

**THE COURT OF APPEALS FOR THE FIFTH  
CIRCUIT: A SELECTIVE REVIEW AND ANALYSIS  
OF THE PANELS’ 2010-2011 INSURANCE-LAW  
OPINIONS**

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## I. INTRODUCTION

The Court of Appeals for the Fifth Circuit's panels decided approximately 134 insurance-law or insurance-related disputes between July 1, 2010, and June 30, 2011.<sup>1</sup> To a greater or lesser degree, however, only twenty-six decisions are simply highlighted or discussed fully in this Article.<sup>2</sup> Of course, the reason is not complicated: Slip opinions and unpublished decisions comprised the greater majority of the Fifth Circuit's rulings.<sup>3</sup> In addition, among the cases selected

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1. On August 1, 2011, the author accessed Westlaw and searched the Court of Appeals for the Fifth Circuit's database (CTA5). The author submitted the query, "sy (insurer policy insured insurance) & date (after June 30, 2010) & date (before July 1, 2011)," which produced 134 insurance-law and insurance-related cases.

2. Each of the following twenty-six decisions were read thoroughly and considered for a full review and analysis: Case 1: *Danos Marine, Inc. v. Certain Primary Prot. and Indem. Underwriters*, 613 F.3d 479 (5th Cir. July 2010)—Eastern District of Louisiana; Case 2: *Stewart Enters., Inc. v. RSUI Indem. Co.*, 614 F.3d 117 (5th Cir. Aug. 2010) (per curiam)—Eastern District of Louisiana; Case 3: *Bayle v. Allstate Ins. Co.*, 615 F.3d 350 (5th Cir. Aug. 2010)—Eastern District of Louisiana; Case 4: *Consol. Cos., Inc. v. Lexington Ins. Co.*, 616 F.3d 422 (5th Cir. Aug. 2010)—Eastern District of Louisiana; Case 5: *Bradley v. Allstate Ins. Co.*, 620 F.3d 509 (5th Cir. Sept. 2010)—Eastern District of Louisiana; Case 6: *Cal-Dive Int'l, Inc. v. Seabright Ins. Co.*, 627 F.3d 110 (5th Cir. Nov. 2010)—Eastern District of Louisiana; Case 7: *Seacor Holdings, Inc. v. Commonwealth Ins. Co.*, 635 F.3d 675 (5th Cir. Mar. 2011)—Eastern District of Louisiana; Case 8: *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683 (5th Cir. Mar. 2011)—Eastern District of Louisiana; Case 9: *French v. Allstate Indem. Co.*, 637 F.3d 571 (5th Cir. Apr. 2011)—Eastern District of Louisiana; Case 10: *Bayou Steel Corp. v. Nat'l Union Fire Ins. Co.*, 642 F.3d 506 (5th Cir. May 2011)—Eastern District of Louisiana; Case 11: *Penthouse Owners Ass'n v. Certain Underwriters at Lloyds, London*, 612 F.3d 383 (5th Cir. July 2010)—Southern District of Mississippi; Case 12: *Canal Ins. Co. v. Coleman*, 625 F.3d 244 (5th Cir. Nov. 2010)—Northern District of Mississippi; Case 13: *Capital City Ins. Co. v. Hurst*, 632 F.3d 898 (5th Cir. Feb. 2011)—Southern District of Mississippi; Case 14: *Barden Miss. Gaming L.L.C. v. Great N. Ins. Co.*, 638 F.3d 476 (5th Cir. Apr. 2011)—Northern District of Mississippi; Case 15: *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299 (5th Cir. July 2010)—Southern District of Texas; Case 16: *Standard Waste Sys. Ltd. v. Mid-Continent Cas. Co.*, 612 F.3d 394 (5th Cir. July 2010)—Northern District of Texas; Case 17: *Great Am. Ins. Co. v. AFS/IBEX Fin. Servs., Inc.*, 612 F.3d 800 (5th Cir. July 2010)—Northern District of Texas; Case 18: *RSR Corp. v. Int'l Ins. Co.*, 612 F.3d 851 (5th Cir. July 2010)—Northern District of Texas; Case 19: *Emp'rs Mut. Cas. Co. v. Bonilla*, 613 F.3d 512 (5th Cir. July 2010)—Northern District of Texas; Case 20: *Mid-Continent Cas. Co. v. Bay Rock Operating Co.*, 614 F.3d 105 (5th Cir. Aug. 2010)—Western District of Texas; Case 21: *DPC Indus., Inc. v. Am. Int'l Specialty Lines Ins. Co.*, 615 F.3d 609 (5th Cir. Aug. 2010)—Southern District of Texas; Case 22: *Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel, L.L.C.*, 620 F.3d 558 (5th Cir. Sept. 2010)—Northern District of Texas; Case 23: *Keller Found., Inc. v. Wausau Underwriters Ins. Co.*, 626 F.3d 871 (5th Cir. Nov. 2010)—Western District of Texas; Case 24: *VRV Dev. L.P. v. Mid-Continent Cas. Co.*, 630 F.3d 451 (5th Cir. Jan. 2011)—Northern District of Texas; Case 25: *Md. Cas. Co. v. Acceptance Indem. Ins. Co.*, 639 F.3d 701 (5th Cir. Apr. 2011)—Western District of Texas; Case 26: *Evanston Ins. Co. v. Legacy of Life, Inc.*, 645 F.3d 739 (5th Cir. June 2011)—Western District of Texas.

