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Fire Losses and Conflicting Judicial Rulings over Whether Property Insurers Must Indemnify Insureds and Pay Third-Party Claims - Some Implications for Wildfire Litigation in Texas's Courts

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FIRE LOSSES AND CONFLICTING JUDICIAL RULINGS OVER WHETHER PROPERTY INSURERS MUST INDEMNIFY INSUREDS AND PAY THIRD-PARTY CLAIMS—SOME IMPLICATIONS FOR WILDFIRE LITIGATION IN TEXAS'S COURTS

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I. INTRODUCTION

During their first semester in law school, many students must read *Vaughan v. Menlove*[1] and *Ryan v. New York Central R.R. Company*.[2] Certainly, covering a span of ten years, *Vaughan* and *Ryan* were required reading in my torts course. Both cases present probative facts and legal principles which are not terribly difficult. In *Vaughan,* a boundary separated Menlove and Vaughan's homesteads. Vaughan built cottages near the boundary. Later, Menlove decided to build a hay rick near the divide. Insisting repeatedly that the rick would be a fire hazard, Vaughan encouraged Menlove not to build the rick so close to the boundary and cottages. Menlove ignored Vaughan's warnings.[3] In the course of events, extreme heat ignited the rick. Flames spread to Menlove's barn and stables. Ultimately, the fire reached Vaughan's cottages, which were destroyed.[4]

In *Ryan*, either the railroad company's "careless management" or an "insufficient condition" in one of the company's engines caused sparks from the engine to reach the company's woodshed.[5] Flames engulfed the structure. Ryan's house was located one hundred and

1. Vaughan v. Menlove, (1837) 132 Eng. Rep. 490 (C.P.), 3 Bing. N.C. 468.
2. Ryan v. N.Y. Cent. R.R. Co., 35 N.Y. 210 (1866).
3. *Vaughan*, 132 Eng. Rep. at 491, 3 Bing. N.C. at 470–71.
4. *Id.* at 491, 3 Bing. N.C. at 469–70.
5. *Ryan,* 35 N.Y. at 210.

thirty feet from the burning woodshed. Sparks spread to Ryan's house and the fire destroyed the residence.[6]

Stated briefly, the facts in *Vaughan* presented a question of first impression: whether a landowner has a duty to protect his neighbor's property from risks created on the landowner's property. Citing insurance-law decisions, the Court of Common Pleas expanded the negligence doctrine and entered a judgment in favor of Vaughan. The court concluded: A landowner must act like a reasonable person—under the same or similar circumstances—and use his land without damaging another person's property.[7] In *Ryan*, the New York Court of Appeals cited and considered the standard of care ruling in *Vaughan*. But, the *Ryan* court framed the question this way: "A house in a populous city takes fire, through the negligence of the owner or his servant; the flames extend to and destroy an adjacent building . . . . Is the owner of the first building liable to the second owner for the damage sustained by such burning?"[8]

To resolve the dispute, the court of appeals cited and applied the familiar proximate cause doctrine: "[E]very person is liable for the consequences of his . . . acts. . . . [Or stated slightly differently, every person is] liable in damages for the proximate results of his own acts, but not for remote damages."[9] Therefore, in light of the facts, the New York Court of Appeals concluded that the railroad company was not liable.[10] The court declared that the fire was the proximate cause of the torched woodshed and its contents. But it was only the remote cause of Ryan's loss.[11]

A cursory review of reported decisions and law articles reveals an unsurprising development: The respective standard-of-care and proximate-cause principles in *Vaughan* and *Ryan* explain why jurists and commentators are significantly more likely to cite and/or critique those opinions. On the other hand, some less-discussed facts and dicta explain the Author's thirty-year fascination with *Vaughan* and *Ryan*.

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6. *Id.*

7. *Vaughan*, 132 Eng. Rep. at 494, 3 Bing. N.C. at 476-77 ("Under the circumstances of the case it was proper to leave it to the jury whether with reference to the caution which would have been observed by a man of ordinary prudence [Menlove] had not been guilty of gross negligence. . . . The principle on which this action proceeds is by no means new. . . . The conduct of a prudent man has always been the criterion for the jury in such cases: but it is by no means confined to them. In insurance cases, where a captain has sold his vessel after damage too extensive for repairs, the question has always been whether he had pursued the course which a prudent man would have pursued under the same circumstance.").

8. *Ryan*, 35 N.Y. at 210.

9. *Id.*

10. *Id.* at 210–12.

11. *Id.* at 213. According to the court of appeals, one could reasonably anticipate or expect the railroad company's woodshed to catch fire; however, Ryan's house catching fire was "not a natural and expected result" of the burning woodshed. *Id.* at 212.

In both cases, the courts discussed property insurance. More specifically, the two courts impliedly raised an extremely important question without addressing it: whether an insurer must indemnify a negligent property owner if the latter starts a fire on his property, which spreads and destroys a third party's commercial or residential property.

Again, in *Vaughan*, Menlove's decision to build a hay rick on his property increased substantially the probability of a fire. Over a period of five weeks, he was warned repeatedly about the peril that he was creating and encouraged to disassemble the rick. In response, Menlove stated that "he would chance it" and accept the high likelihood of a fire on his property. Why? Menlove's property or "his stock was insured."[12] Justice Vaughan took special note of Menlove's confidence because Menlove reasonably concluded that his English underwriter would indemnify him for the value of his fire-destroyed property.[13]

Justice Hunt wrote for the majority in *Ryan*, concluding that the railroad company was not liable for Ryan's fire-destroyed property. To help reach that conclusion, Justice Hunt raised the question: whether a careless property owner or his insurer must indemnify a neighbor, if a fire spreads from the insured's property to the neighbor's property and destroys the neighbor's property. The justice answered the question this way:

> A man may insure his own house or his own furniture, but he cannot insure his neighbor's building or furniture, for the reason that he has no interest in them. To hold that the owner must not only meet his own loss by fire, but that he must guarantee the security of his neighbors on both sides . . . [would create liabilities which would destroy] all civilized society. . . . [However, if each person buys] insurance against such hazards, [he can obtain some] . . . reasonable security against [his] loss. To neglect such precaution, and . . . call upon his neighbor, on whose premises a fire originated, to indemnify him . . . would be . . . a punishment quite beyond the offense committed.[14]

Between 2004 and 2011, the Author left scorching summers' temperatures in South Texas for working vacations in Northern Arizona, California, Colorado, and New Mexico. And each summer, the Author witnessed (1) the devastating consequences of out-of-control pre-

12. *Vaughan*, 132 Eng. Rep. at 491, 3 Bing. N.C. at 471.

13. Justice Vaughan in his concurring opinion noted that "every one [sic] takes upon himself the duty of so dealing with his own property as not to injure the property of others. . . . [W]hen the Defendant upon being warned as to the consequences likely to ensue from the condition of the rick . . . he adverted to his interest in the insurance office." *Id.* at 494, 3 Bing. N.C. at 477.

14. *Ryan*, 35 N.Y. at 216–17. Justice Hunt went on to posit that "if the negligent party is liable to the owner of a remote [fire-consumed] building, . . . he would also be liable to the insurance companies who should pay losses to such remote owners. The principle of subrogation would entitle the companies to the benefit of every claim held by the party to whom a loss should be paid. . . ." *Id.* at 217.

scribed burns in the National Forests of Northern Arizona and Eastern New Mexico, and (2) the financial and personal effects of wildfires—brush, grass and prairie fires—in Southern California.[15] In very recent summers, the Author returned from his vacations only to witness the widespread and cataclysmic aftermath of thousands of wildfires in Texas.[16] However, each time the Author observed wildfires in Texas or elsewhere, and saw the devastation in their wake, the Author remembered Justices Vaughan and Hunt's insurance-law dicta in *Vaughan* and *Ryan*, respectively.

But even more importantly, those wildfires have generated two interrelated questions: (1) whether insurers have a duty to indemnify residential and commercial property owners if a wild forest, brush, grass, or prairie fire destroys homeowners' property in Texas, and (2) whether insurers have a duty to pay or settle third-party claims in Texas if a property owner starts a fire on her property, which evolves into a wildfire and destroys a third party's residential or commercial property. To be sure, Texas courts have a long tradition of deciding whether fire insurers have a duty to indemnify commercial and residential property owners after on-the-premises fires destroy goods and structures.[17] And both insurers and property owners have won a fair

15. *See* M.P. McQueen, *Where Wildfires Burn, Insurers Get Cold Feet: Homeowners in Western U.S. Find Tougher Requirements, Fewer Options for Coverage*, WALL. ST. J., Aug. 14, 2008, at D1, *available at* http://online.wsj.com/article/SB121867195558038891.html; *see also* Tamara Audi, *Evacuations Continue as Arizona Fire Spreads*, WALL ST. J., June 7, 2011, at A3, *available at* http://online.wsj.com/article/SB10001424052702304906004576369843152407046.html ("The so-called Wallow Fire, burning across the eastern Arizona wilderness and the Apache National Forest, has grown to 233,000 acres since it started more than a week ago. The fire . . . [is the] third-largest in state history . . . . Officials in neighboring New Mexico braced . . . for the fire to cross into their state.").

16. *See* Molly Hennessy-Fiske, *Texas Fires Destroy 500 Homes: Scores of Blazes Rage Across Central and Eastern Parts of the Drought-Stricken State*, L.A. TIMES, Sept. 6, 2011, at AA1, *available at* http://articles.latimes.com/2011/sep/06/nation/la-na-texas-wildfires-20110906.

17. *Compare* Ginners' Mut. Underwriters of San Angelo, Texas v. Wiley & House, 147 S.W. 629, 632 (Tex. Civ. App.—El Paso 1912, writ ref'd) (holding that the insurer had a duty to indemnify a small business for a fire loss), *and* Delaware Ins. Co. of Philadelphia v. Hill, 127 S.W. 283, 294 (Tex. Civ. App.—San Antonio 1910, writ ref'd) (holding that the insurer had a duty to indemnify a partnership for a fire loss), *and* Orient Ins. Co. v. Parlin & Orendorff Co., 38 S.W. 60, 62 (Tex. Civ. App.—Dallas 1896, writ ref'd) (declaring that the fire insurer had a duty to indemnify the small business), *with* Westchester Fire Ins. Co. v. McMinn, 188 S.W. 25, 26 (Tex. Civ. App.—Texarkana 1916, no writ) (concluding that the insurer had no duty to indemnify the small business for a fire loss), *and* Fidelity-Phenix Fire Ins. Co. v. Sadau, 167 S.W. 334, 337 (Tex. Civ. App.—Amarillo 1914, no writ) (holding that the insurer had no duty to indemnify a homeowner for a fire loss), *and* Nat'l Fire Ins. Co. v. J.W. Caraway & Co., 130 S.W. 458, 460–61 (Tex. Civ. App.—Galveston 1910, no writ) (concluding that the property insurer had no duty to indemnify the corporation for a fire loss).

share of those decisions.[18] Still, the two questions posed above are not simply academic.

As of this writing, various courts in California have resolved a number of disputes over whether insurers must reimburse property owners after wildfires destroyed insureds' goods and structures.[19] Also, in very recent years, the Fifth Circuit has addressed and settled several controversies over whether insurers have a duty to indemnify after tropical storms destroyed commercial and residential property in Texas.[20] Insurers and insurance consumers, however, have not asked Texas's courts to address the specific questions appearing above or to resolve a more general dispute: whether insurers must pay or settle first- and third-party, wildfire-loss claims. In light of the large numbers of wildfires that have destroyed commercial and residential structures and properties in Texas recently, these types of disputes are likely to appear more frequently in Texas's courts and in the federal district courts located in Texas.

Therefore, this essay has two purposes. First, it is designed to highlight some of the issues and principles that have influenced historically whether state and federal courts will order *property* insurers to indemnify insureds after a fire destroys the latter's commercial and/or residential property. The second purpose is to find a plausible answer to the implied, duty-to-pay question that appears in *Ryan v. New York Central R.R. Company*: whether *liability* insurers must pay proceeds to cover third-party, fire-loss claims, if a fire (1) ignites on an insured's property, (2) spreads, (3) evolves into a "wildfire," and (4) eviscerates third-party claimants' structures and personalty.

