SMU Annual Texas Survey

Volume 9 Article 7

2023

Insurance Law

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Recommended Citation
J. Price Collins et al., *Insurance Law*, 9 SMU ANN. TEX. SURV. 149 (2023)

INSURANCE LAW

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DOI: https://doi.org/10.25172/smuatxs.9.1.7

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ABSTRACT

This Article describes and analyzes major developments in insurance law that occurred in Texas between December 1 and November 30 of 2022.

I. INTRODUCTION

This Survey period was an active one, with significant decisions in several different areas of insurance law. In a long-awaited decision, the Texas Supreme Court recognized a limited exception to the eight-corners rule to permit consideration of extrinsic evidence in determining an insurer's duty to defend, with Texas federal courts then reaching varying results in applying the exception. The U.S. Court of Appeals for the Fifth Circuit, for the second time, recognized the lack of clarity in Texas law regarding concurrent causation in property damage cases and re-certified the same three questions to the Texas Supreme Court seeking clarification. Also for the second time, the parties settled before the supreme court could address the questions, and the uncertainty remains. We anticipate the issue will continue to be litigated and will likely make its way to the supreme court again.

II. DUTY TO DEFEND

A. The *Monroe* Exception: The Texas Supreme Court Recognizes an Extrinsic Evidence Exception to the Eight-Corners Rule

To determine whether a liability insurer has a duty to defend its insured against an underlying lawsuit by a third-party claimant, Texas follows the "eight-corners rule," under which only the policy and the pleading against the insured are relevant and extrinsic evidence outside of the pleading generally is not considered.[1] Over the last several decades, state and federal courts have struggled with whether there is any exception to this rule, particularly where the pleading is silent on a fact that is determinative of coverage, and they have reached inconsistent results.[2] In 2004, the Fifth Circuit made an "*Erie* guess" that the Texas Supreme Court would not recognize any exception, but that if they were to recognize an exception, it would apply only "when it is initially impossible to discern whether coverage is potentially implicated *and* when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case."[3] In the nearly two decades after *Northfield*, there remained a split of authority on the issue, with the Fifth Circuit and federal district courts being

1. Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp., 640 S.W.3d 195, 199 (Tex. 2022).
2. *See id.* at 199–200.
3. Northfield Ins. Co. v. Loving Home Care, Inc., 363 F.3d 523, 531 (5th Cir. 2004).

more likely to consider extrinsic evidence than state courts.[4] To resolve this dispute, the Fifth Circuit certified the issue to the Texas Supreme Court.[5]

In *Monroe*, the supreme court for the first time approved the consideration of extrinsic evidence under the following framework:

> [I]f the underlying petition states a claim that could trigger the duty to defend, and the application of the eight-corners rule, due to a gap in the plaintiff's pleading, is not determinative of whether coverage exists, Texas law permits consideration of extrinsic evidence provided the evidence (1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved.[6]

The supreme court, however, emphasized that it was not abandoning the eight-corners rule, which remains the initial inquiry to determine the duty to defend.[7] The supreme court also noted that its rule comports with *Northfield*, with three "minor refinements."[8] First, while *Northfield* permitted extrinsic evidence where it was "initially impossible" to determine if "coverage is potentially implicated," the supreme court explained that "this standard invites courts to [impermissibly] 'read facts into the pleadings [and] imagine factual scenarios'" that do not exist and that "[t]he better . . . inquiry . . . is [whether] the pleading contain[ed] the facts necessary to" determine coverage.[9] Second, the supreme court eliminated *Northfield*'s requirement that the evidence pertain "to a fundamental coverage issue."[10] Third, the supreme court ruled that while the evidence need not be in the form of a stipulation, the "evidence may not be considered if there would remain a genuine issue of material fact as to the coverage fact to be proved."[11]

The supreme court then applied this new standard to determine if extrinsic evidence could be considered in the case before it.[12] The underlying claimant sued the insured for damages resulting from the insured's drilling operations on the claimant's property, but the underlying pleading did not identify when the alleged damage happened.[13] The insured sought coverage from its two liability insurers, and one of the insurers "defended under a reservation of rights," but the other insurer "refused to defend" on the basis "that any property damage occurred [prior to] its policy period."[14] The defending insurer sued the other insurer, and the insurers stipulated

4. *See Monroe*, 640 S.W.3d at 201.
5. *Id.* at 196.
6. *Id.* at 203.
7. *Id.* at 201.
8. *Id.* at 202.
9. *Id.*
10. *Id.* at 202–03.
11. *Id.* at 203.
12. *Id.* at 203–04.
13. *See id.* at 197.
14. *Id.*

to the date when the drill bit incident happened, which was before the inception of the other insurer's policy.[15]

The supreme court explained that because its new standard did "not categorically limit the types of potentially coverage-determinative facts that may be proven by extrinsic evidence," evidence of an occurrence date may be considered if that evidence meets the standard's other requirements.[16] The supreme court, however, determined that the extrinsic evidence here could not be considered because it overlapped with the merits of liability, reasoning that "[a] dispute as to *when* property damage occurs also implicates *whether* property damage occurred on that date, forcing the insured to confess damages at a particular date to invoke coverage, when its position may very well be that no damage was sustained at all."[17]

Simultaneously with *Monroe*, the Texas Supreme Court issued a second opinion addressing the use of extrinsic evidence.[18] The auto liability policy covered "'damages because of bodily injury or property damage' . . . if those damages . . . result[ed] from the ownership, maintenance, or use of *a covered auto*," which was defined as "a land motor vehicle . . . *designed for travel on public roads*."[19] The underlying pleading alleged injuries resulting "from the negligent use of a 'golf cart.'"[20] Explaining that undefined terms are given their "ordinary and generally accepted meaning," the court looked to dictionary and statutory definitions of the term "golf cart" and determined that the term "refers to a cart designed for use on a golf course" and "not for travel on public roads."[21]

Then addressing whether extrinsic evidence could be considered, the supreme court determined that the "fact" of whether the vehicle was designed for travel on public roads pertained solely to coverage and did not overlap with the merits of liability, thus satisfying the first *Monroe* factor, but that the other factors were not met.[22] Specifically, because the pleading alleged the injured person was thrown from a "golf cart," there was no "gap" in the pleading that would prevent determination of the duty to defend.[23] The court emphasized that "[m]ere disagreements about the common, ordinary meaning of an undefined term do not create the type of 'gap' *Monroe* requires," and that absent "such a gap," extrinsic evidence showing that the person "was actually thrown from something other than a 'golf cart' would contradict the facts alleged in" the pleading.[24] Conversely, if the pleading had alleged only that the person "was thrown from a 'vehicle'

15. *See id.* at 198.
16. *Id.* at 204.
17. *Id.* (emphasis in original).
18. *See* Pharr-San Juan-Alamo Indep. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self Ins. Fund, 642 S.W.3d 466, 472 (Tex. 2022).
19. *Id.* at 468 (emphasis in original).
20. *Id.* at 473.
21. *Id.* at 473–77.
22. *Id.* at 477.
23. *Id.*
24. *Id.* at 477–78.

without" alleging "the type of vehicle or whether it was designed for travel on public roads," there would have been a gap and extrinsic evidence may have been permissible.[25] After determining that the *Monroe* exception did not apply, the supreme court applied the eight-corners rule and concluded there was no duty to defend because the pleading did not allege a claim for liability resulting from the use of a vehicle designed for travel on public roads as required by the policy.[26]

B. Federal District Courts Reached Varying Results in Deciding Whether to Apply the Monroe Exception

In the period since *Monroe* and *Pharr* were issued, numerous Texas federal courts have had the opportunity to consider the *Monroe* exception in decisions that are instructive as to how the exception will continue to be applied.