After weighing the relative significance of the procedural and substantive questions appearing in each case, the author, however, decided not to discuss fully the following thirteen cases in this review: Case 1, Case 6, Case 7, Case 8, Case 10, Case 14, Case 15, Case 16, Case 17, Case 20, Case 24, Case 25, Case 26.

3. Compare *supra* note 1 (explaining that the 5th Circuit decided 134 insurance-law cases and insurance-related cases from June 30, 2010, to July 1, 2011), with *supra* note 2 (explaining that of the 134 decisions, 26 are available for full analysis). There were twenty-three slip opinions and the remainder were

for review, thirty-nine percent (38.5%) originated in the United States District Court for the Eastern District of Louisiana.<sup>4</sup> And, every Louisiana case involved a *first-party* insurance dispute.<sup>5</sup> To be sure, that percentage is significant. The explanation, however, mirrors largely the one proffered in the 2009–2010 Fifth Circuit review: Three to six years after causing massive property losses along the Gulf Coast, Hurricanes Katrina and Gustav continue to generate large numbers of first-party insurance lawsuits in the Eastern District of Louisiana as well as in the Southern District of Mississippi.<sup>6</sup>

On the other hand, forty-six percent (46.2%) of the discussed decisions were initiated in the United States District Courts for the Northern, Southern, and Western Districts of Texas. And, of these latter cases, most were filed in the Northern and Western Districts. Unlike the controversies in the Louisiana cases, however, all of the disputes in the Texas cases involved *third-party* insurance claims.<sup>7</sup> The remaining fifteen percent (15.3%) of insurance controversies began in the United States District Courts for the Northern and Southern Districts of Mississippi. And those cases involved both first-party and third-party insurance disputes.<sup>8</sup>

Among the first-party and third-party insurance decisions discussed or highlighted in this Article, there are no novel or major procedural disputes. Instead, insurance consumers and insurers asked the Fifth Circuit to address and resolve only substantive questions of fact and law.<sup>9</sup> Generally, those questions are (1) whether residential and commercial property insurers have a

labeled “not for publication” or contained procedural or substantive decisions that were not unique or groundbreaking. See *supra* note 1.

4. See *supra* note 2.

5. See *supra* note 2; see also Willy E. Rice, *Destroyed Community Property, Damaged Persons, and Insurers’ Duty to Indemnify Innocent Spouses and Other Co-Insured Fiduciaries: An Attempt to Harmonize Conflicting Federal and State Courts’ Declaratory Judgments*, 2 EST. PLAN. & COMMUNITY PROP. L.J. 63, 74 (2009) (“[P]rudent insurance consumers commonly purchase two types of insurance contracts. Some insurance agreements are called ‘first-party insurance.’ First-party insurance covers innocent insureds’ person and property. The other is labeled ‘third-party insurance.’ The latter covers innocent insureds who might be vicariously liable for deviant co-insureds’ negligent or intentional conduct. Unquestionably, there are major and legally significant differences between the two categories of insurance. Part III briefly discusses those insurance contracts, since innocent co-insured spouses and other co-insured fiduciaries commence legal actions against insurers under both first and third-party insurance contracts.”).

6. See Willy E. Rice, *The Court of Appeals for the Fifth Circuit: A Review of Selected 2009-2010 Insurance Decisions*, 43 TEX. TECH L. REV. 971, 973 n.6 (2011); Lavonne Kuykendall, *Hurricane Gustav: Estimates on Losses Are Reduced*, WALL ST. J., Sept. 2, 2008, at C7; see also *infra* notes 22-146, 288-366 and accompanying text (discussing Hurricanes Katrina- and Gustav-related cases).

7. See *Evanston Ins.*, 645 F.3d 739; *Md. Cas.*, 639 F.3d 701; *VRV Dev.*, 630 F.3d 451; *Keller Found.*, 626 F.3d 871; *Rentech Steel*, 620 F.3d 558; *DPC Indus.*, 615 F.3d 609; *Bay Rock Operating Co.*, 614 F.3d 105; *Bonilla*, 613 F.3d 512; *RSR Corp.*, 612 F.3d 851; *Great Am. Ins.*, 612 F.3d 800; *Standard Waste Sys.*, 612 F.3d 394; *Amerisure Ins.*, 611 F.3d 299.

8. See *Barden Miss. Gaming L.L.C. v. Great N. Ins. Co.*, 638 F.3d 476 (5th Cir. Apr. 2011)—Northern District of Mississippi; *Capital City Ins. Co. v. Hurst*, 632 F.3d 898 (5th Cir. Feb. 2011)—Southern District of Mississippi; *Canal Ins. Co. v. Coleman*, 625 F.3d 244 (5th Cir. Nov. 2010)—Northern District of Mississippi; *Penthouse Owners Ass’n v. Certain Underwriters at Lloyds, London*, 612 F.3d 383 (5th Cir. July 2010)—Southern District of Mississippi.

9. See *infra* Parts II-III.

contractual duty to pay first-party tangible and intangible property-loss claims;<sup>10</sup> (2) whether various liability insurers have a contractual duty to defend insureds against third parties' personal-injury and property-damage lawsuits;<sup>11</sup> and (3) whether indemnity insurers have a contractual duty to reimburse or indemnify insureds after the latter used out-of-pocket funds against third parties' environmental pollution lawsuits where insureds settle, defend themselves, or both.<sup>12</sup>

More precisely, among other specific questions, litigants asked the Fifth Circuit panels to determine (1) whether property insurers have a contractual duty to pay "additional insurance proceeds" after settling property owners' first-party claims;<sup>13</sup> (2) whether the doctrine of anti-concurrent causation bars insureds' reimbursement requests under first-party property-insurance contracts;<sup>14</sup> (3) whether "additional insurance payments" are impermissible "double recovery" under property insurance contracts;<sup>15</sup> (4) whether property insurers have a contractual obligation to indemnify business owners after the latter incur business interruption losses;<sup>16</sup> and (5) whether environmental liability and commercial-general-liability insurers must pay insurance proceeds to decontaminate polluted areas and pay third-party victims' pollution-related personal-injury and property-damage claims.<sup>17</sup>

Furthermore, these introductory remarks would be incomplete without mentioning the following: Several panels made "slight" and "full" *Erie* guesses to decide a few controversies.<sup>18</sup> And, another panel certified two substantive

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10. See *infra* Part I.A-B.

11. See *infra* Part II.A-B.

12. See *infra* Part III.

13. See *infra* notes 22-143 and accompanying text.

14. See *infra* notes 148-92 and accompanying text.

15. See *infra* notes 195-284 and accompanying text.

16. See *infra* notes 285-366 and accompanying text.

17. See *infra* notes 583-748 and accompanying text.

18. See *Bradley v. Allstate Ins. Co. (Bradley II)*, 620 F.3d 509, 517 n.2 (5th Cir. Sept. 2010) ("When sitting in diversity, this Court applies the substantive law of the state.") (citing *Erie R.R. v. Tompkins*, 304 U.S. 64, 89 (1938)); *Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel, L.L.C.*, 620 F.3d 558, 564 (5th Cir. Sept. 2010) ("Where, as here, the proper resolution of the case turns on the interpretation of Texas law, we 'are bound to apply [Texas] law as interpreted by the state's highest court.' Because the Texas Supreme Court has never ruled on whether the Texas Workers' Compensation Act 'obligates' a nonsubscribing employer to compensate an employee for injuries sustained due to employer negligence, we must make an 'Erie guess' as to how the Texas Supreme Court would rule upon the issue based on (1) decisions of the [Texas] Supreme Court in analogous cases, (2) the rationales and analyses underlying [Texas] Supreme Court decisions on related issues, (3) dicta by the [Texas] Supreme Court, (4) lower state court decisions, (5) the general rule on the question, (6) the rulings of courts of other states to which [Texas] courts look when formulating substantive law and (7) other available sources, such as treatises and legal commentaries. . . . In making our *Erie* guess, we look first to those Texas Supreme Court cases that, while not deciding the issue, provide guidance as to how the Texas Supreme Court would decide the question before us. Our preeminent *Erie*-guess authorities, language and decisions from the Texas Supreme Court, suggest that the court would find that a negligence claim against a nonsubscriber is a common-law claim, and that section 406.033 imposes no 'obligation' upon Rentech Steel to pay the Teels' judgment." (citations omitted) (citing *Barfield v. Madison Cnty., Miss.*, 212 F.3d 269, 271-72 (5th Cir. 2000)); *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 307, 310 n.4 (5th Cir. July 2010) ("Since *Mid-Continent*, the Texas Supreme Court has not

questions of law to the Texas Supreme Court instead of making *Erie* guesses.<sup>19</sup> Finally, based on the author's prior reviews, the Fifth Circuit Court of Appeals does not intentionally assign a theme to the aggregate of the panels' yearly insurance-law decisions.<sup>20</sup> A careful reading of the 2010–2011 cases, however, leads the author to this conclusion: Whether intended or unintended, the greater majority of this year's insurance-law rulings and declarations falls under the

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specified the precise boundaries of its holding as it applies to contractual subrogation when the insured is fully indemnified. Nor do we attempt to do so here. Instead, our decision here is an *Erie* guess, and in making an *Erie* guess, we must determine how the Texas Supreme Court would resolve the issue under the specific circumstances presented. . . . In making an *Erie* guess, this court may consult the decisions of other jurisdictions so long as the highest court of the forum state has not addressed the issue.”); *Emp’rs Mut. Cas. Co. v. Bonilla*, 613 F.3d 512, 519 (5th Cir. July 2010) (“We acknowledge finding no published Texas caselaw . . . . We conclude, though, that the Texas Supreme Court if presented with this precise issue would take as a natural next step from *Lindsey* that this accident occurred from ‘the inherent nature’ of this mobile catering truck. The vehicle intended is not some mystical, generic vehicle, but the one specifically insured by the parties to the policy. The special nature of this vehicle was not hidden or otherwise unknown—it literally was in black and white in the policy. . . . The policies . . . in this case defined the business as ‘mobile catering’ and expressly covered mobile catering trucks which were equipped with a kitchen to prepare food. Though there was no express inclusion or exclusion of uses relating to the business purpose, such purpose would be the intent of the parties in contracting a ‘commercial automobile liability policy’ for automobiles engaged in the mobile catering business. We go no further than to hold, in what is a slight *Erie* guess but relying on substantial direction from the Texas courts, that a business vehicle policy covers the intended and identified uses of that business vehicle.”); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 206 (5th Cir. 2007) (“To determine Louisiana law, we look to the final decisions of the Louisiana Supreme Court. In the absence of a final decision by the Louisiana Supreme Court, we must make an *Erie* guess and determine, in our best judgment, how that court would resolve the issue if presented with the same case. In making an *Erie* guess, we must employ Louisiana’s civilian methodology, whereby we first examine primary sources of law: the constitution, codes, and statutes.”); *see also* *Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992) (“[I]t is the duty of the federal court to determine as best it can, what the highest court of the state would decide.”).

19. *See* *Evanston Ins. Co. v. Legacy of Life, Inc.*, 645 F.3d 739, 751 (5th Cir. June 2011) (“In summary, if the Texas Supreme Court determines that Evanston did have a duty to defend based on either the ‘personal injury’ or ‘property damage’ provisions of the insurance policy, then we will: 1) reinstate Legacy’s counterclaims for breach of contract and violation of the Texas Insurance Code for Prompt Payment of Claims; 2) render judgment that Evanston breached its contract with Legacy; 3) render judgment that Evanston violated the Texas Insurance Code for Prompt Payment of Claims; 4) render judgment that Evanston must pay Legacy \$56,598.69 as damages for Legacy’s defense of the Underlying Lawsuit; 5) render judgment that Evanston must pay eighteen percent interest (to date of judgment) on the \$56,598.69 pursuant to the Texas Insurance Code for Prompt Payment of Claims; and 6) remand to the district court for determination of reasonable attorneys’ fees to be paid to Legacy in respect to litigating the present lawsuit and appeal. Conversely, if the Texas Supreme Court determines that Evanston did *not* have a duty to defend, none of the foregoing relief will be awarded Legacy.”). