ McKenna hired Lacy to design, construct, and renovate its hospital building.⁵⁹⁷ At all relevant times, Employers Mutual Casualty Company (EMC) as well as Utica National Insurance, National American Insurance Company, and Trinity Universal Insurance Company (Trinity) insured Lacy under separate commercial general liability (CGL) insurance contracts.⁵⁹⁸

Under each CGL policy, each insurer had a contractual duty to defend Lacy against underlying third-party lawsuits.⁵⁹⁹ And each insurance contract required the insurer to indemnify Lacy Masonry for “sums that [Lacy Masonry] becomes legally obligated to pay as damages” to cover a third party's “bodily injury” or “property damage.”⁶⁰⁰ Even more relevant, each of the four CGL insurance contracts “contained materially identical pro rata or other-insurance clauses.”⁶⁰¹ And each other-insurance provision required “each insurer [to contribute] equal amounts until [each insurer had] paid its applicable limit of insurance or none of the loss remains, whichever comes first.”⁶⁰²

Eventually, McKenna sued Lacy and several other companies, alleging that each damaged some aspect of the hospital building during the building's design, construction, and improvement.⁶⁰³ Lacy asked its

Insurance' clause, by its own terms, renders its policy excess—is reasonable, it is contrary to controlling Fifth Circuit precedent. . . . Because we do not find the instant case distinguishable from *Royal Insurance*, we hold [the other-insurance clauses] conflict and that liability . . . should be apportioned on a pro rata basis.”)

592. *Id.* at 313.

593. *Id.* at 313-14 (“Although the underlying suit was still pending when the district court issued its summary judgment order, [the suit] settled while the instant appeal was pending. In light of this development and the fact that other parts of our decision necessitate remand, we also remand the indemnity issues to the district court.”).

594. *Trinity Universal Ins. Co. v. Emp'rs Mut. Cas. Co.*, 592 F.3d 687, 690 (5th Cir. Jan. 2010).

595. *Id.*

596. *Id.*

597. *Id.*

598. *Id.* at 689-90.

599. *Id.* at 690.

600. *Id.* (alteration in original).

601. *Id.*

602. *Id.*

603. *Id.*

insurers to provide a legal defense.⁶⁰⁴ Trinity and the other insurers agreed to defend Lacy and shared the defense costs.⁶⁰⁵ EMC, however, asserted that it had no contractual duty to defend Lacy and refused to contribute funds or pay any defense costs.⁶⁰⁶ Ultimately, the participating insurers settled McKenna's underlying lawsuit.⁶⁰⁷

Trinity and the other participating carriers filed a lawsuit against EMC in the United States District Court for the Southern District of Texas.⁶⁰⁸ The complaint petitioned the court for a declaratory judgment as well as relief for breach of contract.⁶⁰⁹ Trinity and other the participating insurers asked the district judge to declare that EMC had a contractual obligation to defend Lacy against McKenna's lawsuit.⁶¹⁰ The parties filed cross motions for summary judgment.⁶¹¹ The district court partially granted Trinity's motion for declaratory relief, finding that EMC had a duty to defend Lacy in the underlying suit.⁶¹² The district court, however, dismissed Trinity's claims on the merits.⁶¹³ Citing the Texas Supreme Court's reasoning and conclusion in *Mid-Continent*, the district court concluded that Trinity and the other CGL insurers "could not recover defense costs from EMC under either contribution or subrogation theories."⁶¹⁴ Both parties timely appealed.⁶¹⁵

Circuit Judge Edward Prado wrote the opinion for the *Trinity* panel.⁶¹⁶ At the very outset, Judge Prado characterized the pro rata or other-insurance controversy in *Trinity* as an "issue of first impression."⁶¹⁷ With all due respect to the learned judge, the author read the opinion multiple times; and, each time, the author could not find a novel question or an "issue of first impression."⁶¹⁸ Yet, the *Trinity* panel fashioned a novel and dubious

604. *Id.*

605. *Id.*

606. *Id.*

607. *Id.*

608. *Id.* at 689.

609. *Id.* at 690.

610. *Id.*

611. *Id.*

612. *Id.*

613. *Id.*

614. *Id.*

615. *Id.*

616. *Id.* The panel comprised Circuit Judges Harold DeMoss, E. Grady Jolly, and Edward Prado.
Id.

617. *Id.* at 689.