In *Drawbridge*, coverage hinged on whether a claim had been made during the policy period of a claims-made policy, the claim being the event that triggers coverage.[27] Because the pleading was silent as to when the claim was first made, the district court considered a letter that was not referenced in the pleading.[28] Looking to the *Monroe* factors, the district court held:

> First, the letter goes solely to the coverage issue of when the claim was first made and does not overlap with the merits of liability. Second, it does not contradict facts alleged in the underlying pleadings; in fact, it presages the underlying petition. Third, the letter conclusively goes to the heart of the pivotal issue, as it evidences that the claim against the Plaintiffs was first made prior to the inception of the policy period. Thus, the Keybridge Letter may be considered in determining whether Federal had a duty to defend Plaintiffs under the policy.[29]

The district court thus held that Federal had no duty to defend.[30]

Conversely, in *Everest National Insurance Co. v. Megasand, Enterprises, Inc.*,[31] the same federal district court distinguished *Drawbridge* and declined to consider prior pleadings in two underlying actions, finding the *Monroe* exception did not apply.[32] In *Megasand*, Everest argued that the two latest amended pleadings were "silent on a coverage-determinative fact" and the prior pleadings filled the "informational gap" because the prior pleadings provided more information about what materials had entered the waterways, thereby implicating the policy's pollution exclusion.[33]

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25. *Id.* at 478.
26. *Id.* at 478–79.
27. Drawbridge Energy US Ventures, LLC v. Fed. Ins. Co., No. 4:20-CV-03570, 2022 WL 991989, at *1–2 (S.D. Tex. Apr. 1, 2022).
28. *Id.* at *5.
29. *Id.* (citing Monroe, 640 S.W.3d at 202).
30. *Id.* at *6.
31. No. 4:20-CV-1265, 2022 WL 6246854, at *1 (S.D. Tex. Aug. 5, 2022) (mem.), *report and recommendation adopted*, 2022 WL 6225838 (S.D. Tex. Oct. 7, 2022).
32. *Id.* at *3.
33. *Id.* (citing Monroe, 640 S.W.3d at 200).

The district court disagreed, holding that it was clear from the operative pleadings what materials and substances entered the waterways; therefore, the claim was "not silent."[34] The district court found the pleading triggered a duty to defend.[35]

In *Benites v. Western World Insurance Co.*, "a group of family members and friends" sued Benites, from whom they had rented a condominium, and the condominium owners association after they sustained injuries caused by the collapse of a balcony attached to the condominium.[36] Benites sought coverage under the condominium owners association policy, which extended additional insured status to each individual unit owner, "but only with respect to liability arising out of the ownership, maintenance or repair of that portion of the premises which is *not* reserved for that unit owner's exclusive use or occupancy."[37] The petition contained allegations that Benites owned the condominium but did not contain allegations as to whether he had exclusive use or occupancy; therefore, the district court found the petition did not contain facts necessary to determine whether Benites was an insured.[38] The district court held that, based on *Monroe*, it was appropriate to allow extrinsic evidence.[39] The district court considered the association's Declarations and Bylaws in conjunction with the Texas Property Code and case law addressing whether balconies attached to condominiums are considered limited or general common elements, and concluded that Benites' private balcony was reserved for his "exclusive use or occupancy" and that he was not an insured.[40]

In *Progressive Commercial Casualty Ins. Co. v. Xpress Transportation Logistics, LLC*, Progressive sought a declaratory judgment that there was no coverage for its insured, Xpress, for an auto accident.[41] After Xpress failed to answer the coverage action, the court considered whether Progressive was entitled to default judgment on coverage.[42] The Progressive policy covered "claims involving only insured auto[s] identified on the policy's declarations page."[43] The accident involved an auto that was not scheduled on the Progressive policy, but the underlying petition made no mention of the truck model or ownership.[44] The court held that the *Monroe* exception applied because the underlying lawsuit "turn[ed] on the negligence" of the insured, "[t]he identification of the truck [did] not contradict facts alleged

34. *Id.*
35. *Id.* at *4.
36. No. 1:21-CV-1093-RP, 2022 WL 2820669, at *1 (W.D. Tex. July 18, 2022), *report and recommendation adopted*, 2022 WL 18034649 (W.D. Tex. Oct. 18, 2022).
37. *Id.* at *4 (emphasis added).
38. *Id.*
39. *Id.* (citing Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp., 640 S.W.3d 195, 202 (Tex. 2022)).
40. *Id.* at *5–6.
41. No. CV H-21-2683, 2022 WL 6779078, at *7 (S.D. Tex. Oct. 11, 2022).
42. *Id.*
43. *Id.*
44. *Id.*

in the underlying pleadings," and the identification of the truck established the coverage obligations.[45]

In *National Liability & Fire Insurance v. Turimex, LLC*, the insurer contended that it had no duty to defend because the accident at issue occurred outside of the policy's "coverage territory," which was generally defined to include the United States and Canada, but not Mexico.[46] The district court provided a roadmap as to how the *Monroe* factors are applied as it determined that extrinsic evidence could be introduced to show the accident occurred in Nuevo Leon, Mexico:

> First, the extrinsic evidence must be limited to the issue of coverage and may not overlap with the merits of liability. The underlying petition alleges three causes of negligence against Turimex. Ramon alleges that Turimex is liable for her injuries under a theory of respondeat superior, arguing that the negligent bus driver was acting within the course and scope of his employment for Turimex. Ramon also alleges that Turimex owed a duty to exercise reasonable care in hiring, training, supervising, and retaining its employees. In the alternative, Ramon alleges that Turimex is negligent for failing to use ordinary care to protect persons from dangerous activities. The extrinsic evidence at issue concerns where the accident occurred and whether it occurred within or outside of the "coverage territory." The location of the accident goes solely to an issue of coverage and not to the merits of liability as it does not speak to whether Turimex was negligent in causing Ramon's injuries. Second, the extrinsic evidence may not contradict any facts alleged in the underlying petition. Because the underlying petition is silent as to where the accident occurred, the extrinsic evidence showing that the accident occurred in Mexico does not contradict any facts in the underlying petition. In fact, National's evidence is consistent with the allegations in the petition because it alleges the incident occurred "in route to Cuernavaca [Mexico.]" Finally, the extrinsic evidence must conclusively establish the coverage fact to be proved. The Court finds that the evidence submitted by National conclusively establishes that the accident occurred in Mexico, a fact which is pivotal to determining whether coverage exists.[47]

The district court thus found that National did not owe Turimex a duty to defend or indemnify.[48]

Allstate Fire & Casualty Insurance Co. v. Hurtado involved a lawsuit arising from an auto collision in which the petition alleged that Hurtado "was in the course and scope of his employment as a courier for Data Rush."[49] Hurtado sought coverage under his personal auto policy, which

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45. *Id.* at *8. We note that although the district court found there was no coverage, it declined to enter default judgment that the MCS-90 endorsement did not apply.

46. No. 4:21-CV-3967, 2022 WL 16838038, at *1 (S.D. Tex. Oct. 20, 2022) (mem.), *report and recommendation adopted sub nom.*, 2022 WL 1683642 (S.D. Tex. Nov. 9, 2022).

47. *Id.* at *3 (internal citations omitted) (emphasis added to separate test factors).

48. *Id.* at *4.