Necessarily, to achieve these ends, Part II discusses briefly the important distinction between insurers' obligations under first- and third-party insurance contracts. Part III discusses several legal issues which have shaped courts' duty-to-indemnify ruling, involving: (1) whether insureds' requests for "additional living expenses" were legitimate, and (2) whether property insurers must pay to the "replacement value" rather than the "actual cash value" of fire eviscerated property. Quite simply, these issues have produced diverse rulings in

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18. *See* cases cited *supra* note 17.

19. *See generally* Mahnke v. Superior Court, 103 Cal. Rptr. 3d 197 (Cal. Ct. App. 2009); United Pac. Ins. Co. v. S. Cal. Edison Co., 209 Cal. Rptr. 819 (Cal. Ct. App. 1985); Scally v. Pac. Gas & Elec. Co., 100 Cal. Rptr. 501 (Cal. Ct. App. 1972); Davenport v. Nat'l Reserve Ins. Co., 267 P. 132 (Cal. Dist. Ct. App. 1928).

20. *See* Willy E. Rice, *The Court of Appeals for the Fifth Circuit: A Review of 2007-2008 Insurance Decisions*, 41 TEX. TECH L. REV. 1013, 1036–40 (2009). *See also* 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, 850–58 (2006); John Tedesco, *Tropical Storm Makes Waves*, SAN ANTONIO EXPRESS-NEWS, June 6, 2001, at 1A, *available at* 2001 WLNR 11972334 ("The first tropical storm of the season was churning off the coast of Texas and Louisiana . . . packing heavy rain and wind gusts clocked at more than 60 mph. Tropical Storm Allison . . . prompt[ed] forecasters to warn of flash floods.").

Texas courts as well as in the Court of Appeals for the Fifth Circuit. And those rulings are likely to have a bearing on whether property insurers or insureds will prevail in any insurance-related, duty-to-indemnify litigation involving losses from wildfires.

Part IV addresses the general question: whether a property owner's liability insurer has a duty to reimburse a third party if a fire spreads from the owner's property to the third party's property and destroys personalty and structures. Of course, as this essay discloses, courts beyond Texas are seriously divided over (1) whether liability insurers must pay third-party claims on behalf of insureds if the latter's *"prescribed fires" escape from designated boundaries and burn third parties' properties, and (2) whether* liability insurers must defend insureds and pay third-party claims on behalf of insureds if: (a) the latter start fires on their property, and (b) the fires spread and destroy third parties' residential and commercial properties.

Finally, Part V presents the results of a case study. Briefly put, the Author searched all law-related, electronic databases and reporters—looking for cases in which courts resolved fire-loss-compensation disputes between insureds and their insurers. Among others, the following empirical questions influenced the Author's decision to conduct the study: (1) whether insurers or property owners are more likely to win duty-to-indemnify, fire-loss disputes in state and federal courts; (2) whether property owners' theories of recovery influence courts' decision to resolve duty-to-indemnify disputes in favor of fire insurers or property owners; (3) whether residential or commercial property owners are more likely to prevail against insurers; and (4) whether certain affirmative defenses increase or decrease fire insurers' likelihood of winning duty-to-indemnify disagreements. Part VI answers these questions.

II. The Distinction between Insurers' Obligations Under First-Party and Third-Party Insurance Contracts

A. *Property Insurance Contracts and the Scope of Insurers' Duty to Indemnity First-Party Claimants*

Generally, first-party insurance covers an insured's person, personalty, and/or real property.[21] Life, health, homeowners', theft, business, fire, and property insurance agreements are familiar first-party insurance contracts. But, it must be stressed: The definition of coverage under, say, a property insurance contract varies considerably from an insurance consumer's fairly commonsensical or ordinary definition

21. *See* Great Am. Ins. Co. v. Jim Stephenson Motor Co., No. 05-94-00858-CV, 1996 WL 135688, at *5 (Tex. App.—Dallas Mar. 26, 1996, writ denied) (not designated for publication) (observing that jurists define first-party insurance as coverage for "the insured's own property or person" and citing various passages in insurance dictionaries and glossaries).

of coverage. To illustrate, under a first-party, property insurance agreement, an insurer covers a loss only if a "listed peril" in the contract causes a loss.[22] Conversely, a property insurer has no duty to cover a loss if an "excluded peril" is the efficient proximate cause of the destruction.[23]

Second, fairly often, a duty-to-indemnify provision appears in first-party, property insurance contracts. The typical clause states that the insurer will indemnify an insured when the latter uses out-of-pocket dollars to replace partially or totally destroyed, commercial or residential property. But it is important to stress: Under Texas's law, a property insurer has a contractual duty to indemnify the insured if a "covered peril" or "a peril insured against" destroys the insured's property.[24] On the other hand, a property insurer has no duty to indemnify if the insured does not file a property-loss claim "as soon as practicable" and presents proof of a covered loss.[25]

Furthermore, it must be noted: Under Texas law, an insurer's duty to defend and a property insurer's duty to indemnify "are distinct and separate duties."[26] As discussed more extensively in the following section, a *liability* insurer's duty to defend arises when an alleged third-party victim's petition alleges facts that a liability insurance contract could potentially cover. On the contrary, a *property* in-

22. *See* Warrilow v. Norrell, 791 S.W.2d 515, 527 (Tex. App.—Corpus Christi 1989, writ denied) (stressing that one must determine if covered perils or excluded ones produce losses before concluding that an insurer is liable under a property insurance contract). *See also* Manhattan Fire & Marine Ins. Co. v. Holloway, 359 S.W.2d 203, 205–06 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.) (concluding that the destroyed servant's house was "covered" at the time of loss, since the servant's occupancy or a change in the occupancy "did not enhance the hazard of fire" and was not "directly or indirectly responsible for the loss").

23. *Warrilow*, 791 S.W.2d at 527 ("In Texas, if one force is covered and one force is excluded, the insured must show that the property damage was caused solely by the insured force, or he must separate the damage caused by the insured peril from that caused by the excluded peril." (citing Travelers Indem. Co. v. McKillip, 469 S.W.2d 160, 162 (Tex. 1971))).

24. *See* Stillwagoner v. Travelers Ins. Co., 979 S.W.2d 354, 360 (Tex. App.—Tyler 1998, no pet.) (holding that "[p]roperty insurance is based on the principle of indemnity"); Cumis Ins. Soc'y, Inc. v. Republic Nat'l Bank of Dallas, 480 S.W.2d 762, 765 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (concluding that "[a] contract provides property insurance if it binds the insurer to indemnify the insured for loss of identifiable property described either specifically or by general language, such as property in a certain place or within the possession of the insured").

25. *Cf.* Dairyland County Mut. Ins. Co. of Tex. v. Roman, 498 S.W.2d 154, 157 (Tex. 1973) (requiring the insured to give notice "as soon as practicable [as] a condition precedent to liability" and concluding that "[i]n the absence of waiver or other special circumstances, failure to perform the condition constitutes an absolute defense to liability on the policy").

26. *See* Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co., 141 S.W.3d 198, 203 (Tex. 2004) (citing King v. Dallas Fire Ins. Co., 85 S.W.3d 185, 187 (Tex. 2002)). *See also* Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 821–22 (Tex. 1997) (citing Am. Alliance Ins. Co. v. Frito-Lay, Inc., 788 S.W.2d 152, 153 (Tex. App.—Dallas 1990, writ dism'd)).

surer's duty to indemnify generally arises after a trial on the merits, and after adjudicated facts have established that a "covered peril" caused the insured's loss. Or stated slightly differently, allegations in an insured's pleading do not trigger a property insurer's duty to indemnify. The duty is triggered if a property insurance contract covers a loss and the insured prevails on the merits in a trial.[27]

B. *Liability Insurance Contracts and the Scope of Insurers' Duty to Pay and Defend Insureds against Third-Party Claims*

Quite simply, consumers purchase third-party insurance to cover third-party victims' property-loss and/or "bodily injury" claims.[28] Property owners can purchase third-party coverage under a "liability insurance contract" and/or under an "indemnity insurance contract."[29] Generally, third-party insurance is designed to help shield an insured from having to pay out-of-pocket damages to a third-party victim. Additionally, "[under a liability insurance contract], . . . the insurer's obligation to pay arises *as soon as* the insured incurs liability for [a] loss."[30] However, under an indemnity insurance contract, an insurer is only required to reimburse the insured after the insured has paid or been ordered to pay a third party's expenses.[31]

Liability insurance contracts have several familiar features: (1) a coverage provision, outlining the types of risks that insurers have assumed, (2) a broad exclusion clause, highlighting various exclusions and limitations, (3) a right-to-settle clause, giving insurers the exclusive right to settle all third-party claims, (4) a duty-to-defend provision, instructing liability insurers to hire legal counsel for the insureds'

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27. *See* Lamar Homes, Inc. v. Mid–Continent Cas. Co., 242 S.W.3d 1, 5 (Tex. 2007) (stating in certified question case that "[w]e do not reach the duty to indemnify [issue] . . . as that duty is not triggered by allegations but rather by proof at trial").

28. Under this general heading, one finds a variety of automobile, homeowners', professional-malpractice, general-business, commercial general liability, renter's, and multi-peril policies. *See* Leon E. Wynter, *Business & Race: Insurers Join the Effort to Tackle Discrimination*, WALL ST. J., Mar. 5, 1997, at B1 (reporting that so-called *employee-practices liability insurance policies* are spreading and, therefore, such development "may place insurers in the role of watchdog for corporate behavior")

29. *See MGM Grand Wins Award in Lawsuit on Las Vegas Fire*, WALL ST. J., Jan. 23, 1985 ("MGM Grand Hotels said a federal judge ruled in its favor in the first of three lawsuits between the company and its insurance carriers over the settlement of claims from the 1980 fire at the MGM Grand Hotel. . . . [The federal judge] ordered American Excess Insurance Company . . . to pay $4.7 million to cover legal fees and other costs that MGM Grand incurred in *defending more than 3,000 liability claims by hotel guests* from the fire, in which 84 people died. . . . American Excess previously paid MGM Grand $10 million to cover claims by hotel guests *specified by its indemnity policy*.") (emphasis added).

30. Little v. MGIC Indem. Corp., 836 F.2d 789, 793 (3d Cir. 1987) (emphasis added).

31. *See* Fight Against Coercive Tactics Network, Inc. v. Coregis Ins. Co., 926 F. Supp. 1426, 1432–33 (D. Colo. 1996). *See also Little*, 836 F.2d at 793 ("In general, under an indemnity policy the insurer is obligated only to reimburse the insured for covered loss that the insured himself has already paid.").

benefit and pay defense costs, and (5) a duty-to-pay clause, outlining the conditions under which insurers will pay after the insured's liability has been established.[32] Furthermore, a liability insurance contract usually does not cover a third party's loss if an insured's intentional act was the cause in fact and/or proximate cause of the loss.[33] On the other hand, if an insured's negligence caused the third-party injuries, the liability insurer must pay insurance proceeds, settle the third party's claim, or defend the insured against a third-party lawsuit.[34]

An insurer's duty to indemnify under a "true" indemnity insurance contract is somewhat different than its obligation under a liability insurance contract. Under the former, an indemnity insurer must reimburse all expenses after the insured pays a third-party claimant.[35] However, duty-to-defend clauses generally do not appear in indemnity insurance contracts. Instead, if the third party sues the insured, the insured has exclusive authority to retain an attorney and control the legal defense without securing the indemnity insurer's consent.[36] And like liability insurance agreements, indemnity insurance contracts do not cover an insured's allegedly malicious, dishonest, fraudulent, libelous, or slanderous conduct.[37] Finally, indemnity insurance agreements appear in a variety of flavors.[38]

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32. *See* EMERIC FISCHER & PETER N. SWISHER, PRINCIPLES OF INSURANCE LAW, app F, at F-3–16 (Matthew Bender ed., 2d ed. 1994). *See also* ALAN I. WIDISS, INSURANCE: MATERIALS ON FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND REGULATORY ACTS, app. I, at 1133–47 (West ed., 1989); KENNETH H. YORK ET AL., GENERAL PRACTICE: INSURANCE LAW, app F at 867–75 (West ed., 3d ed. 1994).

33. *See* Superior Ins. Co. v. Jenkins, 358 S.W.2d 243, 244 (Tex. Civ. App.—Eastland 1962, writ ref'd n.r.e.) (observing that the liability insurance contract clearly excluded coverage for "bodily injury or property damage caused intentionally by or at the direction of the insured").

34. *See infra* notes 81–88 and accompanying text.