618. *See id.* In fact, the Texas Supreme Court and several Fifth Circuit panels have addressed and decided pro rata or other-insurance questions; and several of those cases—*Traders & Gen. Ins.*, *Hardware Dealers*, *Mid-Continent*, *Willbros* and *Travelers*—are discussed in this review. *See supra* Part IV.B. Perhaps the "first impression" label was chosen for the following reason: The District Court for the Southern District of Texas cited and applied the pro rata/other-insurance rule in *Mid-Continent*. *See Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 772-74 (Tex. 2007). Again, in *Mid-Continent*, the Texas Supreme Court decided a pro rata dispute, in which the underlying controversy involved duty-to-indemnify expenses and the nonparticipating insurer's lack of

analysis to reach its conclusion that the District Court for the Southern District of Texas misapplied the rule in *Mid-Continent* and committed reversible error.⁶¹⁹

Under EMC's liability policy, EMC had a "right and duty to defend" Lacy against any suit if the damages or injuries were potentially covered under the insurance contract.⁶²⁰ Consequently, in light of that finding, Judge Prado concluded that the other-insurance clause did not modify that contractual obligation and make it "several and independent."⁶²¹ Judge Prado, however, did not cite a single Texas Supreme Court decision to support that conclusion.⁶²²

There is more. In *Mid-Continent*, the Texas Supreme Court cited one of its earlier rules in *Traders & General Insurance* and wrote:

We recognized long ago in [*Traders & General Insurance*] "the general rule that, if two or more insurers bind themselves to pay the entire loss insured against, and one insurer pays the whole loss, the one so paying has a right of action against his co-insurer, or co-insurers, for a ratable proportion of the amount paid by him, because he has paid a debt which is equally and concurrently due by the other insurers."⁶²³

To be fair, Judge Prado cited the above passage, which appears in *Traders & General Insurance*.⁶²⁴ But, the learned judge decided to fashion an arguably new rule of the panel: "The duty to defend creates 'a debt which is equally and concurrently due by' all of its insurers."⁶²⁵ To be sure, after carefully researching Texas law, the author did not find a single Texas Supreme Court duty-to-defend case in which that precise rule appears. And certainly, that precise duty-to-defend rule does not appear in *Traders & General Insurance*. But even more importantly, Judge Prado cited several cases and carefully reviewed Texas's eight-corners doctrine.⁶²⁶ Yet, his new rule does not appear in any of the cited cases.⁶²⁷

contribution. See *id.* at 768. But here, Judge Prado concluded early on that the *Mid-Continent* rule and analysis could not resolve the pro rata question in *Trinity*. See *Trinity*, 592 F.3d at 689-90. In the latter case, the underlying controversy involved duty-to-defend expenses and the nonparticipating insurer's lack contribution. See *id.* at 693-95.

619. See *id.* at 689-90.

620. *Id.* at 695.

621. *Id.*

622. See *id.*

623. *Traders & Gen. Ins. Co. v. Hicks Rubber Co.*, 169 S.W.2d 142, 148 (Tex. 1943) (emphasis added).

624. *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 772 (Tex. 2007) (citing *Traders & Gen. Ins. Co.*, 169 S.W.2d at 148).

625. *Trinity*, 592 F.3d at 695 (quoting *Mid-Continent*, 236 S.W.3d at 772).

626. *Id.* at 691.

627. See *id.* To justify the "new" rule, Judge Prado wrote: "Indeed, this conclusion is supported by the uniform holdings of Texas courts that if even a single claim in a lawsuit potentially falls within an insurance policy's coverage, the insurer has a duty to provide a complete defense." *Id.* at 695 (citing

The pro rata or other-insurance controversy in *Traders & General Insurance* is important to stress because it also involved the subterranean issue of whether the two insurers had a duty to defend the insured and share the defense costs.⁶²⁸ Again, an employee of Hicks injured a pedestrian while both insurance policies were current.⁶²⁹ The third-party victim sued and a jury awarded a \$10,000 judgment against Hicks.⁶³⁰ The two liability insurers—Traders and Employers—satisfied the third party’s judgment.⁶³¹ Traders, however, contributed more than its two-thirds proportionate share.⁶³² As a result, Traders filed an equitable-contribution action against Employers to force the latter insurer to pay its proportionate one-third share to cover defense costs and other expenses.⁶³³

Of course, because the circuit judge characterized the controversy in *Trinity* as an “issue of first impression,” the panel was precluded effectively from discussing and applying the Texas Supreme Court’s analysis and holding in *Hardware Dealers*.⁶³⁴ As a consequence, the learned judge and panel did not craft a sound analysis or an answer to the central question of whether one or multiple liability insurers may recoup a portion of their insurance-defense expenditures from a nonparticipating co-insurer, if “materially identical pro rata or ‘other insurance’ clauses” appear in the insurance contracts and the nonparticipating insurer refused to defend a co-insured.⁶³⁵