49. No. 4:21-CV-3686, 2022 WL 4390644, at *2 (S.D. Tex. Aug. 31, 2022) (mem.), *report and recommendation adopted*, 2022 WL 4389704 (S.D. Tex. Sept. 22, 2022).

excluded "liability arising out of the ownership or operation of a vehicle while it is . . . being used to carry property for a fee . . . ."[50] However, the exclusion was subject to an exception, stating that the exclusion did not apply to bar coverage for the named insured (Hurtado) "unless the *primary* usage of the vehicle is to carry property for a fee."[51] The petition included no facts regarding "the primary usage" of the vehicle.[52] Looking at extrinsic evidence of Hurtado's deposition testimony as to the usage of the vehicle offered by Allstate, the district court concluded that the first two *Monroe* factors were met: *i.e.*, the evidence (1) did not overlap with Hurtado's alleged liability; and (2) did not contradict the facts alleged.[53] However, the district court found the evidence did not satisfy the third *Monroe* factor, as the extrinsic evidence did not *conclusively establish* the coverage fact at issue.[54] While "[t]he extrinsic evidence . . . establishe[d] that Hurtado [had] used the [vehicle] to carry property for a fee," the "extrinsic evidence [did] not *conclusively* establish that the *primary* usage of the [vehicle was] to carry property for a fee."[55] Relying on the eight corners analysis, the district court found a duty to defend existed because the petition did not include factual allegations establishing that Hurtado's "primary usage" of the vehicle was to carry property for a fee.[56]

We note that the decisions to date applying the *Monroe* exception and allowing extrinsic evidence have been from federal district courts, which had generally recognized the *Northfield* exception prior to *Monroe*; these courts have merely refined their approach to be in accordance with the test set out in *Monroe*.[57] What seems clear is that litigation will continue as to the

50. *Id.* at *1, *3.
51. *Id.* at *3 (emphasis added).
52. *Id.* at *4.
53. *Id.* at *5.
54. *Id.* at *5–6.
55. *Id.*
56. *Id.*
57. *See* Certain Underwriters at Lloyd's v. Keystone Dev., LLC, No. 3:21-CV-336-L, 2022 WL 6202129, at *5 (N.D. Tex. Oct. 7, 2022) (disallowing extrinsic evidence because the petition alleged the number of stories of the condominiums and no further evidence was needed to determine the height of those buildings; the petition therefore did not create a gap with respect to coverage); Allied Prop. & Cas. Ins. Co. v. Armadillo Distrib. Enter., No. 4:21-CV-00617-ALM, 2022 WL 3568482, at *6 (E.D. Tex. Aug. 18, 2022) (disallowing extrinsic evidence as to time of trademark damage because the complaint alleged no specific dates but generally alleged violations both before and within the policy period; thus, the complaint contained allegations sufficient to trigger a duty to defend); Allstate Vehicle & Prop. Ins. Co. v. Crawford, No. 3:21-CV-2806-K, 2022 WL 2790650, at *3–4, 7–8 (N.D. Tex. July 16, 2022) ("Because the Court finds that the Policy and the pleadings contain the facts necessary to resolve the question of whether the claim is covered, the Court sees no reason to deviate from the traditional eight-corners doctrine"; allegations regarding a "sprint-style device" used for racing sufficient to trigger the motor vehicle exclusion, and Allstate had no duty to defend or indemnify); Knife River Corp.—S. v. Zurich Am. Ins. Co., No. 3:21-CV-1344-B, 2022 WL 686625, at *7 (N.D. Tex. Mar. 8, 2022) (disallowing consideration of subcontract which allocated responsibility for certain tasks at construction site because it would "overlap with the merits of liability").

issues of whether and to what extent the *Monroe* exception is applicable in determining whether a duty to defend is implicated under Texas law.

C. The Fifth Circuit Reaffirms No Duty to Defend Until Insured Requests a Defense

Plaintiff-Appellant Osman Moreno worked as a painter for N.F. Painting, a contractor working for Beazer Homes, a home builder.[58] Moreno was injured after falling from a ladder and sued the contractor, N.F. Painting, and the homebuilder, Beazer.[59] Defendant-Appellee Sentinel Insurance Company had issued a business owner's policy to N.F. Painting, and Beazer "was an 'additional insured' under the Sentinel policy."[60]

Beazer requested a defense and indemnity from Sentinel, which Sentinel provided.[61] N.F. Painting, however, did not contact Sentinel about Moreno's lawsuit and did not request a defense.[62] Instead, N.F. Painting retained its own choice of counsel, who filed an answer.[63] Sentinel made numerous attempts to determine whether N.F. Painting was also seeking coverage, but N.F. Painting never requested a defense.[64] At Sentinel's request, N.F. Painting's counsel did however forward a copy of the petition.[65] Sentinel subsequently sent a letter to N.F. Painting and its counsel, denying coverage under the policy based on Moreno's status as an employee and requesting that N.F. Painting forward any new allegations or additional information that could alter Sentinel's position as to coverage.[66]

Beazer later settled with Moreno and was dismissed from the lawsuit.[67] In the following month, Moreno filed an Amended Petition against N.F. Painting, and Sentinel was not notified when the Amended Petition was filed.[68] Ultimately, a May 2019 Proposed Agreed Judgment stated that Sentinel provided liability insurance to N.F. Painting, that N.F. Painting placed Sentinel on proper notice of Moreno's claims, and that Moreno was entitled to over $1.6 million in damages.[69]

As a judgment creditor, Moreno then sued Sentinel directly, restating the "findings" of the state court's "Agreed Judgment."[70] Moreno argued that the policy does not expressly require an insured to "request" a defense and that Sentinel had knowledge of the underlying lawsuit because it

58. Moreno v. Sentinel Ins. Co., 35 F.4th 965, 968 (5th Cir. 2022).
59. *Id.*
60. *Id.*
61. *Id.* at 970.
62. *Id.*
63. *Id.*
64. *Id.* at 970–71.
65. *Id.* at 971.
66. *Id.* at 972.
67. *Id.*
68. *Id.*
69. *Id.* at 972–73.
70. *Id.* at 973.

was defending another defendant, Beazer, in the same case.[71] Moreno also argued that Sentinel's insured had, in fact, forwarded a copy of the Petition to Sentinel and that collateral estoppel prevented Sentinel from challenging the findings of the Agreed Judgment.[72] Sentinel argued that N.F. Painting never requested a defense or coverage and that Sentinel's duty to defend was never triggered.[73]

The district court concluded that Sentinel did not breach its policy obligations and ruled that the recitations in the Agreed Judgment were not binding because they were not actually litigated but were "transparently intended to establish Sentinel's liability for the judgment."[74] On appeal, relying on the Texas Supreme Court's *Crocker* opinion and others, the Fifth Circuit affirmed the district court's summary judgment for Sentinel, finding that an insured must not only forward suit papers but must request a defense, which did not occur in this case.[75] The court rejected Moreno's argument that notice of the lawsuit from co-defendant Beazer was sufficient, holding that Sentinel was not obligated to defend N.F. Painting based on knowledge of the lawsuit or notice by another insured.[76] The court also rejected an argument by Moreno on appeal that prejudice was required, finding that notice to the insurer was wholly lacking (where prejudice is not required) as opposed to cases where notice to the insurer is merely late (requiring prejudice).[77]

This case offers a more recent application of the long-standing *Crocker* rule, which remains strong precedent requiring that each insured provide notice of a claim and request a defense, even in a situation where the insurer has actual knowledge of the lawsuit.

III. CONCURRENT CAUSATION

Issues involving concurrent causation are litigated frequently, and Texas courts are in need of clarification from the Texas Supreme Court on some crucial issues. In *Overstreet v. Allstate Vehicle & Property Insurance Co.*, the Fifth Circuit was thwarted a second time from receiving answers from the Texas Supreme Court to certified questions regarding concurrent causation due to the parties' settlement.[78]

In *Overstreet*, the insured homeowner contended that his home was damaged by a wind and hail storm on June 6, 2018.[79] Allstate valued the loss at less than the deductible and paid the homeowner nothing.[80] In subsequent

71. *See id.* at 973–74, 977.
72. *Id.* at 973.
73. *Id.* at 977–78.
74. *Id.* at 973–74, & n.7.
75. *Id.* at 975 (citing Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Crocker, 246 S.W.3d 603, 608 (Tex. 2008); Harwell v. State Farm Mut. Auto. Ins. Co., 896 S.W.2d 170, 174–75 (Tex. 1995); Weaver v. Hartford Accident & Indem. Co., 570 S.W.2d 367, 370 (Tex. 1978)).
76. *Id.* at 976–77.
77. *Id.* at 978–79.
78. 34 F.4th 496, 497 (5th Cir. 2022).
79. *Id.*
80. *Id.*

coverage litigation, the district court granted the insurer's motion for summary judgment, finding that the losses involved concurrent causes and the insured had not met his burden of proving how much damage was caused by only the June 6, 2018 storm.[81] On appeal, the Fifth Circuit observed that Texas "courts have sent mixed signals about when the concurrent causation doctrine applies, and what the doctrine requires when it does."[82] The court noted that the homeowner contended his roof never leaked before the reported date of loss, but there was evidence of ordinary wear and tear, along with potential prior hail damage before the policy incepted.[83] Under the current concurrent causation case law, it is unclear whether this created a fact question for a jury; whether an insured must apportion damages, even for minor wear and tear that did not impair roof function; and whether an insured can satisfy its burden to segregate damages by simply attributing all of the loss to a covered cause.[84] The court reiterated its observation from *Frymire Home Services, Inc. v. Ohio Security Insurance Co.* that "'an ugly roof can function until it is hit by a hailstorm. Would the hail damage that rendered it nonfunctional be covered in full?' Existing precedents do not yield a clear answer."[85] Noting that "[t]here are substantial gaps in the concurrent causation doctrine" and that "this case poses significant consequences for the Texas insurance market," the Fifth Circuit certified the same three questions it had previously certified in *Frymire*:[86]

1. Whether the concurrent causation doctrine applies where there is any non-covered damage, including "wear and tear" to an insured property, but such damage does not directly cause the particular loss eventually experienced by plaintiffs;
2. If so, whether plaintiffs alleging that their loss was entirely caused by a single, covered peril bear the burden of attributing losses between that peril and other, non-covered or excluded perils that plaintiffs contend did not cause the particular loss; and
3. If so, whether plaintiffs can meet that burden with evidence indicating that the covered peril caused the entirety of the loss (that is, by implicitly attributing one hundred percent of the loss to that peril).[87]

Similar to *Frymire*, the *Overstreet* case settled after certification, and once again, the Texas Supreme Court did not have an opportunity to address these certified questions. However, these important questions, which have been certified twice but remain unanswered, will almost certainly make it back to the Texas Supreme Court in the future.

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81. *Id.*
82. *Id.*
83. *Id.* at 497–98.
84. *Id.* at 498–99.
85. *Id.* at 499 (citing Frymire Home Services, Inc. v. Ohio Sec. Ins. Co., 12 F.4th 467, 471 (5th Cir. 2021)).
86. The Texas Supreme Court did not have the opportunity to answer the *Frymire* questions as the case settled soon after certification. *Id.* at 497, 499.
87. *Id.* at 499.

In *Dillon Gage v. Certain Underwriters at Lloyds*, the Fifth Circuit was able to apply the Texas Supreme Court's answers to certified questions in a case involving an insured's "million-plus-dollar loss for sending gold coins to a thief who forged check[s] . . . and intercepted . . . shipment[s] of those coins."[88] In January 2018, Dillon Gage received an order for $549,000.00 in gold coins which he thought was from an orthopedic surgeon from Alabama.[89] In reality, the order was from a thief who stole the surgeon's identity and personal checks.[90] After receiving a signed (forged) check for the coins, Dillon Gage shipped the order by UPS and provided tracking information to the email address provided by the thief.[91] The thief then "sent UPS an instruction to hold the package . . . instead of delivering it," and an unknown person retrieved the package without signing for it minutes after it arrived at the UPS facility, despite the fact that UPS was not authorized "to reroute the package without Dillon Gage's consent."[92] Having successfully stolen the first shipment, the thief ordered and stole another $655,000.00 worth of coins using the same method.[93] The surgeon discovered the fraud and the checks were not honored.[94]

Dillon Gage filed an insurance claim and the insurer denied "pursuant to an exclusion for 'any claim . . . where the loss has been sustained by the Insured *consequent upon* handing over such Insured property to any third party against payment by [fraudulent check].'"[95] On cross-motions for summary judgment in subsequent coverage litigation, the district court concluded this exclusion applied.[96] On appeal, the parties disagreed as to the scope of the exclusion, and the Fifth Circuit determined that the language "consequent upon" had yet to be interpreted by the Texas Supreme Court.[97] The court thus certified the following questions:

> 1. Whether Dillon Gage's losses were sustained consequent upon handing over insured property to UPS against a fraudulent check, causing the policy exclusion to apply.
>
> And if that answer is yes,
>
> 2. Whether UPS's alleged errors are considered an independent cause of the losses under Texas Law.[98]

Concluding that the ordinary meaning of "consequent upon" is but-for causation, the Texas Supreme Court answered "yes" to the first question.[99]

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88. 26 F.4th 323, 324 (5th Cir. 2022).
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *See id.*
95. *Id.* (emphasis in original).
96. *Id.* at 325.
97. *Id.*
98. *Id.*
99. *Id.* (citing Dillon Gage, Inc. of Dallas v. Certain Underwriters at Lloyds Subscribing to Pol'y No. EE1701590, 636 S.W.3d 640, 644–45 (Tex. 2021)).

The supreme court answered "no" to the second question, concluding that "UPS's alleged negligence was a concurrent cause of loss, dependent upon Dillon Gage's handing over of the gold coins against fraudulent checks."[100] In light of these answers, the Fifth Circuit concluded Dillon Gage's losses were "sustained by the Insured *consequent upon* handing over such Insured property to any third party against payment by [fraudulent check]" and were thus excluded from coverage.[101]

Until the Texas Supreme Court provides clarity on the concurrent causation issue, litigants will likely continue to see "mixed signals" from the courts, as noted by the Fifth Circuit. Consequently, absent clear precedent to the contrary, an insurer relying on the concurrent causation doctrine should be able to assert there exists a "bona fide coverage dispute" in response to an insured's bad faith claim.

IV. TEXAS SUPREME COURT DECLINES TO EXPAND AN INSURER'S DUTY OF GOOD FAITH AND FAIR DEALING TO INSURER'S POST-ACCIDENT INSTRUCTIONS

In last year's Survey, we noted that a case to watch was *Elephant Ins. Co., LLC v. Kenyon*, where the Texas Supreme Court was asked to consider whether to broaden an insurer's duty to its insured outside of the insurance agreement in a case involving post-accident conduct.[102] In April of 2022, the supreme court issued its opinion and, following mixed decisions in the underlying courts, declined to find a separate duty of care in addition to the duty of good faith and fair dealing recognized by Texas courts.[103]

In *Elephant*, an insured motorist, Lorraine Kenyon, lost control of her vehicle while driving on a wet roadway, causing her car to slide into a guardrail.[104] After calling her husband, Mrs. Kenyon called "her insurer, Elephant Insurance Company, to report the accident."[105] During her discussion with the Elephant representative, Mrs. Kenyon asked whether Elephant wanted her to take pictures of the accident scene.[106] The Elephant representative allegedly confirmed that Mrs. Kenyon should take pictures, but there was no discussion between the two regarding the time, place, or manner in which the photographs should be taken.[107] Mrs. Kenyon's husband arrived at the scene and, after Mrs. Kenyon advised him that pictures were needed per the instruction from the Elephant representative, he began taking pictures of the vehicle.[108] Tragically, while Mr. Kenyon

100. *Id.* (citing *Dillon Gage*, 636 S.W.3d at 645–46).
101. *Id.* at 324–55.
102. J. Price Collins & Aaron G. Stendell, *Insurance Law*, 8 SMU Ann. Tex. Surv. 177, 190 (2022).
103. *See* Elephant Ins. Co., LLC v. Kenyon, 644 S.W.3d 137, 148 (Tex. 2022).
104. *Id.* at 140.
105. *Id.*
106. *Id.* at 141.
107. *Id.*
108. *See id.*

was standing off the road to take pictures, another driver lost control of their car on the wet roadway, striking and killing Mr. Kenyon.[109] Mrs. Kenyon subsequently filed suit against Elephant, alleging that Elephant's representative was negligent in "instructing" her to take the photographs of the accident scene.[110]

Mrs. Kenyon filed a wrongful death and survival action against Elephant and the other driver, asserting negligence theories against Elephant based on the argument that Elephant's call-center employee was negligent in instructing her to take the photos which "substantially increased the risk of harm" to Mr. Kenyon.[111] The trial court concluded that Elephant did not owe the Kenyons a duty with respect to Mrs. Kenyon's negligence-based claims and granted Elephant's motion for summary judgment.[112] In a split decision, the San Antonio Court of Appeals initially upheld the trial court's decision but subsequently reversed the trial court on rehearing.[113] Observing "that insurers . . . owe . . . insureds 'a duty of good faith and fair dealing,'" the court determined that under the circumstances, Elephant had a duty to protect the insured's safety when providing post-accident guidance.[114] Elephant appealed the appellate court's decision.[115]

Emphasizing the duty of good faith and fair dealing applies only to issues of timeliness and "unscrupulous" conduct in the investigation, processing, and payment of claims, the supreme court held:

> Kenyon's negligence and gross-negligence claims against Elephant for lack of appropriate "guidance" are not based on "unequal bargaining power," "the nature of insurance contracts," "tak[ing] advantage" of the insured's misfortunes, "bargaining for settlement or [resolution of] claims," or the deprivation of any contractually assured benefit.[116]

Accordingly, the supreme court determined that the duty of good faith and fair dealing was not applicable to Elephant's alleged misconduct.[117]

In determining whether Texas courts should recognize a separate duty of care under these circumstances, the supreme court applied what are commonly called the "*Phillips* factors."[118] Those factors require the court to weigh "the risk, foreseeability, and likelihood of injury against the social utility of the actor's conduct . . . the burden of guarding against the injury,

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109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 142.
113. *Id.* at 142–43.
114. *Id.* at 143.
115. *Id.* at 144.
116. *Id.* at 148–49 (citing Union Bankers Ins. Co. v. Shelton, 889 S.W.2d 278, 283 (Tex. 1994)).
117. *Id.* at 149.
118. *Id.* (citing Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523 (Tex. 1990)).

and the consequences of placing the burden on the defendant."[119] The court should also "consider whether one party . . . h[as] superior knowledge of the risk or . . . [ability] to control the actor who caused the harm."[120] After observing, among other things, that the risk of harm was as or more foreseeable to those at the scene than it was to the insurer's representative, the supreme court declined to impose a duty on Elephant to ensure the Kenyons' safety post-accident.[121]

The supreme court then evaluated whether Elephant may be liable under a "negligent undertaking" theory.[122] The supreme court observed this duty arises when the defendant undertakes to render services "necessary for the protection of the other's person or things" and either: (1) fails to exercise reasonable care which increases the risk of physical harm; or (2) the injured party is harmed because of its reliance on the defendant undertaking those services.[123] The supreme court rejected this argument, finding that "guiding an insured through the initial steps" of an insurance claim was "not an action 'necessary' to 'protect' the insureds or their property from 'harm.'"[124] Since Elephant did not undertake necessary protective action and Kenyon did not rely on anything the Elephant representative said or did not say with respect to ensuring the safety of a person or property, the supreme court declined to impose a duty on Elephant based on a negligent undertaking theory.[125] Accordingly, the supreme court concluded that Elephant did not owe a duty to the Kenyons and affirmed the trial court's grant of summary judgment as to Kenyon's negligence-based claims.[126]

V. COVID-19 CASES

The widespread impact of the COVID-19 pandemic continues to plague business owners, with many seeking relief from their insurers under the "business interruption" or "business income" coverages in their property insurance policies.[127] However, as these cases work their way through Texas courts, it is clear there are significant hurdles to coverage for these claims.

In *Terry Black's Barbecue, L.L.C. v. State Automobile Mutual Insurance Co.*, the insured sought coverage under its "all risk" commercial property policy for losses sustained when it slowed its usual business operations at its two restaurants in response to the Governor's March 19, 2020, executive

119. *Id.* (quoting Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170, 182 (Tex. 2004)).

120. *Id.* (citing Praesel v. Johnson, 967 S.W.2d 391, 397–98 (Tex. 1998)).

121. *Id.* at 149–51.

122. *Id.* at 151.

123. *Id.* (citing Torrington Co. v. Stutzman, 46 S.W.3d 829, 837–38 (Tex. 2000)).

124. *Id.* at 151–52.

125. *Id.* at 152.

126. *Id.*

127. *See generally* Natalie E. deLatour, *Insuring the "Uninsurable": Business Interruption Insurance Coverage & COVID-19*, 37 Ga. St. U. L. Rev. 1 (2021).

order.[128] The federal district court granted judgment on the pleadings in favor of the insurer, and the insured appealed.[129]

On appeal, the Fifth Circuit first addressed the policy's business income and extra expense provision (BI/EE), which applies to losses caused by "direct physical loss of or damage to property."[130] The court explained that although the words "direct physical loss" were not defined in the policy and had not been interpreted by Texas courts under a BI/EE policy, courts' interpretations of similar language in different types of policies were instructive.[131] Specifically, Texas courts have interpreted the term "physical" to mean "tangible" and the term "loss" to mean "a state of fact of being lost or destroyed, ruin or destruction."[132] Based on these authorities, the court concluded that the Texas Supreme Court would interpret "direct physical loss" to require "a tangible alteration or deprivation of property."[133] Reasoning that the insured maintained ownership of, access to, and ability to use all physical parts of its restaurants, the court determined the insured had not shown any tangible alteration or deprivation of its property and that the losses therefore were not covered under the BI/EE provision.[134]

The policy also contained a restaurant extension endorsement (REE) covering the suspension of operations due to a civil authority order "resulting from the actual or alleged . . . exposure of the described premises to a contagious or infectious disease."[135] Noting that the "plain meaning of 'resulting from' is causation," the court reasoned that the REE provision required a causal connection between the restaurant's exposure to a contagious disease and the civil authorities suspending their operations.[136] Because the insured did not allege that causal connection, the court concluded that the losses also were not covered under the REE provision.[137]

In two subsequent decisions, the Fifth Circuit followed its holdings in *Terry Black's Barbecue* to affirm the district courts' dismissals of the insureds' claims for coverage on the ground that absent tangible alteration or deprivation of the insureds' property, there was no direct physical loss or damage to property as required by the policies.[138]

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128. 22 F.4th 450, 453 (5th Cir. 2022).
129. *Id.* at 454.
130. *Id.* at 453, 455.
131. *Id.* at 455.
132. *Id.* at 455–56.
133. *Id.* at 456, 458.
134. *Id.*
135. *Id.* at 453, 458.
136. *Id.* at 458–59.
137. *Id.* at 459.
138. Ferrer & Poirot, GP v. Cincinnati Ins. Co., 36 F.4th 656, 658 (5th Cir. 2022) ("While COVID-19 has wrought great physical harm to people, it does not physically damage property within the plain meaning of 'physical.'"); Aggie Invs., L.L.C. v. Cont'l Cas. Co., No. 21-40382, 2022 WL 257439, at *2 (5th Cir. Jan. 26, 2022).

VI. TEXAS FEDERAL COURT CONFIRMS THAT WRONGFUL EVICTION PORTION OF "PERSONAL AND ADVERTISING INJURY" DEFINITION REQUIRES LANDLORD-TENANT RELATIONSHIP

In *Texas A&M University 12th Man Foundation v. Hartford Lloyds Insurance Co.*, plaintiffs in two underlying state court actions alleged that they were Texas A&M alumni who had donated to the 12th Man Foundation beginning in 1970 to purchase scholarships.[139] The donors alleged that the scholarships included promises that they would be assigned "best-available parking locations for home football games" and "established and best-available seating" for home and away football games, for life or some for thirty years.[140] Beginning in 2005, the Foundation implemented a "*Priority Point System* that reallocated parking spaces based on yearly donations," forcing the plaintiff donors to compete with other donors to retain their spaces.[141] Over the next few years, the Priority Point System was applied to football tickets for both away and then home games.[142] "The underlying plaintiffs brought claims" against the Foundation "for breach of contract, promissory estoppel, and breach of fiduciary duty."[143]

Hartford "issued an insurance policy to the Foundation in 2009 which was renewed annually" through 2018.[144] The policy provided coverage for "personal and advertising injury," defined in relevant part to include:

The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that the person occupies, committed by or on behalf of its owner, landlord or lessor.[145]

The Foundation sought coverage under this provision, and Hartford denied.[146] The Foundation argued that the ordinary meaning of "evict" is to force out, expel, or dispossess, and that one could be evicted from a stadium seat or parking space.[147] The district court, however, agreed with Hartford that the word "bears a more technical meaning" and requires a "landlord-tenant relationship."[148] The district court found that because the noun "eviction" was modified by the adjective "wrongful," the words must be interpreted together.[149] The district court further found that "Texas courts have interpreted this phrase to bear a technical meaning," requiring "a plaintiff to show (i) the existence of an unexpired lease, (ii) the tenant's

139. Tex. A&M Univ. 12th Man Found. v. Hartford Lloyds Ins. Co., 596 F. Supp. 3d 788, 790 (S.D. Tex. 2022).
140. *Id.*
141. *Id.* at 791 (emphasis in original).
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 791–92.
146. *Id.* at 792.
147. *Id.* at 793.
148. *Id.*
149. *Id.* at 793 (citing Hettler v. Travelers Lloyds Ins. Co., 190 S.W.3d 52, 57 (Tex. App.—Amarillo 2005, pet. denied)).

occupancy of the premises, (iii) the landlord's eviction of the tenant, and (iv) damages suffered by the tenant attributable to the eviction."[150]

The district court also found that invasion of the right of private occupancy must be read as a phrase in context with wrongful eviction and wrongful entry.[151] Texas courts have thus interpreted this phrase to be limited to "landlord-tenant scenarios or situations when the occupier has a vested interest in the occupancy of the premises."[152]

The district court further rejected the Foundation's argument that the seats and parking spots are premises from which someone can be evicted.[153] Citing dictionary definitions, the district court found that "[e]ach definition describes *premises* as the whole property, not a subunit of the property."[154] Finally, the district court "noted that *premises* is preceded . . . by *room* and *dwelling*," and that the Foundation's argument "would render these words superfluous," holding that "the clause doesn't protect an insured who expels an individual from any single *portion* of the property if that portion isn't a room or dwelling."[155] The district court concluded:

> The underlying plaintiffs contend that the [Priority Point System] resulted in their receipt of inferior stadium seats and parking spaces. No one contends that stadium seats and parking spaces fall within the definition of *room* or *dwelling*. And no native English speaker would suggest that a stadium seat or parking space is a *premises*. A stadium seat is instead *located on* the premises or is *part of* the premises. A parking space likewise is *located on* the premises or is *part of* the premises—it's not itself a premises.[156]

The district court thus found that Hartford had no duty to defend or indemnify the Foundation.[157]

Besides having interesting facts, this case confirms that Texas, which has some of the most well-developed case law addressing this issue, narrowly construes and ascribes specific meaning to the wrongful eviction subsection of the "personal and advertising injury" definition.

VII. APPRAISAL

Two significant appraisal opinions were released in 2022. The first, *Castanon v. Safeco Insurance Co. of Indiana*, addresses when an insured

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150. *Id.* at 793–94 (citing Garcia v, Galvan, Nos. 14–11–00338–CV, 14–11–00350–CV, 2012 WL 1606312, *3 (Tex. App,—Houston [14th Dist] 2012, pet dism'd) (mem. op.); 18 William V. Dorsaneo III et al., *Texas Litigation Guide* § 282.132 (2023)).

151. *Id.* at 794.

152. *Id.* (citing Decorative Ctr. Of Hous. V. Emps. Cas. Co., 833 S.W.2d 257, 260 (Tex. App.—Corpus Christi 1992, writ denied); 21 William V. Dorsaneo III et al., *Texas Litigation Guide* § 341.09)).

153. *Id.*

154. *Id.* (emphasis in original).

155. *Id.* (emphasis in original).

156. *Id.* at 796 (emphasis in original).

157. *Id.*

waives appraisal.[158] The second, *Texas Fair Plan Ass'n v. Adil Ahmed*, addresses whether an insurer that pays an appraisal award and prompt pay interest is entitled to summary judgment.[159]

In *Castanon*, the district court noted that the standard for waiving appraisal is high.[160] The party arguing waiver must show that (1) the party invoking appraisal unreasonably delayed in invoking appraisal and (2) that they were prejudiced by this delay.[161] Whether delay is reasonable is measured from when the parties reach an impasse; that is, "when there is a breakdown of good-faith negotiations" or "further negotiations would be futile."[162] Although whether delay was unreasonable is typically a fact question, courts have held that delays of seven, eleven, and twelve months are unreasonable.[163]

Although it may not be difficult to show unreasonable delay, the insurer must also show it was prejudiced, which is more difficult to establish.[164] In fact, most courts find a lack of prejudice and waiver is stopped at the second step.[165] However, in *Castanon*, the court held that Safeco was prejudiced by a delay such that the insured waived its right to appraisal.[166] Specifically, the court noted that the insured had already repaired the property and that Safeco had already incurred discovery and expert costs litigating the case for six months, which resulted in prejudice to Safeco.[167]

It remains to be seen if this case will represent a shift where courts no longer permit an insured to litigate a case through expert discovery and, upon realizing they may not reach a favorable result in court, only then invoke appraisal. It is notable that 2022 also saw a reversal of decades-long jurisprudence requiring prejudice to find waiver of an arbitration provision.[168] As the Texas Supreme Court has analyzed waiver of appraisal by comparison to waiver of arbitration, it is possible that the Texas Supreme Court may correspondingly conclude that prejudice is not required to show waiver of appraisal.[169] For now, *Castanon* remains an aberration in the appraisal-waiver jurisprudence, but it provides support for those wishing to oppose this type of gamesmanship.

In *Adil*, the Fourteenth District Court of Appeals considered a question of first impression—whether an insurer who pays an appraisal award and

158. No. 5:21-CV-00851-XR, 2022 WL 2671866, at *1 (W.D. Tex. July 8, 2022).
159. 654 S.W.3d 488, 489–90 (Tex. App.—Houston [14th] Dist. 2022, no pet. h.).
160. *See Castanon*, 2022 WL 2671866, at *1.
161. *Id.*
162. *Id.* at *2.
163. *See id.* (collecting cases).
164. *See id.* at *1–2.
165. *See generally* Brendan K. McBride et al., *Insurance Appraisal in Texas and its Place in Coverage Litigation*, 50 St. Mary's L.J. 405, 415–16 (2019).
166. *Castanon*, 2022 WL 2671866, at *2.
167. *Id.*
168. *See* Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1714 (2022) ("[P]rejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA.").
169. *See* In re Universal Underwriters of Tex. Ins. Co., 345 S.W.3d 404, 411 (Tex. 2011).

interest is entitled to summary judgment.[170] The *Adil* court answered no, relying on the Texas Supreme Court's dicta in *Barbara Technologies Corp. v. State Farm Lloyds*.[171] In *Barbara Technologies*, the Texas Supreme Court noted that appraisal "represents a willingness to resolve a dispute outside of court—often without admitting liability on the claim, or even specifically disclaiming liability—similar to a settlement."[172] Because payment of the award is not an admission of liability nor a judicial determination, payment cannot resolve the question of whether an insurer is liable on the claim, a core inquiry of a prompt pay claim.[173] As a result, the supreme court held that payment of an appraisal award does not "conclusively establish" that the insurer is not liable for the claim.[174]

Taking this one step further, the *Adil* court concluded that because payment of an appraisal award and interest is similar to settlement, granting summary judgment would in effect force the insured to accept a settlement to which he did not agree.[175] The insurer would be entitled to an offset for the payment but not summary judgment, as there remains a fact question over whether payment of the appraisal award and interest constitutes "accepting" the claim.[176]

This case highlights some of the potential pitfalls in resolving appraisal payments and provides a cautionary tale that both sides should have a clear understanding of what payment of an appraisal award and interest represents.

VIII. UNINSURED/UNDERINSURED MOTORIST COVERAGE—WHAT DOES OCCUPYING MEAN?

In *Hill v. Allstate Fire & Casualty Insurance Co.*, the Fourteenth District Court of Appeals addressed the fact-specific Uninsured/Underinsured (UM/UIM) issue which has been the subject of seemingly inconsistent case law throughout the country: what constitutes occupying a covered auto?[177] In *Hill*, Cortney Hill borrowed her mother's vehicle to run errands, taking along J.B. and another minor, D.M.[178] The car ran out of gas, and Cortney called her future mother-in-law, Evelyn Brown, who filled a gas can and parked behind Cortney.[179] Cortney took the gas can and was filling the gas

170. Tex. Fair Plan Ass'n v. Ahmed, 654 S.W.3d 488, 490 (Tex. App.—Houston [14th Dist.] 2022, no pet. h.).

171. *Id.* (citing Barbara Techs. Corp. v. State Farm Lloyds, 589 S.W.3d 806, 819 (Tex. 2019)).

172. *Id.* at 493 (quoting *Barbara Techs.*, 589 S.W.3d at 820).

173. *Id.*

174. *Id.*

175. *Id.* ("[T]here is simply a claim that [the insurer] sent a payment to [the insured] that may or may not constitute the full amount of the interest owed . . . under the [Prompt Payment Act].").

176. *Id.* at 493–94.

177. *See* Hill v. Allstate Fire & Cas. Ins. Co., 652 S.W.3d 516, 518, 522–23 (Tex. App.—Houston [14th Dist.] 2022, no pet.).

178. *Id.* at 518.

179. *Id.*

tank, pressing her body against the car to avoid passing cars.[180] D.M. was holding the door handle as a vehicle approached rapidly, and he took evasive maneuvers to protect himself by laying on the roadway in close proximity to the vehicle.[181] The approaching vehicle crashed into the back of Evelyn's vehicle and ran over Cortney's foot.[182] Evelyn died in the ambulance.[183]

Cortney and D.M. sought UIM coverage under Cortney's mother's policy issued by Allstate.[184] The UM/UIM form protected "'covered person[s]' while occupying the covered auto."[185] "[C]overed person[s]" were defined in relevant part as "[a]ny other person occupying our covered auto."[186] "Occupying" was defined as "in, upon, getting in, on, out, or off."[187] Thus, the issue before the court was "whether Cortney and D.M. were 'occupying' the vehicle during the accident."[188]

Allstate argued that "Cortney's 'incidental contact' with the vehicle [did] not equate to her being 'on' or 'upon' the vehicle."[189] However, looking to "the common and ordinary meaning[] of the word 'upon'" as being in "contact with," the court found it "reasonable to conclude the parties contemplated a construction of the word that would include actual physical contact with the vehicle."[190] The court distinguished a prior Texas Supreme Court case, *United States Fidelity & Guaranty Co. v. Goudeau*, on its facts because there, the supreme court held that a UM/UIM claimant was not occupying a vehicle where he was not in contact with the vehicle until *after* the crash when it pinned him against a wall.[191] As to D.M., the court held that "fair-minded jurors could differ in their conclusions regarding whether D.M. was in a single course of action that falls within the ordinary, everyday meaning of 'occupying,' i.e., 'getting in, on, out or off,' the vehicle, even considering that D.M. took evasive actions and was not physically touching the vehicle immediately prior to the accident."[192] The court therefore found there was "a genuine issue of material fact" regarding whether Cortney and D.M. were "occupying" the vehicle at the time of the accident and reversed the trial court's grant of summary judgment.[193]

Significantly, one of the three justices on the panel, Justice Kevin Jewell, dissented, stating he "would hold that [Cortney] and D.M. were not 'occupying' the vehicle at the time of the incident and therefore did not

180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 518–19.
185. *Id.* at 518.
186. *Id.* at 517.
187. *Id.* at 518.
188. *Id.* at 520.
189. *Id.*
190. *Id.* at 521.
191. *Id.* at 520 (citing United States Fid. & Guar. Co. v. Goudeau, 272 S.W.3d 603, 606 (Tex. 2008)).
192. *Id.* at 521.
193. *Id.*

qualify as covered persons . . . ."[194] Justice Jewell looked to *Ferguson v. Aetna Casualty & Surety Co.*, which rejected the "contention that 'physical contact' alone is the test as to whether an insured is 'in or upon' an automobile."[195] As to whether Cortney was "on" the vehicle, he pointed out that the term "on" is modified by the gerund "getting," and there was no evidence that Cortney was "getting on" the vehicle.[196]

Justice Jewell similarly found that under *Ferguson*, D.M. was not "upon" the vehicle by touching the door handle in the seconds prior to the accident.[197] On the question of whether D.M. was "getting in" the vehicle, Justice Jewell stated: "[s]tanding next to the car—even touching the door handle—without taking action to open the door and enter the car's interior does not constitute 'occupying' the car under Texas law."[198]

This case raises numerous questions about what constitutes occupying a vehicle for purposes of UM/UIM coverage, underscoring the fact-intensive nature of the inquiry. We expect more litigation will follow regarding this issue that may ultimately be addressed by the Texas Supreme Court.

IX. PERILS V. ALL-RISK—THE POLICY MEANS WHAT IT SAYS

In *Landmark American Insurance Co. v. SCD Memorial Place II, LLC*, the Fifth Circuit addressed "whether an insurance policy covered flood-related damage sustained by a building during Hurricane Harvey.[199] The policy at issue was a "deductible buy back policy," a type of policy that an insured may purchase to cover a high deductible on the insured's primary insurance policy.[200] Here, SCD Memorial Place, II, LLC's (SCD) primary policy was issued by Lexington Insurance Company, and was an "all risks" policy with a high deductible that covered "all risks of direct physical loss or damage including flood, earth movement, and equipment breakdown."[201] SCD purchased the Landmark policy to help cover the cost of the deductible.[202] The insuring clause of the Landmark policy provided it would cover damage caused by "any of such perils as are set forth in item 3 of the schedule, and which are also covered by [the primary insurance]."[203] Item 3 states that the perils covered are "Windstorm or Hail associated with a Named Storm."[204]

194. *Id.* at 522 (Jewell, J., dissenting).
195. *Id.* at 523 (quoting Ferguson v. Aetna Cas. & Sur. Co., 369 S.W.2d 844 (Tex. App.—Waco 1963, writ ref'd)) (Jewell, J., dissenting).
196. *Id.* (Jewell, J., dissenting).
197. *Id.* at 524 (Jewell, J., dissenting).
198. *Id.* (Jewell, J., dissenting).
199. 25 F.4th 283, 284 (5th Cir. 2022).
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* at 284–85.
204. *Id.* at 285.

In August 2017, Hurricane Harvey, a Named Storm, "caused tremendous damage to one of SCD's insured properties."[205] The damage was caused by a bayou overflow which flooded SCD's property.[206] An independent adjuster confirmed there was no reported wind or hail damage to the property.[207] The Lexington policy paid out millions of dollars for damage to the property, but Landmark filed a declaratory judgment action against SCD seeking a declaration that its policy did not apply to the loss.[208]

On motions for cross-summary judgment, the district court agreed with SCD that the Landmark policy applied.[209] On appeal, SCD argued that because Hurricane Harvey was a "Windstorm," and that all perils associated with it were covered under the Landmark policy.[210] Landmark, on the other hand, argued that the only perils covered for any Named Storm were "Windstorm" and "Hail."[211] The court agreed with Landmark, finding that its interpretation "aligns with the plain meaning of the text of the policy."[212] Specifically, the policy's listing of "Windstorm" and "Hail" separately established that the policy covers certain specified perils but not others.[213] The court rejected SCD's contention that *Pan Am Equities, Inc. v. Lexington Insurance Co.* stands for "the proposition that, as a matter of law, the peril of 'Windstorm' includes the peril of flood."[214] The court concluded that in *Pan Am*, the "Named Storm provision" enlarged what qualified as a loss under the "Windstorm deductible," whereas here, "the term 'Named Storm' is the overarching occurrence, and the policy expressly describes which perils associated with that occurrence are covered."[215] Furthermore, the *Pan Am* policy specifically "enlarged" the term "Windstorm" to "include flood-related damage."[216] Landmark is a good example of a Texas court applying the rules of construction to read an insurance policy according to its terms.

X. FIFTH CIRCUIT WIDENS AVAILABILITY OF FEDERAL COURT JURISDICTION IN PROPERTY COVERAGE DISPUTES

Chapter 542A of the Texas Insurance Code provides "a framework by which an [insurer] can elect to accept whatever liability its agent may have for the agent's acts or omissions related to the claim."[217] If the insurer

205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 284.
210. *Id.* at 286.
211. *Id.*
212. *Id.*
213. *Id.* at 287.
214. *Id.* (citing Pan Am Equities, Inc. v. Lexington Ins. Co., 959 F.3d 671 (5th Cir. 2020)).
215. *Id.* (citing *Pan Am*, 959 F.3d at 673–75).
216. *Id.* at 288 (citing *Pan Am*, 959 F.3d at 676).
217. *See* TEX. INS. CODE ANN. § 542A.006(a); Jennifer Martin & Timothy P. Delabar, *Fifth Circuit Widens Availability of Federal Jurisdiction in Property Insurance Disputes*, XII 13 NAT'L L. REV. 304 (2022).

makes its election before suit is filed, "no cause of action exists against the agent."[218] If the insurer makes its election after suit is filed, the court must dismiss the agent with prejudice.[219] Since this statute was enacted in 2017, federal district courts have been divided over the statute's impact on whether a suit filed in state court can be removed to federal court, even resulting in conflicting decisions from judges within the same district.[220] Although the courts agreed that a case is removable if the election is made prior to suit being filed, they disagreed on removability when the election is made after the suit is filed.[221] Because the agent was a proper party when the suit was filed, some federal district courts held that the removal was barred by the "voluntary-involuntary rule," which holds that if a case is not initially removable to federal court, then it can only become removable by the voluntary act of the plaintiff.[222] "This became known as the majority view."[223] In contrast, the federal district courts that adopted the minority view held that because the election is irrevocable and there is no possibility that the insured can recover against the agent, the "improper-joinder rule" applies and the case is removable.[224]

This split in authority created great uncertainty for both insurers and insureds, leaving them not knowing if their case was removable until after the insurer filed the notice of removal and the case was assigned to a judge.[225] In *Advanced Indicator & Manufacturing, Inc. v. Acadia Insurance Co.*, the Fifth Circuit resolved this split and adopted the minority view.[226] The court explained that this approach is a "natural extension" of its precedent recognizing an exception to the voluntary-involuntary rule where the "claim against a non-diverse or in-state defendant is dismissed on account of fraudulent joinder."[227] Because the insurer's election meant the insured had no possibility of recovery against the agent, the court reasoned that the agent was improperly joined at the time of removal, such that the removal was proper.[228] As the concurring opinion noted, this decision is not limited to Chapter 542A and "all but eviscerates the voluntary-involuntary rule" in the Fifth Circuit.[229] Thus, defendants of all types may be able to more freely access the federal courts on cases that previously seemed non-removable.

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218. Tex. Ins. Code § 542A.006(b).
219. *Id.* § 542A.006(c).
220. Martin & Delabar, *supra* note 217.
221. *Id.*
222. *See, e.g.*, Morgan v. Chubb Lloyds Ins. Co., 541 F. Supp.3d 754, 757 (N.D. Tex. 2021).
223. Martin & Delabar, *supra* note 217.
224. *See, e.g.*, Valverde v. Maxum Cas. Ins. Co., 558 F. Supp.3d 385, 396–98 (S.D. Tex. 2021).
225. Martin & Delabar, *supra* note 217.
226. Advanced Indicator & Mfg., Inc. v. Acadia Ins. Co., 50 F.4th 469, 474 (5thth Cir. 2022).
227. *Id.*
228. *Id.*
229. *Id.* at 478 (Engelhardt, J., concurring).