35. *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, 1146–47 nn.76–78 (1998) (comparing the significant distinction between "true" indemnity insurance contracts and indemnity provisions under liability contracts).

36. *Id.*

37. *Id.*

38. *Id.* at 1147 ("Insurers sell several types of . . . indemnity contracts: Professional indemnity plans, hospital indemnity insurance, workers compensation indemnity plans, excess-employers indemnity policies, and industrial indemnity insurance. Directors' and officers' policies, . . . however, appear to be the most widely distributed and well-known type[s] of indemnity contracts.").

III. Texas Courts, the Fifth Circuit and Conflicting Rulings over Whether Insurers Must Indemnify Insureds and Other Interested Parties After Fire Losses

A. *Disputes over Whether Fire Insurers Must Pay Proceeds to Cover Insureds' "Additional Living Expenses"*

Normally, homeowners' insurance contracts contain an "additional living expenses" provision.[39] Quite simply, if a covered peril—a hurricane, an earthquake, or a fire—makes a residential structure uninhabitable, property insurers will pay the increased costs associated with the property owners' having to live temporarily elsewhere.[40] However, fairly often, property insurers refuse to indemnify insureds for the latter's increased living expenses. To illustrate, an earthquake destroyed homes in California, forcing homeowners to spend money to secure temporary shelter and other necessities.[41] The insurer refused to cover the additional living expenses; therefore, the insureds filed a duty-to-indemnify action against the property insurer.[42] In Texas, Allstate Insurance Company refused to pay many policyholders' additional living expenses after Hurricane Rita destroyed residential property.[43] In one instance, a disabled and displaced father needed air conditioning because he could not live in the extreme heat and

39. *See generally* Purva Patel, *Have* Insurance Questions: Here Are Some Answers, Chron.com, (Sept. 28, 2008, 5:30 AM), http://www.chron.com/business/real-estate/article/Have-insurance-questions-Here-are-some-answers-1779472.php.

40. *See Take Time to Review Fire Insurance*, L.A. Times, Oct. 31, 1993, at K1, *available at* http://articles.latimes.com/1993-10-31/realestate/re-51556_1_homeowners-insurance-coverage ("An advantage of having a homeowners' policy over separate polices for fire, theft and other perils is that a homeowners' policy will pay any additional living expenses—over and above normal expenditures—should the policyholder be forced by fire or other [perils] to temporarily live elsewhere.").

41. *See generally* Barry Stavro, *Nader to Discuss State Earthquake Insurance Reform—Homeowners: Activist and Presidential Candidate Opposes California Commissioner's Plan Limiting Damage Claims*, L.A. Times, July 27, 1996, at B5, *available at* http://articles.latimes.com/1996-07-27/local/me-28633_1_insurance-reform ("20th Century Insurance . . . has been a key target of consumer groups. The state Department of Insurance launched an investigation into 138 open damage claims filed against 20th Century . . . . All told, 20th Century was hit with 46,000 Northridge quake damage claims, 36,000 of them from homeowners . . . . Of those 1,000 open cases, many are disputes over additional living expenses . . . . About 200 lawsuits have been filed against the company over unresolved quake claims . . . .").

42. *Id.*

43. *See generally* Purva Patel, *Hurricane Rita: The Aftermath—Allstate Is Told to Pay Living Expenses for Now,* Hous. Chron., Oct. 8, 2005, at Business 1, *available at* http://www.chron.com/CDA/archives/archive.mpl/2005_3909933/hurricane-rita-the-aftermath-allstate-is-told-to-p.html ("Insurers generally pay policyholders' living expenses if [the insureds must] live elsewhere while their homes are being repaired after a disaster. But in this case, Allstate and the state disagree on what triggers the payments. In Texas, Allstate says it has never paid living expenses for those who evacuate, unless homeowners can reasonably establish that their homes were directly damaged and thus unlivable.").

humidity after the hurricane. Furthermore, the father's son was autistic; therefore, the latter's medicine needed refrigeration to prevent spoilage.[44] Still, in the wake of Rita, Allstate refused to cover those temporary and additional living expenses. In response, the father, son and many other affected homeowners sued Allstate and secured a temporary injunction.[45]

Over the 2011 Labor Day weekend, "the costliest wildfire in Texas's history" occurred in Bastrop, Texas.[46] The raging fire consumed "more than 1,500 homes and 34,000 acres" of pine forest.[47] The wildfire-losses across Texas were projected to reach $500 million.[48] Some insurers compensated some homeowners for lost structures and contents within twenty-four hours after the wildfires. However, the overwhelming majority of insurers did not deliver additional living-expenses checks to the burned-out property owners as readily.[49] Typically, insurance adjusters promised only to cover insureds' increased living costs at a later date.[50]

In California and other states, insureds have commenced legal actions against property insurers after the insurers refused to cover addi-

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44. *Id.* ("One complaint came from a policyholder whose husband was disabled and whose son had autism. The family needed the additional living expenses because the husband couldn't live in extreme heat and his medication had to be refrigerated.").

45. *Id.* ("Allstate customers who've had trouble collecting living expenses in the aftermath of Hurricane Rita may soon find it easier to get paid . . . . Allstate denied payments unless customers could prove damage, even though many were prohibited by authorities from returning. But . . . a Travis County state district judge granted a temporary restraining order barring Allstate from denying living expenses to those policyholders. . . . In her order, state District Judge Darlene Byrne cited a case [stating] that . . . when policies . . . have more than one meaning, 'the policy will be construed strictly against the insurer.'").

46. *See* Mike Ward, *Fires Costliest in State's History*, AUSTIN AM.-STATESMAN, Sept. 13, 2011, at A1, *available at* http://www.statesman.com/news/local/area-wildfires-costliest-in-state-history-1850464.html?printArticle=y.

47. *See* Moritz Honert, *Wildfires and Drought Cost Texas Billions —Millions of Acres Burned, Thousands of Homes Lost*, Chi. Trib., Sep. 13, 2011, at C3

48. *Insured Losses from Bastrop, Texas, Wildfire Rise to $325M*, INS. J. (Dec. 8, 2011), http://www.insurancejournal.com/news/southcentral/2011/12/08/226681.htm.

49. *Id.* ("A majority of the homeowners . . . received payments for the loss of their home. . . . 'The insurance industry was handing out checks the day after the fire to homeowners who had lost everything,' said Mark Hanna, a spokesman for the Insurance Council of Texas. 'The recovery process will simply take time as insurers continue to pay for additional living expenses (ALE) for homeowners who are either rebuilding or seeking a new place to call home.'").

50. *See* Laylan Copelin, *Lessons Learned the Hard Way*, AUSTIN AM.-STATESMAN, Sept. 13, 2011, at A1 ("Javier and Carmen called their insurance company on Sept. 5, the day after the wildfires started. Within an hour, Farmers Insurance wired the first check —$900 for living expenses . . . . [F]ive days after the fires started, the Chaparros met their adjuster [who] . . . hands them two checks, a partial payment for contents, plus the full policy amount for the structure. . . . [The adjuster promised that more would] be coming for living expenses . . . .").

tional living expenses.[51] Like many displaced property owners who filed legal actions, significant numbers of burned-out homeowners in Texas are likely to file similar duty-to-indemnify lawsuits against some of the same insurers.[52] Certainly, disgruntled property owners have already filed administrative complaints against insurers in Texas.[53] Therefore, given the extreme likelihood of wildfire litigation in Texas courts and in federal district courts, determining whether insureds or insurers are more likely to win a majority of wildfire-litigation suits is a timely and warranted exercise. Presently, courts in Texas are divided over whether insurers must cover insureds' "increased living expenses" in the wake of widespread fire- and hurricane-related property losses.

To illustrate, consider the dispute in *Beacon Nat'l Ins. Co. v. Glaze*.[54] Insured homeowners sued the insurer to secure reimbursements for additional living expenses after a fire destroyed their house. Beacon argued: A plain and ordinary reading of the relevant words and phrases in the contract revealed that it had no duty to cover the increased living expenses. But, the Tyler Court of Appeals disagreed and forced the insurer to cover the additional costs.[55] The appeals court applied the doctrine of ambiguity, finding that the insurance contract failed to state clearly whether the insurer had a duty to indemnify.[56] The Tyler Court of Appeals embraced the trial court's findings and declared: The language in the fire insurance policy—when viewed in its entirety—could be construed as requiring the insureds to keep detailed records or other documentation in order to

51. *Cf.* Marc Lifsher, *Wildfires Heat Up Debate on Rising Rebuilding Costs: Are Policies Adequate to Help Make Homeowners Whole?*, L.A. TIMES, June 6, 2008, at C1, *available at* http://articles.latimes.com/2008/jun/06/business/fi-fires6 ("California courts . . . are backing insurance companies. In a recent case stemming from the 2003 Southern California wildfires, a panel of judges . . . ruled that State Farm . . . did not misrepresent its coverage limits when it declined to pay full replacement value to a San Bernardino woman, who lost her home . . . ."); M.P. McQueen, *Where Wildfires Burn, Insurers Get Cold Feet: Homeowners in Western U.S. Find Tougher Requirements, Fewer Options for Coverage*, WALL. ST. J., Aug. 14, 2008, at D1, *available at* http://online.wsj.com/article/SB121867195558038891.html ("[D]isputes between homeowners and insurers over claims settlements from last year's wildfire season are . . . continuing . . . . State officials received more than 512 complaints about claims after the 2007 fires in Northern and Southern California . . . .").

52. *Cf. Top Local Stories of the Week,* AUSTIN AM.-STATESMAN, Jan. 15, 2012, at B3 ("Wildfire suit 'resolved': A lawsuit filed against Bluebonnet Electric Cooperative by people who lost their homes in the 2009 Wilderness Ridge wildfire was 'resolved' . . . a Bluebonnet spokesman said. Up next are a dozen lawsuits over the 2011 Bastrop Complex Fire in Bastrop County.").

53. *See, e.g.*, *Insured Losses from Bastrop*, *supra* note 48 ("From all of the wildfires in Texas this year, the Texas Department of Insurance has received . . . 11 . . . complaints from homeowners who have run into problems with their insurance companies.").

54. 114 S.W.3d 1, 3 (Tex. App.—Tyler 2003, pet. denied).

55. *Id.* at 4–5.

56. *Id.* at 4 (reasserting that an insurance contract is "ambiguous" when it is reasonably susceptible to more than one meaning).

receive additional-living-expenses funds. Or the words and phrases could be construed to cover additional living expenses if the insureds presented only oral testimony.[57]

In *Commonwealth Lloyd's Ins. Co. v. Thomas*,[58] a different court of appeals reached the same conclusion. A fire totally destroyed the Thomases' house and the contents. The losses were $375,000 and $162,000, respectively. The property insurer paid sufficient funds to rebuild the dwelling and to restore the contents. However, Commonwealth refused to pay the homeowners' increased living costs.[59] To defend itself, the insurer asserted that the Thomases did not produce any evidence of their pre-fire living expenses; therefore, the insured were effectively precluded from establishing conclusively their "increased living expenses" after the fire. Put simply, the Fort Worth Court of Appeals rejected Commonwealth's argument. The court concluded: The Thomases only had to establish—by a preponderance of the evidence—their necessary and reasonable living expenses after the fire. Consequently, the insurer had to pay sufficient proceeds to increase the Thomases' likelihood of returning to their "normal standard of living" before the fire.[60]

In *Fidelity-Southern Fire Ins. Co. v. G. G. Whitman*,[61] the Houston Court of Appeals for the Fourteenth District reached a different conclusion. The relevant facts are not terribly complex. A fire damaged Whitman's house and its contents. Following customary practices, the insurer sent an agent to investigate the loss. Whitman and the agent discussed the various losses. Shortly thereafter, the agent delivered a $5,500 check to Whitman's mortgagee and contractors to cover the structural damage to the house.[62] The agent also delivered a $1,220 check to Whitman. Based on the insurance adjuster's oral representations, Whitman concluded that $1,000 was compensation to replace the contents of the house and $200 was partial compensation to cover the insured's increased living expenses.[63] In the end, Whitman signed a full release, continuing to rely on the agent's oral representations

57. *Id. See also* Mobile Cnty. Mut. Ins. Co. v. Jewell, 555 S.W.2d 903 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.). The El Paso Court of Appeals also embraced the jury's findings, applied the doctrine of ambiguity and declared that the insurer has a duty to pay $600 to cover the insureds' additional living expenses after a fire destroyed their house. *Id.* at 913.

58. 678 S.W.2d 278, 291 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

59. *Id.*, at 290

60. *Id.* at 290–91 ("It is undisputed that the Thomases' [sic] standard of living was high, as were their living expenses before the fire . . . . [W]e hold there was . . . sufficient evidence to require the submission of [the increased living expenses issue] to the jury and to support its finding thereon.")

61. *See* 422 S.W.2d 552 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.).

62. *Id.* at 554.

63. *Id.* at 553–54.

and believing that the insurer would pay the entire amount to cover his additional livings costs.

In the course of events, the insurer refused to pay any amount above the $220. Whitman sued the insurer. A jury found that the $220 was only a partial payment for the insured's increased costs. Ultimately, the Houston Court of Appeals disagreed, finding that the signed agreement was a totally integrated and binding full release. Therefore, the insurer had no obligation to pay any additional proceeds to cover Whitman's post-fire living expenses. To help reach that conclusion, the Houston Court of Appeals applied the doctrines of ambiguity and plain meaning as well as the parol evidence rule. The latter rule prevented the insurance agent's questionable oral representations from contradicting or altering the terms of the release agreement.[64]

Also, as reported earlier, Texas courts are a split over whether insurers must pay homeowners' increased living expenses after a hurricane destroys residential property and forces displaced insureds to live elsewhere temporarily. In *Temcharoen v. United Fire Lloyds*,[65] the homeowners were victims of Hurricane Rita. The massive storm damaged their house. The insureds sued the insurer who refused to cover the insureds' additional living expenses.[66] United Fire Lloyds filed a traditional motion for summary judgment, claiming that the policy was void because one of the insureds submitted bogus "receipts" for additional living expenses.

Finding that the anti-technicality statute—Tex. Ins. Code Ann. § 705.003 (Vernon 2009) —did not apply and that the insured had made a fraudulent statement, the trial court granted United Fire Lloyds's motion.[67] Put simply, the Eastland Court of Appeals cited language in the insurance contract and concluded that section 705.003 was not applicable, that United Fire Lloyds did not meet the requirements of section 705.003(b), and that there were unresolved questions of fact. Consequently, the court of appeals reversed the summary judgment in favor of United Fire Lloyds and remanded the cases for a trial on the merits.[68]

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64. *Id.* at 557 ("The acceptance of the check and its endorsement constituted a full settlement and release of all claims arising out of fire damage to personal property and additional living expense. It is unambiguous. . . . [The introduction of the agent's oral representation] that the check was 'only in partial payment of the losses' [violated] the parol evidence rule.").

65. 293 S.W.3d 332, 333 (Tex. App.—Eastland 2009, pet. denied).

66. *Id.* at 333–34 ("[The homeowners sued the insurer] for breach of contract . . . . They alleged that United Fire Lloyds failed to completely pay for damages they incurred as a result of Hurricane Rita. The homeowner's policy covered damage to the house, and in an endorsement, [the insurer] also agreed to reimburse the Temcharoens for [their] additional living expenses . . . .").

67. *Id.* at 334.

68. *Id.*

Then again, when Hurricane Carla destroyed a different set of insureds' property, the Corpus Christi Court of Appeals did not award damages to cover the insureds' increased living costs. In *Hartford Fire Ins. Co. v. Christianson,*[69] a jury found that Hurricane Carla made the insureds' house uninhabitable. The jury also found that $1,800 was "the reasonable and necessary" compensation to cover the increased living expenses in Carla's wake.[70] Without a doubt, the insurance contract required the insurer to pay the insureds' additional living expenses.[71] Still, the insurer insisted that the jury's answers were based on insufficient evidence. The appellate court concluded that the jury's findings were based on speculation, which essentially "varied and altered the terms of the contract by adding language and conditions."[72] Consequently, the Corpus Christi Court of Appeals reformed the trial court's judgment, concluding that the $1,800 additional-living-expenses award was inappropriate.

B. *Conflicts over Whether Insurers' Must Pay Sufficient Proceeds to Cover the "Actual Cash Value" or the "Replacement Value" of Insureds' Fire Eviscerated Property*

As of this writing, some victims of Texas's wildfires have begun to rebuild their residences and commercial establishments. Rebuilding is proceeding at a modest pace, because many of those persons' properties were insured against the risk of fire.[73] But, in the wake of major disasters, one question arises frequently when victims are deciding to rebuild their partially or totally destroyed residential or commercial structures: whether property insurers must pay the replacement value of a new structure or the actual cash value of the old property before a covered peril vaporized it.

Without doubt, property insurance contracts vary. Generally, a "replacement costs policy" requires an insurer to replace a structure within a preset limit. Conversely, an "actual cash value policy" only requires an insurer to pay enough money to rebuild a destroyed commercial or residential property after deducting the depreciation

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69. 395 S.W.2d 53 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.).

70. *Id.* at 61–62.

71. *See id.* at 62. The "additional living expenses" provision read in pertinent part:

> Coverage D: If loss . . . renders the described dwelling or appurtenant private structures untenantable, this Company agrees to pay the necessary and *reasonable increase in expenses* in conducting the Insured's household . . . caused by such untenantability. Loss under Coverage D shall be computed commencing with the date of loss and extending for, but not exceeding, the time required with due diligence and dispatch *to repair or replace the property damaged or destroyed*. *Id.* (emphases added).

72. *Id.*

73. *See, e.g., Insured Losses from Bastrop, Texas*, *supra* note 48. "More than half of the homeowner insurance claims have been settled in the Bastrop (Texas) Complex Wildfire . . . . The final tally for insured losses from the wildfire is projected to hit $325 million from the destructions of 1,673 homes." *Id.* (alteration in original).

value.[74] But consider the following "replacement cost" provision, which appears in standard property insurance contracts:

> When replacement cost is shown on the "declarations" for covered property, the value of covered property will be *based upon the replacement cost without any deduction for depreciation*. . . . "You" may make *a claim for actual cash value* before repair or replacement takes place, *and later for replacement cost* if "you" notify "us" of your "intent" within 180 days after the loss.[75]

In light of the italicized phrases, reconsider the previous question arise: Does an insurance contract require an insurer to pay a new structure's replacement costs or its actual cash value before it was destroyed? Arguably, the language is ambiguous. Therefore, as wildfire litigation increases in Texas, property owners and their insurers are likely to ask courts to declare whether such language requires insurers to pay replacement prices or the cash value of a destroyed structure. Certainly, both insurers and insured should be concerned: This question has produced conflicting and even confusing rulings among Texas's courts of appeals.[76]

Also wildfire litigants and their attorneys need to be cognizant of the following. Typically, insured property owners must satisfy several conditions precedent, even if their insurers have a contractual duty to pay a fire-damaged property's repair costs or a fire-eviscerated structure's replacement costs. Property owners must repair or replace a damaged structure before an insurer will pay repair or replacement

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74. *See* Purva Patel, *Rebuilding to Cost Homeowners More: Higher Supply, Labor Expenses May Outstrip Limits of Insurance Policies*, HOUS. CHRON., Sept. 19, 2008, at Business 1, *available at* http://www.chron.com/CDA/archives/archive.mpl/2008_4637950/rebuilding-to-cost-homeowners-more-higher-supply-l.html. *See also* Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 352 (Ind. 1982).

75. Fitzhugh 25 Partners v. KILN Syndicate KLN 501, 261 S.W.3d 861, 862 (Tex. App.—Dallas 2008, pet. denied) (emphases added).

76. *Compare* St. Paul Lloyd's Ins. Co. v. Fong Chun Huang, 808 S.W.2d 524, 528 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (concluding that the actual cash value rather than repair or replacement value is the correct measure of insurance compensation after a fire loss), *and* Millers Mut. Fire Ins. Co. v. Eggleston, 357 S.W.2d 766, 767 (Tex. Civ. App.—Fort Worth 1962, no writ) (ruling against the insured because the insured did not establish the reasonable repair costs by showing the difference in the property's actual cash values before and after the damage), *with* Commonwealth Lloyd's Ins. Co., 678 S.W.2d 278, 293 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.) (allowing a recovery for fire damage based upon replacements costs rather than on the actual cash value of a property before the fire), *and* Commercial Ins. Co. v. Colvert, 425 S.W.2d 34, 35 (Tex. Civ. App.—Fort Worth 1968, no writ) (using the same damage calculation as the one used in *Commonwealth Lloyd's Ins. Co. v. Thomas*), *and* Farmers Mut. Protective Ass'n v. Cmerek, 404 S.W.2d 599, 600 (Tex. Civ. App.—Austin 1966, no writ) (using the same damage calculation as the prior two cases), *and* Lerman v. Implement Dealers Mut. Ins. Co., 382 S.W.2d 285, 288 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.) (using the same damage calculation as the prior three cases), *and* Gulf Ins. Co. v. Carroll, 330 S.W.2d 227, 233 (Tex. Civ. App.—Waco 1959, no writ) (using the same damage calculation as the prior four cases).

costs.[77] Furthermore, the rebuilding or replacement must occur within a definite period.[78] In addition, insureds must (1) make repairs or rebuild on the "same site," (2) use the repaired or replaced structure for the "same purpose," and (3) repair or replace the damaged structure with "similar materials."[79] Courts, however, are divided over whether various types of replaced properties are "functionally similar" or "comparable" to the destroyed properties.[80]

IV. Texas Courts' Conflicting Rulings over Whether Liability Insurers Must Defend Insureds Against Third-Party Fire-Loss Claims and Pay Damages

A. *Third-Party Property Losses and the Scope of an Insurer's Duty to Defend*

Assume that an insured's negligence caused a fire, which totally or partially destroyed a third party's property. Now, assume that the complainant sues both the insured and the latter's liability insurer because neither has covered the loss. At that point, the insurer must decide whether to defend the negligent insured against the third party's lawsuit. Making a sound decision is not easy because liability insurers have several options. An underwriter may (1) refuse to provide a legal defense for the negligent insured, (2) file a declaratory-judgment action to determine whether it has a duty to defend, (3) defend the insured under a reservation of rights or a non-waiver agreement, or 4) defend the insured completely and unconditionally.[81]

To determine whether a liability insurer must defend a negligent insured, Texas's courts apply the "eight corners" rule or the complaint-allegation rule: A court must review the allegations in the third party's complaint, without trying to determine the truth or falsity of

77. *See Fitzhugh 25 Partners*, 261 S.W.3d at 865 (embracing the universal proposition that insurers are not obligated to indemnify before insureds repair or replace their destroyed properties).

78. *See* Patel, *supra* note 74 ("Most insurers give homeowners about a year to rebuild before they make full payments . . . . State Farm gives policyholders two years to recover replacement costs.").

79. *See* Southland Lloyds Ins. Co. v. Cantu, No. 04-09-00705-CV, 2011 WL 1158244, at *1 (Tex. App.—San Antonio 2011, pet. filed). The insurer required those conditions to be satisfied before it would pay to repair a hail-damaged roof. *Id. See also* Garcia v. State Farm Lloyds, 287 S.W.3d 809, 822 (Tex. App.—Corpus Christi 2009, pet. denied). Here, the insurer required those same conditions to be satisfied before paying for mold remediation. *Id.*

80. *Compare* Fitzhugh 25 Partners, 261 S.W.3d at 865 (concluding that the insurer had no duty to indemnify because the replaced office park was functionally dissimilar to the destroyed apartment complex), *with* Republic Underwriters Ins. Co. v. Mex-Tex, Inc., 150 S.W.3d 423, 425 (Tex. 2004) (declaring that the insurer had a duty to indemnify, since the insured mall's newly installed mechanical roof was comparable to the mall's hail-destroyed, stone-ballasted roof).

81. *See* Farmers Tex. Cnty. Mut. Ins. Co. v. Wilkinson, 601 S.W.2d 520, 522 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

the allegations.[82] If a provision in the insurance contract reasonably or potentially covers the allegations, the liability insurer has a duty to defend.[83] "Even if the allegations are groundless, false, or fraudulent, the insurer must [defend the insured]."[84] The general rule is clear: If any ambiguity exists about whether a liability insurer must defend an insured, Texas's courts must resolve all doubts by ruling in favor of the insured.[85]

The scope of liability insurers' duty to defend is not terribly complicated. Insurers must hire competent lawyers to represent the insureds as well as pay all defense and court costs. An insurer's duty to defend, however, is broader than and very unlike the carrier's duty to indemnify.[86] For example, assuming that an insured pays out-of-pocket damages to cover a third party's destroyed property, an insurer may have a duty to defend the insured without having a concomitant obligation to indemnify the insured.[87] On the other hand, the "eight corners" doctrine also leaves open the possibility that a liability insurer will indemnify voluntarily or involuntarily the third-party victim.[88]

An insurer might indemnify a third party for a fairly obvious reason: If a liability insurer defends an insured and the third party wins, the insurer has a contractual obligation to pay damages to repair or replace the third party's destroyed property.[89] Another reason, however, is not as readily apparent: Consumers purchase liability insur-

82. GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church, 197 S.W.3d 305, 308 (Tex. 2006).

83. *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." (quoting C. T. Drechsler, Annotation, *Allegations in Third Person's Action Against Insured as Determining Liability Insurer's Duty to Defend*, 50 A.L.R.2d 458, at 504 (1956))).

84. Zurich Am. Ins. Co. v. Nokia, Inc., 268 S.W.3d 487, 491 (Tex. 2008).

85. *See, e.g.*, King v. Dall. Fire Ins. Co., 85 S.W.3d 185, 187 (Tex. 2002).

86. *Id.*

87. *See* Farmers Tex. Cnty. Mut. Ins. Co. v. Griffin, 955 S.W.2d 81, 82 (Tex. 1997).

88. *See* Dall. Nat. Ins. Co. v. Sabic Ams., Inc., 355 S.W.3d 111, 115 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). *See also* Henson v. Am. Eagle Ins. Co., 832 S.W.2d 145, 146 (Tex. App.—Fort Worth 1992, no pet.) ("Joe Best sued Henson . . . for damaging his aircraft . . . . Since American Eagle failed to provide Henson a defense in the original suit, Henson [sent a formal demand to] American Eagle . . . advising them that they had sixty days to . . . provide a legal defense . . . and pay any damages and court costs arising out of [the underlying third-party lawsuit].").

89. *See* Fed. Ins. Co. v. Samsung Elecs. Am., 268 S.W.3d 506, 507 (Tex. 2008) ("Samsung . . . was sued in five putative class action lawsuits . . . . Samsung tendered the defense of these cases to Federal, from which Samsung had purchased several commercial general liability insurance policies and excess liability policies . . . . The relevant policies covered 'damages the insured becomes legally obligated to pay' . . . . Federal agreed to defend all of the cases except [one]. . . . The trial court [held] that Federal had no duty to defend Samsung in the five case. . . . [W]e conclude that Federal has a duty to defend Samsung [against four of the five lawsuits].").

ance contracts willingly and compulsorily. And unlike first-party property insurance, liability insurance is often called "third-party insurance." The name is proper because third-party victims are the intended beneficiaries when insurers defend insureds and pay proceeds under the terms of liability insurance contracts.[90]

B. *"Prescribed Fires," "Hostile Fires," Third-Party Losses, and Judicial Conflicts over Whether Liability Insurers Must Defend and/or Indemnify Insureds*

Generally, in Texas, *property insurers* are liable only if a "hostile fire" rather than a "friendly fire" completely or partially eviscerates an insured's property.[91] Put simply, a fire is "friendly" if it remains in an intended receptacle or place.[92] Conversely, if a fire escapes and burns an unintended object or burns in an unintended location, it becomes a "hostile fire."[93] But these definitions generate two questions: (1) whether a liability insurer must defend an insured if the insured's "friendly" prescribed burn or fire becomes uncontrollable, spreads and consumes third parties' structures and personal property; and (2) whether a liability insurer must indemnify third-party victims if an insured's "hostile fire" spreads and destroys third parties' property.

Arguably, fairly soon, negligent persons who start wildfires in Texas, the presumed tortfeasors' liability insurers, and residential and commercial victims are likely to file a number of declaratory-judgment actions and raise these and related questions. However, based on a few reported decisions, Texas's courts are likely to give conflicting answers. When addressing these questions, courts have ruled in favor of both insureds and liability insurers. Of course, courts have given various explanations of their diverse rulings, looking beyond the probative facts in the cases. As a consequence, traumatized third-party property owners—the intended beneficiaries of liability insurance— have a mixed history of receiving compensation to repair or replace their totally or partially fire-destroyed residential and commercial buildings. To illustrate, compare the relevant facts and rulings

90. *See* Progressive Cnty. Mut. Ins. Co. v. Sink, 107 S.W.3d 547, 553–54 (Tex. 2003) (reiterating that third-party victims are treated as beneficiaries under liability-insurance agreements if insureds are legally responsible for third-party victims' injuries or losses). *See also* Dairyland Cnty. Mut. Ins. Co. v. Childress, 650 S.W.2d 770, 775 (Tex. 1983) (emphasizing that third-party victims are the intended beneficiaries under liability insurance contracts).

91. *See* Reliance Ins. Co. v. Naman, 6 S.W.2d 743, 744 (Tex. 1928); Garfield Mut. Fire & Storm Ins. Ass'n v. Calhoun, 532 S.W.2d 663, 666 (Tex. Civ. App.—Corpus Christi 1975, no writ).

92. *See* City of New York Ins. Co. v. Gugenheim, 7 S.W.2d 588, 589 (Tex. Civ. App.—Waco 1928, no writ).

93. Mid-Continent Cas. Co. v. Safe Tire Disposal Corp., 16 S.W.3d 418, 422 (Tex. App.—Waco 2000, pet. denied).

in *Spruiell v. Lincoln Ins. Co.*[94]and *Mid-Continent Cas. Co. v. Safe Tire Disposal Corp.*[95] with those in *E & L Chipping Co. v. Hanover Ins. Co.*[96]

In *Spruiell*, the insured—Michael McKean—owned and operated a cafe and grill. The business was located in a section of a leased building. McKean purchased a commercial general liability insurance contract from Lincoln Insurance Company. Spruiell's Automotive shared an adjoining firewall with the cafe. One fateful night, a fire destroyed the cafe and heavily damaged Spruiell's business. Twenty months later, Spruiell sued McKean, alleging negligence and seeking compensation for Spruiell's destroyed personal property and commercial equipment. Under a reservation of right, Lincoln hired an attorney to defend McKean.[97]

But, Lincoln also filed a declaratory judgment action. Both McKean and Spruiell were listed as defendants in the complaint. The question before the court was whether the liability insurer had a duty to defend McKean in the underlying negligence action. The trial judge's summary-judgment order stated that Lincoln had neither a "duty to defend" nor a "duty to indemnify."[98] Spruiell—the third-party victim and the potential beneficiary of a damages award —appealed the adverse ruling. On appeal, Lincoln argued that Spruiell did not have standing to challenge the trial court's declaration: Lincoln had no contractual obligation to defend McKean. The Amarillo Court of Appeals disagreed, citing Texas Supreme Court decisions. Briefly put, the Texas Supreme Court has declared that liability-insurance contracts give intended beneficiaries the right to participate in duty-to-defend, declaratory-judgment trials.[99]

Addressing the duty-to-defend question, the appellate court applied the "eight corners" doctrine. Spruiell's allegations did not contain particular facts. Instead, his original petition alleged that McKean "carelessly and negligently . . . caused an explosion."[100] That simple allegation was sufficient to bring the complaint within coverage under

94. No. 07-97-0336-CV, 1998 WL 174722 (Tex. App.—Amarillo Apr. 13, 1998, pet. denied) (not designated for publication).

95. 16 S.W.3d at 418.

96. 962 S.W.2d 272 (Tex. App.—Beaumont 1998, no pet.).

97. *Spruiell*, 1998 WL 174722 at *1.

98. *Id.* at *1 n.1.

99. *Id.* at *1 ("[I]t is important to note that Lincoln named Spruiell as a party defendant in its declaratory judgment suit. By suing Spruiell, Lincoln gave him standing to contest the judgment on appeal and, under the doctrine of invited error, Lincoln is now precluded from claiming that Spruiell lacks standing to challenge the judgment. [Moreover], the [Texas] Supreme Court [has] suggested that injured third parties may wish to participate in declaratory judgment actions involving the insurer's duty to defend." (citing Farmers Tex. Cnty. Mut. Ins. Co. v. Griffin, 955 S.W.2d 81, 84 (Tex. 1997), and State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 714 (Tex. 1996))).

100. *Id.* at *2–3.

the insurance contract. Therefore, the appellate court declared that Lincoln had a duty to defend McKean. But, the Amarillo Court of Appeals did not stop there. It also ruled in favor of Spruiell, concluding that "McKean's and Spruiell's rights [were] inextricably intertwined" under the liability insurance contract.[101]

The Waco Court of Appeals reached a similar conclusion in *Mid-Continent* after performing a slightly different analysis. The relevant facts are simple. Safe Tire Disposal Corporation ("Safe Tire") operates a business in Texas. An "accidental or unintended" fire ignited at one of Safe Tire's facilities. The fire began in a wire pile. Although the fire did not spread beyond piles of rubber chips, it produced thick and black smoke, toxic and hazardous fumes as well as high levels of noxious particulates. Many commercial and residential properties were polluted. In addition, many people became ill.[102] Eventually, claiming that Safe Tire was negligent, adjoining residents filed multiple suits against the disposal company.[103]

Mid–Continent Casualty insured Safe Tire under a general commercial liability insurance contract, which was in force during all relevant periods. Safe Tire notified Mid–Continent in a timely manner and asked Mid–Continent to defend it against the underlying lawsuits. Mid–Continent refused. The liability insurer asserted that a pollution-exclusion clause in the insurance contract precluded compensation for the third parties' property damage and a legal defense against the lawsuits.[104] In response, Safe Tire filed a declaratory-judgment suit against Mid–Continent. The trial court declared that Mid–Continent had a duty to defend Safe Tire.[105] The liability insurer appealed.

Before the Waco Court of Appeals, Mid-Continent insisted that the policy excluded compensation if pollutants on Safer Tire's "owned or occupied" premises escaped and caused third-party property damage or bodily injuries.[106] To counter, Safe Tire argued that the insurance contract's "hostile fire exception" applied. More specifically, the insured asserted that offensive heat, smoke, and fumes arose from a hostile fire on its premises and caused the third parties' injuries and property losses.[107]

The exception clause defined "a hostile fire [as] one which becomes *uncontrollable* or breaks out from where it was intended to be."[108]

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101. *Id.* at *3–4 (citing Kan. Univ. Endowment Ass'n. v. King, 350 S.W.2d 11, 19–20 (Tex. 1961), and Glover v. Henry, 749 S.W.2d 502, 505 (Tex. App.—Eastland 1988, no writ)).

102. Mid-Continent Cas. Co. v. Safe Tire Disposal Corp., 16 S.W.3d 418, 420 (Tex. App.—Waco 2000, pet. denied).

103. *Id.*

104. *Id.*

105. *Id.* at 419.

106. *Id.* at 422.

107. *Id.*

108. *Id.*

Nevertheless, Mid–Continent argued: The hostile fire exception applied only if Safe Tire *intentionally* ignited a controlled fire, which became uncontrollable or escaped.[109] In the underlying third-party complaint, the litigants alleged that a fire "broke out" on Safe Tire's property.[110] However, during the trial, probative evidence revealed that the fire was "*unintended*."[111] The Waco Court of Appeals acknowledged that Mid-Continent and Safe Tire's competing definitions of a "hostile fire" were reasonable. In the end, the appellate court applied the doctrine of ambiguity, concluded that a "hostile fire" caused third–party damages, and declared that Mid-Continent had a duty to defend.[112]

Unlike the insureds in *Spruiell* and *Mid-Continent*, the commercial property owner in *E & L Chipping* had mixed results against its insurers. E & L Chipping Company (E & L) sells lumber. One fateful day, a fire occurred in a wood-chip pile on E & L's property. The company tried to extinguish the fire by spraying large quantities of water on it. Ultimately, the contaminated water left the site and polluted surrounding landowners' land, lakes, springs, and underground water systems.[113] As a consequence, third-party complainants filed four negligence and statutory-based lawsuits against E&L.[114]

When the fire-related pollution occurred, St. Paul Insurance Company as well as the Hanover Insurance Company (Hanover) insured E&L's property against fire.[115] Yet, the insurers refused to defend E&L against the lawsuits.[116] E&L commenced breach-of-contract actions against the insurers. St. Paul and Hanover filed motions for summary judgment. The trial judge granted both without explanations.[117] E&L appealed the rulings to the Beaumont Court of Appeals. After applying the "eight corners" doctrine, the appellate court declared that St. Paul's summary-judgment award was erroneous. St. Paul had a duty to defend E&L against three of the underlying lawsuits.[118]

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* (citing Grain Dealers Mut. Ins. Co. v. McKee, 943 S.W.2d 455, 458 (Tex. 1997) (declaring that an ambiguous exclusion clause must be interpreted in favor of the insured if two or more reasonable interpretations exist)).

113. E & L Chipping Co. v. Hanover Ins. Co., 962 S.W.2d 272, 275 (Tex. App.—Beaumont 1998, no pet.).

114. *Id.* at 276–77.

115. *Id.* at 275.

116. *Id.* at 274 ("[B]oth insurers . . . denied coverage and refused to tender a defense. E & L claims it was forced to incur over $500,000 in legal expenses in the underlying lawsuits, which E & L successfully defended.").

117. *Id.* at 274.

118. *Id.* at 275–76 ("St. Paul's policy covers 'property damage' occurring during the policy period. The policy does not require that an occurrence take place during the policy period. . . . [However] the property damage must be caused by an occurrence, which [the policy defines as] . . . 'an accident, including continuous or repeated expo-

On the other hand, the appellate court upheld Hanover's summary-judgment award. In one of the underlying lawsuits, the claimant alleged "that polluted fire water and other contaminated waters from E&L's property seeped into the ground water and contaminated the lake on her property."[119] According to E & L, that allegation qualifies as a "hostile fire" exception under the property insurance contract's pollution-exclusion clause.[120] The Beaumont Court of Appeals, however, disagreed citing two reasons: (1) The third-party complaint alleged that contaminated water—rather than heat, smoke, or fumes—was the efficient proximate cause of the property damage; and, (2) the cause in fact was liquid pollution, rather than hostile-fire generated smoke, fumes, or heat.[121] Thus, in the end, the appellate court concluded: "[T]he absolute pollution exclusion . . . applies and precludes coverage or a duty to defend [against the underlying suit]."[122] Of course, other appellate courts in Texas have ruled that property insurers do not have a duty to defend insureds against third-party, fire-loss suits.[123]

V. Plausible Explanations to Harmonize Conflicting Duty-to-Indemnify Rulings: An Empirical Analysis of State and Federal Courts' Disposition of Fire- and Property-Loss Actions against Insurance Companies, 1884-2012

Certainly, discovering that courts of appeals are issuing conflicting fire-loss and insurance-compensation decisions is not just an interesting empirical finding. But the analysis does not and should not end with that important finding. Highly competent, experienced, and prudent plaintiffs' and insurance-defense lawyers weigh such judicial con-

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sure to substantially the same general harmful conditions.' . . . The policy specifically states that St. Paul has a duty to defend 'any suit seeking those damages.' . . . In looking at the 'eight corners' of the insurance policy and the underlying pleadings, it is apparent the facts pleaded are within the scope of the policy period. . . . The trial court erred[.]").

119. *Id.* at 277.

120. *Id.*

121. *Id.* at 277–78.

122. *Id.* at 278.

123. *See, e.g.*, *In re* Certain Underwriters at Lloyd's London, No. 01-09-00851-CV, 2010 WL 184300, at *1–3 (Tex. App.—Houston [1st Dist.] Jan. 15, 2010, no pet.) (mem. op.) ("Starla Bauer sued Parker for damages caused by a grass fire. . . . Parker's insurance company [defended Parker] . . . subject to a reservation of rights. Lloyds then petitioned for a declaratory judgment . . . seeking a declaratory judgment that Lloyds owed no duty to defend or indemnify . . . . *Parker answered the lawsuit, but filed no affirmative claims for relief.* . . . Lloyds moved for summary judgment . . . . [T]he trial court signed an order granting Lloyds' motion. . . . The trial court entered the judgment . . . as a final judgment. . . . Over a year and three months after the trial court's [order] . . . , Parker moved for reconsideration of the summary judgment and moved for his own summary judgment. The dispute . . . is whether the trial court's . . . order was a final judgment. . . . We hold that the record supports the trial court's stated intent that the . . . order be a final judgment.") (emphasis added).

flicts extremely carefully before deciding to settle claims or litigate. Therefore, determining why property insurers and fire-loss victims are more or less likely to win duty-to-indemnify disputes in certain appellate courts must be the next inquiry. Are some judges or venues more likely to be "biased" in favor of insurance companies? Do other courts have a "strong propensity" to favor insureds? There is evidence in the literature, suggesting that "judicial bias" exists and colors judges' substantive and procedural rulings.[124] Also, the Author has published articles documenting that appellate-court judges allow extralegal factors to shape significantly both insureds and insurers' likelihoods of winning procedurally and on the merits.[125]

Therefore, considering that wildfire-compensation litigation is likely to increase considerably between insurers and property owners in Texas, the Author decided to conduct an empirical study. The investigation was designed to determine whether *extralegal* factors have affected systematically the disposition of fire-loss claims in appellate courts within and beyond Texas.

A. *Data Sources and Sampling Procedures*

The hypothesis in this study is: no statistically significant difference exists between insurers and fire-loss victims' likelihoods of winning duty-to-indemnify actions in state and federal courts. The Author employed a multi-pronged methodology to build the database.

First, WESTLAW and LEXIS data-retrieval systems were used to locate every reported fire and insurance-related duty-to-indemnify lawsuit that had reached or terminated in a court of appeals. Second, if the electronically reported cases cited other unreported fire-loss cases, the Author canvassed regional reporters to locate those latter cases. Those efforts generated 364 duty-to-indemnify, fire-loss lawsuits between insurers and insured property owners (*loss-from-fire disputes*). Third, the Author also wanted and needed to secure a representative sample of property-loss, duty-to-indemnify lawsuits, which involved property losses from causes other than fires.[126] Therefore, the Author took a proportional-stratified-random sample of all "other" duty-to-indemnify cases that had been decided procedurally or on the mer-

124. *See* Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63, 77, 88, 90–91 nn. 58, 103, 111–12 (2008) (presenting a fairly comprehensive history and description of Professor Rice's published content-analysis studies and theoretical analyses of various common-law and statutory questions).

125. *See, e.g.*, *id.*

126. The Author and his research assistants searched Westlaw's MIN-CS, ALLSTATES, ALLFEDS, CTA and DCT databases between November 2011 and February 2012. In addition, the investigators searched various regional reporters as well as LEXIS's Genfed Library and COURTS File, during the same period.

its.[127] The latter effort produced 397 cases (loss-from-other-perils disputes). The dates of the cases range from 1884 to 2012.[128] Finally, to test the study's hypothesis, the Author performed a content analysis of each case.[129] There are 761 cases in the study.

B. *Background Characteristics of Fire-Loss, Duty-to-Indemnify Litigants in State and Federal Courts between 1884-2012*

TABLE 1 presents frequencies and percentages, illustrating the disposition of insurance-compensation disputes.

The first variable in the table is entitled, JURISDICTIONS. It reveals that loss-from-fire disputes are more likely to be litigated in state courts, while loss-from-other-perils lawsuits are more likely to be resolved in federal courts—87.5% and 58.2%, respectively. The variable—TYPES OF COURTS—gives greater details of the courts, which ultimately decided the cases. Briefly, among the loss-from-fire disputes, Texas's courts decided 34.9% of the controversies. Other state courts decided 52.7% and various federal circuits decided 12.4%. On the other hand, the Fifth Circuit and other federal courts of appeals decided most of the loss-from-other-perils disputes. The percentages are 12.9% and 45.3%, respectively.

The third variable in TABLE 1 is INSUREDS & COMPLAINANTS. It describes first- and third-party victims and property owners who commenced various lawsuits against indemnity and liability insurers. As illustrated, stark differences exist between loss-from-fire and loss-from-other-perils plaintiffs. Overwhelmingly, loss-from-fire victims are significantly more likely to be *homeowners* and *small businesses* — 56.9% and 18.1%, respectively. In contrast, *corporations* and *assign-*

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127. *See* Bruce M. Price, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of Bapcpa (And Some Unintended Consequences)*, 26 YALE L. & POL'Y REV. 135, 138 (2007) ("Using a proportional, stratified, random sample of bankruptcy cases from [two twelve-month periods to create a] . . . database of cases for every state in the Tenth Circuit.").

128. The Author used the following queries to locate cases in the corresponding electronic databases:

1) QUERY—(FIRE! /3 (PROPERTY HOME HOUSE BUSINESS /4 DAMAGE LOSS))—(Westlaw's TXIN-CS database, last visited on January 12, 2012);
2) QUERY—((FIRE! /P WINDS HILLS CANYON FOREST) % EMPLOY! HIRE!)—Westlaw's MIN-CS database, last visited on February 2, 2012);
3) QUERY—(FIRE! /P WINDS HILLS CANYON)—Westlaw's CAIN-CS database, last visited on December 4, 2011); and
4) QUERY—(INSURANCE INSURED /P WILDFIRE "BRUSH FIRE" "FOREST FIRE" "GRASS FIRE")—Westlaw's ALLFEDS database, last visited on November 23, 2011).

129. *See* Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567, 588–95 (1991) (performing a content analysis to examine Justices' opinions).

ees were substantially more likely to sue insurers who refused to cover those complainants' non-fire-related property losses. The percentages are 66.5% and 9.6%, respectively.

Now, consider the complainants' theories of recovery. Among both loss-from-fire and loss-from-other-perils cases, extremely large numbers of complainants filed breach-of-contract actions. The corresponding percentages are 90.3% and 97.2%, respectively. But, among the loss-from-fire cases, the litigants also filed a fairly large number of declaratory-judgment actions (39.6%).

TABLE 2 presents procedural and final dispositions of duty-to-indemnify actions in state and federal courts.

The first half of TABLE 2 shows the procedural dispositions of the actions among both loss-from-fire and loss-from-other-perils cases. Generally, the percentages indicate that *trial and appellate courts* are significantly more likely to decide duty-to-indemnify controversies based on the merits rather than procedurally. For example, among the loss-from-fire actions, trial and courts of appeals decided 93.1% and 86.8% of the disputes on the merits, respectively. Among the loss-from-other-perils cases, the respective percentages for trial and appellate courts are 97.2% and 87.4%.

In the bottom half of TABLE 2, the remaining numbers and percentages illustrate complainants and insurers' win/loss ratios among loss-from-fire and loss-from-other-perils cases. First, consider the variable OUTCOME-TRIAL COURTS. Among the loss-from-fire conflicts, the results indicate that first- and third-party complainants are more likely to win duty-to-indemnify actions in trial courts—56.9% versus 43.1%. Alternatively, among loss-from-other-perils cases, insurers are more likely to win in trial courts—59.5% versus 40.5%.

However, on appeal, complainants' likelihood of prevailing improved appreciably regardless of the types of claims filed against insurers. Among the *loss-from-other-perils* disputes, plaintiffs and insurers *won* nearly equal numbers of cases—50.7% versus 49.3%. For plaintiffs, that was a 10.2% improvement in the courts of appeals. In addition, on appeal, plaintiffs *won* an impressive 58.3% of the fire-related, property-loss lawsuits.

C. *Bivariate Relationships between Litigants' Characteristics and the Disposition of Duty-to-Indemnify, Fire-Loss Actions in Courts of Appeals*

Again, the percentages in the previous section present a description of litigants' demographic characteristics and win/loss ratios. Generally, if fire destroyed insured's or third parties' properties, those complainants are more likely to win duty-to-indemnify lawsuits. So, it is fair to ask: Are property insurers losing significantly more often because appellate courts are more likely to be intentionally biased

against insurers? Quite candidly, the present data and statistical analysis cannot answer that question. On the other hand, TABLE 3 presents the types of legal and extralegal factors that courts of appeals weigh wittingly or unwittingly when deciding whether to decide in favor of property-loss victims or insurers.

TABLE 1. FIRE-RELATED AND OTHER PROPERTY-LOSS LAWSUITS: SOME SELECTED CHARACTERISTICS OF COMPLAINANTS WHO FILED DUTY-TO-INDEMNIFY ACTIONS AGAINST PROPERTY INSURERS, 1884-2012 (N = 761)

CHARACTERISTICS	FIRE-RELATED PROPERTY-LOSS LAWSUITS (N = 364)		OTHER PROPERTY-LOSS Lawsuits (N = 397)	
	Frequency	**Percent**	**Frequency**	**Percent**
Jurisdictions:				
State Lawsuits	319	**87.6***	166	41.8
Federal Lawsuits	45	12.4	231	**58.2***
Types of Courts:				
Texas Courts	127	**34.9***	5	1.3
Fifth Circuit	6	1.7	51	12.9
Other Circuits	39	10.7	180	**45.3***
Other State Courts	192	**52.7***	161	40.5
Insureds & Complainants:				
Homeowners	**207**	**56.9****	25	6.3
Small Businesses	**66**	**18.1****	22	5.5
Corporations	32	8.8	**264**	**66.5****
Partnerships	15	4.1	7	1.8
Banks	12	3.3	10	2.5
Landowners	11	3.0	6	1.5
Agents	11	3.0	6	1.5
Assignees/Third Parties	10	2.8	**38**	**9.6****
Professions	—	—	11	2.8
Educational Institutions	—	—	8	2.0
[+]Theories of Recovery:				
Breach of Contract	329	90.3***	386	**97.2*****
Common-Law "Bad Faith"	28	7.7	21	5.3
Declaratory-Judgment Actions	144	**39.6*****	4	1.0
Insurers' Affirmative Defenses:				
No Insurable Interest	38	10.4	—	—
No Coverage	38	10.4	155	**39.0****
Misrepresentation of Material Facts	30	8.2	7	1.8
Insured's Conduct was Intentional	116	**32.0****	37	9.3
Insured Beached a Condition	63	**17.3****	26	6.6
No Efficient Proximate Cause of Loss	11	5.5	5	1.3
Other Defenses & General Denials	59	16.2	167	**42.0****

[+]The sums of these columns exceed unity (100%), since multiple theories of recovery appeared in many complaints.

Levels of statistical significance:

****** Spearman's rank test:rho = .56 $p \leq .0001$**

***** Spearman's rank test:rho = .45 $p \leq .0001$**

**** Spearman's rank test:rho = .22 $p \leq .03$**

*** Chi Square statistic ≥ 94.00, $df \geq 1$ $p \leq .0001$**

TABLE 2. THE PROCEDURAL AND FINAL DISPOSITIONS OF FIRE-RELATED AND OTHER COVERED-PERILS DUTY-TO-INDEMNIFY LAWSUITS AGAINST PROPERTY INSURERS, 1884-2012 (N = 761)

CHARACTERISTICS	FIRE-RELATED PROPERTY-LOSS LAWSUITS (N = 364)		OTHER PROPERTY-LOSS Lawsuits (N = 397)	
	Frequency	**Percent**	**Frequency**	**Percent**
Disposition — Trial Courts:				
Procedural	25	6.9	11	2.8
Merits	339	**93.1**	386	**97.2**
Disposition — Appeals Courts:				
Procedural	17	4.7	8	2.0
Merits	316	**86.8**	347	**87.4**
No Appeals	31	8.5	42	10.6
Outcomes — Trial Courts:				
Complainants Won	207	**56.9** ***	161	40.5
Insurers Won	157	43.1	236	**59.5** ***
Outcomes Among Complainants Who Decided to Appeal:				
Complainants Won	194	**58.3** **	175	50.7
Insurers Won	139	41.7	180	**49.3** **

Levels of statistical significance:
*** **Chi square statistic = 20.237, *df* = 1, $p \leq .0001$**
** **Chi square statistic = 5.550, *df* = 1, $p \leq .01$**

TABLE 3 presents two categories of cases—Texas Courts of Appeals' cases and cases decided in the Fifth Circuit and other courts of appeals. In addition, the table illustrates the individual effects of various predictors on litigants' likelihood of winning or losing duty-to-indemnify lawsuits (OUTCOME). The reported percentages reveal outcomes from the perspectives of property owners and other interested persons who sued insurers. TYPES OF PLAINTIFFS is the first category of predictors. In Texas's appellate courts, complainants in every category won a significant majority of the lawsuits. The average percentage across the four categories of complainants is 61.4%.

However, among cases decided in the Fifth Circuit and in other appellate courts, corporations/partnerships as well as assignees/third parties were more likely to lose. The corresponding percentages are 59.5% and 57.1%, respectively. On the other hand, small-business owners and homeowners/landowners were significantly more likely to win in the Fifth Circuit and in other courts of appeals. Those percentages are 53.6% and 62.0%, respectively.

In courts of appeals beyond Texas, types of fire losses influenced the disposition of cases. More specifically, property owners were more likely to lose (54.5%) if they sued insurers for failing to cover

TABLE 3. THE DISPOSITION OF DUTY-TO-INDEMNIFY AND FIRE-CAUSED-LOSS ACTIONS AGAINST PROPERTY INSURERS IN STATE AND FEDERAL COURTS OF APPEALS BY SELECTED DEMOGRAPHIC CHARACTERISTICS OF THE LITIGANTS, 1884-2012 (N = 333)

	Dispositions in Texas Courts of Appeals From Plaintiffs' Perspectives			Dispositions in Other Courts of Appeals & Fifth Circuit From Plaintiffs' Perspectives		
Selected Demographics	**Favorable**	**Unfavorable**	**(N = 127)**	**Favorable**	**Unfavorable**	**(N = 206)**
	Percent	**Percent**	**Number**	**Percent**	**Percent**	**Number**
Types of Plaintiffs:						
Corporations/Partnerships/Agents	**66.7**	33.3	(N = 6)	40.5	**59.5**	(N = 42)
Assignees/Financial Institutions/Third Parties	**54.5**	45.5	(N = 11)	42.9	**57.1**	(N = 7)
Small Businesses	**61.1**	38.9	(N = 36)	**53.6**	46.4	(N = 28)
Homeowners/Landowners	**63.5**	36.5	(N = 74)	**62.0**	38.0	(N = 129)
Types of Fire-Related Losses:						
Commercial-Property Losses	**60.4**	39.6	(N = 53)	45.5	**54.5**	(N = 77) ***
Residential-Property Losses	**63.5**	36.5	(N = 74)	**62.0**	38.0	(N = 129) ***
[+]Plaintiffs' Theories of Recovery:						
Breach of Contract and/or "Bad Faith"	**57.9**	42.1	(N = 76)	**59.7**	40.3	(N = 124)
Declaratory-Judgment Action	**68.6**	31.4	(N = 51)	50.0	50.0	(N = 82)
Insurer's Affirmative Defenses & Denials:						
Complainant Had No Insurable Interest	**76.7**	23.3	(N = 30) **	42.9	**57.1**	(N = 7)
Complainant Had No Coverage	46.7	**53.3**	(N = 15)	**52.9**	47.1	(N = 17)
Insured's Conduct Was Intentional	25.0	**75.0**	(N = 12) **	**59.3**	40.7	(N = 91)
Insured Misrepresented a Material Fact	**80.0**	20.0	(N = 5)	43.5	**56.5**	(N = 23)
Insured Breached a Condition	**65.8**	34.2	(N = 38) **	45.4	**54.6**	(N = 22)
Other Defenses & General Denials	**63.0**	37.0	(N = 27)	**63.0**	37.0	(N = 46)
[++]Types of Fires Causing Property Damage and Personal Injuries:						
Wildfires — Brush, Grass and Prairies Fires	—	—	—	40.5	**59.5**	(N = 15) *
Wildfires — Forest Fires	—	—	—	46.7	**53.3**	(N = 15)
Wildfires — Out-of-Control Prescribed Burns	—	—	—	**90.9**	9.1	(N = 11) *
Others — Residential and Commercial Fires	**61.9**	38.1	(N = 126)	**55.1**	45.9	(N = 165)

[+]The "bad faith" claims were based on property insurers' alleged breach of Texas's common-law duty of good faith and fair dealing or on insurers' alleged breach of an implied covenant of good faith and fair dealing in other jurisdictions.

[++]A canvas of Texas-appellate-court cases revealed less than five reported wildfire decisions. Thus those statistics do not appear in the table.

***** Chi square test statistically significant at $p \leq .02$ ** Chi square test statistically significant at $p \leq .03$ * Chi square test statistically significant at $p = .08$**

commercial-property losses. But, in the Fifth Circuit and other appellate courts, disgruntled residential-property owners are appreciably more likely to prevail (62.0%) against insurers. Among cases decided in Texas appellate courts, types of fire losses have no statistically significant effect on the disposition of cases. Property owners won the majority of suits in Texas courts, regardless of whether insurers rejected the owners' commercial or residential fire-loss claims. The percentages are 60.4% and 63.5%, respectively.

Arguably, the bivariate relationships between outcomes and insurers' affirmative defenses and general denials are the most legally and statistically significant findings in TABLE 3. Consider the predominant affirmative defenses that insurers raised in Texas's and in other courts of appeals: (1) First or third-party complainants have no insurable interest in the destroyed property[130]; (2) The complainants' residential and commercial properties are not covered under the insurance contract;[131] (3) The insured's intentional conduct rather than a fire was the efficient proximate cause of the destroyed property;[132] (4) The insured's misrepresentation of a material fact precludes insurance compensation;[133] and (5) Indemnification is precluded because the insured breached a condition in the insurance application or contract.[134]

A careful inspection of the percentages reveals: Only some affirmative defenses are effective in Texas's appellate courts. Still, other defenses are effective only before the Fifth Circuit and in other states' courts of appeals. For example, complainants won 76.7% of the rulings in Texas's appellate courts, when insurers raised the no-insurable-interest defense. Contrarily, insurers won 57.1% of the decisions in other appellate courts when raising the same defense. Of course, one should not attach too much significance to the latter percentage because it is based on just seven cases. But consider these findings: In Texas's courts of appeal, first- and third-party plaintiffs prevailed in 65.8% of the cases, when property insurance companies proffered a breach-of-condition defense. In contrast, insurers prevailed 54.6% of

130. *See* Smith v. Eagle Star Ins. Co., 370 S.W.2d 448, 450 (Tex. 1963) (requiring an insurable interest in a property as a perquisite before purchasing insurance).

131. *See supra* notes 24–25 and accompanying text.

132. *See* Tex. Farmers Ins. Co. v. Murphy, 996 S.W.2d 873, 875 (Tex. 1999) (forcing the property insurer to compensate the innocent spouse but allowing the insurer to withhold compensation for the deviant spouse who intentionally destroyed community property).

133. *See* Haney v. Minn. Mut. Life Ins. Co., 505 S.W.2d 325, 328 (Tex. 1974) (requiring the insurer to prove that the insured made a material misrepresentation "willfully and with design to deceive or defraud" before withholding insurance compensation).

134. *Cf.* Trinity Universal Ins. Co. v. Daniel, 202 S.W.2d 266, 267 (Tex. Civ. App.—Eastland 1947, no writ) ("[U]nless a breach . . . of a condition [in] . . . a fire insurance policy causes or contributes to . . . the destruction of the property, such breach . . . will not render void the policy or constitute a defense to a suit[.]").

the time when the breach-of-condition defense was advanced before the Fifth Circuit and in other courts of appeals.

D. *Two-Stage Multivariate Probit Analysis of the Interrelationships between Litigants' Attributes and the Disposition of Duty-to-Indemnify Actions in State and Federal Courts of Appeals*

Perhaps, the statistically significant findings in TABLE 3 offer a plausible explanation of appellate courts' propensity to issue conflicting decisions, when the probative facts surrounding duty-to-indemnify disputes are fairly to extremely similar. As reported, in Texas's appellate courts, fire-loss victims are more likely to prevail if judges weigh and reject a defined set of affirmative defenses. On the other hand, insurers are more likely to prevail when appellate courts beyond Texas weigh and accept an identical set of affirmative defenses. Certainly, without knowing more, the disparities between Texas and other appellate courts' duty-to-indemnity rulings should not raise any legal concerns.

But again, TABLE 3 presents only simple, bivariate associations between win/loss outcomes and a few categorical variables. The goal, however, is to determine whether appellate court's geographic locations or other factors truly explain those disparities. Therefore, to help approximate that end, one should employ a more powerful statistical procedure, which allows an investigator to measure the *unique* as well as the *simultaneous* effects of multiple legal and extralegal variables on appellate courts' disposition of duty-to-indemnify controversies. Thus, to help increase the likelihood of achieving that goal, the Author employed a multivariate, two-staged probit procedure.[135]

TABLE 4 presents the results of conducting a multivariate-probit analysis of the disposition of duty-to-indemnify, insurance disputes in Texas's and other courts of appeals.

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135. In several published law-review articles, the Author discussed and used this statistical procedure to measure simultaneously individual and multiple effects of independent variables on the disposition of court decisions. In a nutshell, the procedure determines the specific individual, statistical effects ("explanations") of certain variables on, say, appellate courts' dispositions of duty-to-indemnify cases, while controlling for and determining the multiple and simultaneous effects of other "presumed" random factors. *See, e.g.*, Willy E. Rice, *Allegedly "Biased," "Intimidating," and "Incompetent" State-Court Judges and the Questionable Removal of State-Law Class Actions to Purportedly "Impartial" and "Competent" Federal Courts: A Historical Perspective and an Empirical Analysis of Class-Action Dispositions in Federal & State Courts, 1925-2011*, 3 WM. & MARY BUS. L. REV. 2, 127–129 n.787 (April 2012) (listing publications and page numbers on which a multivariate probit analyses were discussed and computed). The Author used StataCorp's Stata Statistical Software to analyze the data generally and to compute the multivariate-probit coefficients in particular.

Once more, it is important to note: The findings in TABLE 4 are based on an analysis of 761 cases. The sample includes 364 fire-loss lawsuits.

TABLE 4. SIMULTANEOUS EFFECTS OF SELECTED PREDICTORS ON LITIGANTS' DECISIONS TO APPEAL ADVERSE DUTY-TO-INDEMNIFY RULINGS AND ON APPELLATE COURTS' ULTIMATE DISPOSITION OF THE LAWSUITS (N = 761)

	Litigants' Decision to Appeal Adverse Duty-to-Indemnify Rulings, Verdicts and Judgments to Courts of Appeals				Disposition of Duty-to-Indemnify Property-Loss Lawsuits in Courts of Appeals Among "Commercial Fire-Loss" Claims			
PREDICTOR VARIABLES	**Probit Coefficients**	**Robust Std. Errors**	**Z-Statistics Absolute Values**	**Statistical Significance**	**Probit Coefficients**	**Robust Std. Errors**	**Z-Statistics Absolute Values**	**Statistical Significance**
Types of Complainants:								
Banks	–0.0212	.4012	0.05		**0.2641**	**.1043**	**2.53**	$p < .01$
Partnerships	–0.1677	.3734	0.45		**0.2418**	**.1130**	**2.14**	$p < .03$
Small Businesses	1.1983	.3228	3.60	$p < .0001$	**0.2346**	**.1034**	**2.27**	$p < .02$
Types of Fires Causing Property Damage and Personal Injuries:								
Wildfires —Forest Fires	–0.3815	.5640	0.68		**–.3313**	**.1836**	**1.80**	$p = .07$
Wildfires —Prescribed Burns	–1.6621	.6396	2.60	$p < .009$	**0.5044**	.1977	2.55	$p < .01$
Plaintiffs' Theories of Recovery:								
Breach-of-Contract Action	–0.4116	.5505	0.75		0.1334	.1129	1.18	
Declaratory-Judgment Action	–0.0370	.3904	0.09		**–.1437**	**.0748**	**1.92**	$p < .05$
Property Insurers' Affirmative Defenses & General Denials:								
Insured Had No Coverage	0.5554	.1947	2.85	$p < .004$	0.0141	.0697	.20	
Insured Breached a Condition	0.2815	.3448	0.82		**–.1945**	**.0795**	**2.45**	$p < .01$
CONSTANT	1.4291	.5611	2.55	$p < .01$	.3687	.1420	2.60	$p < .01$

Wald test for independent equations (rho = 0): Chi square statistic = .08, *df* =1, *p* = .779 This is a test for "selectivity bias." Put simply, rho is the correlation between the errors in the two equations. STATA gives an estimate for rho, and tests that estimate. Here, the null hypothesis (rho=0) is not rejected, suggesting that sample-selection bias is absent.

Wald test for the model's "fit": Chi square statistic = 53.80 *df*=9, *p* = .00001

Of this latter number, litigants appealed 333 duty-to-indemnify decisions to federal and state appellate courts; and they decided not to appeal 31 actions. The remaining 397 cases involve disputes over whether insurers must compensate property owners or interested persons for other-perils-related losses. Those cases were also decided in state and federal lower courts. And, of this group of cases, property owners and insurers decided to appeal nearly ninety percent (89.4%) to appellate courts. The remaining ten percent (10.6%) were not appealed.

To be sure, one cannot overlook cavalierly the finding that some litigants appealed, while others did not. Briefly put, the "nonappealers" were "unobserved" in the courts of appeals. Thus, their absence could be a source of "selectivity bias" when attempting to explain litigants' likelihood or winning/losing in courts of appeals. Elsewhere, in published law-review articles, the Author has addressed questions about the quality of sample data—whether the cases appearing in law reporters or electronic databases actually reflect what is occurring in courts factually.[136] Thus, testing for "selectivity bias" in the present sample data is necessary and the more advanced statistical procedure discussed here performs that test.[137]

In light of those preliminary remarks, reconsider TABLE 4 and review the nine (9) "dummy" or zero/one variables.[138] Each has been categorized under one of four general headings. In addition, the table contains eight (8) distributions of probit coefficients and other statistics. The first four (4) distributions on the left illustrate the statistically significant predictors which influenced insurers and fire-loss victims' decision to appeal trial and district courts' adverse rulings and judgments. Although those findings are relevant, they are not the focus of our attention here. Instead, the goal is to determine which of the nine variables "caused" appellate courts to decide insurance-compensation disputes in favor of or against insured property owners and insurers.

To begin the analysis, consider the three variables under the heading, TYPES OF COMPLAINANTS. Now, consider the four (4) distributions of statistics on the right—probit coefficients, corresponding

136. *See* Rice, *supra* note 35 at 1208–09 (discussing the inherent problems with using just reported cases and simple percentages to make inferences. To be sure, there are "full" judicial decisions, which are not published in various federal and state reporters. However, to address that limitation in part, the present study includes both cases appearing in the reporters as well as in multiple online state and federal databases).

137. In several published articles, the Author discussed "selectivity bias" problems and the test to determine its presence or absence in sample data. *See, e.g.*, Rice, *supra* note 135, at 128–34 nn.266, 783.

138. *See* Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 125–30 (1995) (explaining and measuring the statistical effects of "dummy" variables—zeros and ones—on sellers' and buyers' decisions and bargaining outcomes).

robust standard errors, z-statistics and the coefficients' levels of statistical significance.[139] Also note: The first three probit coefficients—.2642, .2418, and .2346 —are positive. Even more importantly, they are statistically significant. Those findings mean: When property insurers reject banks, partnerships, and small-businesses' commercial fire-loss claims and duty-to-indemnify lawsuits are filed, those entities are substantially more likely to prevail against insurers in all state and federal appellate courts.

The "Wildfires-Prescribed Burns" variable under the next heading—TYPES OF FIRES CAUSING PROPERTY DAMAGE AND PERSONAL INJURIES — has a corresponding positive and statistically significant probit coefficient (.5044). It means that "commercial fire-loss" complainants are substantially more likely to prevail in all state and federal courts of appeals, if (1) out-of-control prescribed burns destroy first- and third-party victims' properties, and (2) insurance companies reject those claims. In contrast, the "Wildfires-Forest Fires" variable almost has a statistically significant effect on the distribution of duty-to-indemnify cases. But, the probit coefficient is negative (-.3313). The coefficient suggests that "commercial fire-loss" victims are substantially less likely to prevail in state and federal courts of appeals, if (1) spreading forest fires destroy victims' properties, and (2) insurers refuse to compensate the victims.

The remaining two statistically significant findings in Table 4 lend credence to the latter interpretation. Consider the PLAINTIFFS' THEORIES OF RECOVERY. *Breach-of-contract* actions produce no statistically meaningful effect on the disposition of cases. However, property owners and third parties are significantly more likely to lose (-.1437), if (1) insurers reject "commercial-fire loss" claims, and (2) plaintiffs seek equitable relief in a declaratory-judgment trial. The second relevant finding appears under the heading, PROPERTY INSURERS' AFFIRMATIVE DEFENSES & GENERAL DENIALS. The negative probit coefficient (-.1945) means: "Commercial fire-loss" victims are substantially less likely to win if insurers prove that insured property owners "materially" breach a condition in an insurance application or contract.

In light of the statistically significant findings, we still must answer an equally important question: Whether "selectivity bias" appears in the data. Or put differently, is there any *meaningful difference* be-

139. *See, e.g.*, Thomas J. Brennan, *What Happens After a Holiday?: Long-Term Effects of the Repatriation Provision of the AJCA*, 5 NW. J. L. & SOC. POL'Y 1, at 22 nn.34–35 (2010) ("Columns of the table represent separate regressions, and rows of the table represent variables corresponding to coefficients computed in the regressions. . . . The value reported for each regression and variable is the point estimate of the coefficient, and the value [to the right] is the robust standard error estimate. . . . In reports of regression results in this Article . . . the notations *, **, and *** are used to indicate statistical significance at the levels of 10%, 5%, and 1%, respectively. These values are computed using the robust standard errors described in [note 34].").

tween litigants who decided to appeal adverse duty-to-indemnity decisions and those litigants who decided not to appeal. Unavoidably, this requires a researcher to "test" for similarities between two equations—the two distributions of probit coefficients. At the bottom of TABLE 4, a Wald test for independent equations suggests that no meaningful "selectivity bias" exists. The corresponding Chi square statistic is not statistically significant. Therefore, in light of no apparent "self-selection bias," we may conclude: Some of the nine predictors' simultaneous and multiple effects are significantly more or less likely to influence the dispositions of insurance-related, duty-to-indemnify disputes in courts of appeals.

VI. SUMMARY-CONCLUSION

As reported earlier, when Hurricanes Rita and Carla destroyed commercial and residential property in Texas, property insurers' adjusters rushed to the scenes of the destruction and delivered checks to affected businesses and homeowners. In the wake of Tropical Storms Allison, Bill, and Frances, other insurance adjusters dashed to destroyed properties and wrote checks. Definitely, most residential and commercial property owners accepted the insurance compensation, even though it was insufficient to repair or replace partially or completely destroyed properties.

Conversely, many residential and commercial property owners sued major insurers to collect funds to cover "additional living expenses." Some tropical-storm victims sued insurers in Texas courts, because the insurers refused to cover totally destroyed properties' replacement costs. In addition, some mortgagees, tenants and assignees—who had insurable interests in destroyed properties—sued property insurers for failing to indemnify.[140] As discussed above, some of those cases have been resolved. But other disputes are still working their way through state and federal courts.

A canvass of hurricane-related and tropical-storms cases reveals that plaintiffs' and insurance-defense attorneys review carefully the disposition of insurance-related, compensation disputes. Today, the same level of attention is warranted because similar duty-to-indemnify controversies are likely to arise substantially in the wake of the massive wildfires-related losses in Texas. But even more importantly, victims of wildfires should be concerned. Again, the present study

140. *See, e.g.*, Hull v. Loe's Highport, Inc., No. 05-91-01019-CV, 1992 WL 193490, at *1 (Tex. App.—Dallas Aug. 13, 1992, no writ.) ("David Hull & Associates d/b/a Waterfront Restaurants . . . appeals a summary judgment . . . and severance order granted in favor of Loe's Highport . . . in a suit to obtain a judicial declaration [of] the parties' rights to insurance proceeds. The trial court granted . . . [the sole rights of the insurance proceeds to Loe as reimbursement for damage to] the restaurant buildings resulting from a flood . . . . Hull contends that . . . he had an insurable interest in the property[.]").

uncovered some debatably unsettling findings: Commercial and residential property owners are substantially more likely to "win" or "lose" when appellate courts allow arguably impermissible or extralegal variables to intentionally or unintentionally influence the disposition of duty-to-indemnify lawsuits.

To repeat, complainants are likely to "win" duty-to-indemnify disputes procedurally or on the merits based on who they are. Insurers are more likely to "win" or "lose" duty-to-indemnify disputes depending on whether grass, brush, prescribed, forest or out-of-controlled prairie fires destroyed the insureds' residential or commercial properties. Arguably, members of plaintiffs' and insurance-defense bars in Texas and the Fifth Circuit—who can appreciate the gravity of the judicial conflicts and empirical finding discussed in this essay—will increase the likelihood of their clients' prevailing in lawsuits involving wildfires, destroyed residential and commercial properties and insurance compensation.