Therefore, even though the *Trinity* panel reached the correct conclusion, the analysis is not firmly ground in Texas’s other-insurance or pro-rata principles.⁶³⁶ Quite simply, the *Trinity* panel should have applied

Tex. Prop. & Cas. Ins. Guar. Ass’n v. Sw. Aggregates, Inc., 982 S.W.2d 600, 606 (Tex. App.—Austin 1998, no pet.). To be sure, explaining how a single insurer’s “complete defense” obligation under a duty-to-defend clause *might* transform into multiple insurers’ “equal[] and concurrent” debt obligations under pro rata or other-insurance clauses would have improved the analysis because other-insurance and duty-to-defend clauses are obviously not synonymous. *See id.*

628. *Traders & Gen. Ins. Co.*, 169 S.W.2d at 148.

629. *Id.* at 144.

630. *Id.* at 144-45.

631. *Id.* at 147-48.

632. *Id.* at 148.

633. *Id.*

634. *Trinity Universal Ins. Co. v. Emp’rs Mut. Cas. Co.*, 592 F.3d 687, 689 (5th Cir. Jan. 2010) (“[T]his appeal presents an issue of first impression . . .”).

635. *Id.* at 690.

636. *See supra* notes 609-11 and accompanying text. In *Trinity*, the court stated:

Contrary to the district court’s conclusion, [Trinity and the other participating insurers] satisfied the “common obligation” requirement for a contribution claim. Because EMC admits that it did not participate in or contribute to Lacy Masonry’s defense, [the participating insurers] satisfy the second requirement for a contribution claim, “that the insurer seeking contribution has made a compulsory payment or other discharge of more than its fair share of the common obligation or burden.” Accordingly, the district court erred in finding that [the complaining insurers] could not recover from EMC a one-fifth portion of the cost of defending Lacy Masonry in the McKenna suit. Therefore we reverse the district court’s finding . . . and remand for the determination of defense costs to which [the

the “conflict analysis” that the Texas Supreme Court fashioned in *Hardware Dealers* because the panel’s essentially duty-to-defend analysis does not address or answer soundly the central pro rata or other-insurance question.⁶³⁷ Moreover, even though the term does not appear in the opinion, the *Trinity* panel’s analysis is arguably a less-than-stellar “*Erie* guess” of how the Supreme Court of Texas would decide the purportedly “issue of first impression.”⁶³⁸ Without a doubt, the *Trinity* panel’s certifying the supposedly “novel” question to the Supreme Court of Texas would have been the more proper and preferred decision.⁶³⁹

V. CONCLUSION

On several occasions, Fifth Circuit panels have embraced and reiterated an obviously significant axiom: “Federal district courts may be *in* Texas, but they are not *of* Texas.”⁶⁴⁰ Most definitely, the same could be said about the federal courts within Louisiana and Mississippi.⁶⁴¹ Arguably, the axiom has two commonsensical meanings. On the one hand, it means that “federal courts . . . are courts *of* the United States.”⁶⁴² Yet, under certain conditions, federal courts have original and supplemental jurisdiction to hear and resolve diverse parties’ state-law disputes.⁶⁴³ On the other hand, the axiom suggests that under the *Erie* doctrine, federal courts sitting in diversity must apply states’ substantive laws.⁶⁴⁴ But, if pertinent state law is absent, *Erie*’s rule may be relaxed, and federal courts may make an *Erie* guess to determine how a state supreme court would fashion and apply a state law.⁶⁴⁵

participating insurers] are entitled and with instructions to enter judgment for [them] in that amount.

Trinity, 592 F.3d at 690 (internal citations omitted).

637. See *supra* notes 626-27 and accompanying text.

638. See *id.* at 689; *supra* note 467 and accompanying text.

639. See *In re Soza*, 542 F.3d 1060, 1070 n.6 (5th Cir. 2008) (Wiener, J., concurring) (emphasizing that cases that are “ripe for certification” or “fit into the certification jurisprudence” should be certified to the Texas Supreme Court).

640. *Dixon v. TSE Int’l Inc.*, 330 F.3d 396, 398 (5th Cir. 2003); see *EnSCO Int’l, Inc. v. Certain Underwriters at Lloyd’s*, 579 F.3d 442, 449 n.12 (5th Cir. Aug. 2009); *Alliance Health Grp., L.L.C. v. Bridging Health Options, L.L.C.*, 553 F.3d 397, 400 (5th Cir. 2008).

641. See, e.g., *Alliance Health*, 553 F.3d at 400.

642. *Dixon*, 330 F.3d at 397-98.

643. See *supra* Part II.A.2.

644. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996).

645. See, e.g., *Beavers v. Metro. Life Ins. Co.*, 566 F.3d 436, 439 (5th Cir. 2009) (quoting *Travelers Cas. & Sur. Co. of Am. v. Ernst & Young L.L.P.*, 542 F.3d 475, 483 (5th Cir. 2008)). As stated in one opinion:

Because the Texas Supreme Court has never ruled on whether the Texas Workers’ Compensation Act “obligates” a nonsubscribing employer to compensate an employee for injuries sustained due to employer negligence, we must make an “*Erie* guess” as to how the Texas Supreme Court would rule . . . based on 1) decisions of the [Texas] Supreme Court in analogous cases, 2) the rationales and analyses underlying [Texas] Supreme Court decisions

Of the cases reviewed in this article, there were no clearly articulated *Erie* guesses. In the overwhelming majority of cases, the Fifth Circuit panels faithfully adhered to the *Erie* doctrine. The panels carefully researched and applied Louisiana's, Mississippi's, and Texas's principles to resolve diverse parties' state-law disagreements. As a consequence, the analyses in the opinions were generally well-reasoned. Even more significant, the outcomes or decisions in the cases were generally fair; and, they were based on careful reviews of relevant facts and on intelligent applications of settled rules.

Then again, a few of the analyses in the insurance-law opinions were less than stellar. And, the author clearly highlighted and discussed those limitations. Therefore, at this point, additional paper and ink will not be allocated to rehashing what was stated before. But, this review would be incomplete if the author did not highlight a concern that Circuit Judges Emilio M. Garza and Jennifer W. Elrod raised in *Willbros*.⁶⁴⁶ As reported earlier, *Willbros* is one of the cases in Trilogy III. And Judge Garza wrote the following in a concurring opinion:

I fully agree with the panel opinion. Although I am inclined to disagree with *Royal Insurance Co. of America v. Hartford Underwriters Insurance Co.*, 391 F.3d 639 (5th Cir. 2004), we are bound by the decision because it is the settled law of this circuit and one panel of this court cannot overrule the decision of another panel. Nonetheless, I encourage the court to revisit en banc our interpretation of what constitutes conflicting "other insurance" provisions under *Hardware Dealers Mutual Fire Insurance Co. v. Farmers Insurance Exchange*, 444 S.W.2d 583 (1969). . . . Indeed *Hardware Dealers* itself teaches that we should not create a "conflict" when the plain language is not reasonably subject to a construction that produces conflict. . . . In my view, the plain language of the "Other Insurance" provisions at issue in this case, just as the language at issue in *Royal Insurance*, is not reasonably subject to a construction that produces a conflict. . . . Because the plain language of the other insurance provisions provides an unambiguous result that does not leave the insured without coverage, I see no reason to artificially create a conflict in order to impose pro rata liability.⁶⁴⁷

Undoubtedly, Circuit Judges Garza and Elrod's concerns are quite insightful and sound. And a careful reading of the pro rata or other-

on related issues, 3) dicta by the [Texas] Supreme Court, 4) lower state court decisions, 5) the general rule on the question, 6) the rulings of courts of other states to which [Texas] courts look when formulating substantive law and 7) other available sources, such as treatises and legal commentaries.

Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel, L.L.C., 620 F.3d 558, 564 (5th Cir. Sept. 2010) (quoting *Hodges v. Mack Trucks, Inc.*, 474 F.3d 188, 199 (5th Cir. 2006)).

646. See *Willbros RPI, Inc. v. Cont'l Cas. Co.*, 601 F.3d 306, 314 (5th Cir. Mar. 2010).

647. *Id.* at 314, 316.

insurance clauses and decisions in the cited cases will support the circuit judges' assertions. So, yes: The decision in *Hardware Dealers* should be revisited and a more "robust" test should be developed to determine whether two other-insurance provisions actually "conflict." Actually, the current standard is seriously wanting. But, the Texas Supreme Court rather than an en banc Fifth Circuit Court of Appeals should revisit that issue and craft a better test. Again, it is worth repeating: "Federal . . . courts may be *in* Texas, but they are not *of* Texas."⁶⁴⁸ Consequently, in light of the *Erie* doctrine, the Fifth Circuit should certify the other-insurance-conflict question to the Texas Supreme Court when the opportunity presents itself.⁶⁴⁹ Indisputably, the latter court is superiorly qualified and better suited to determine what Texas's law is and should be.

648. *Dixon v. TSE Int'l Inc.*, 330 F.3d 396, 398 (5th Cir. 2003); *supra* note 640 and accompanying text.

649. *Cf. Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997) (noting that the "certification procedure . . . allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response"); *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (stating that certification "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism").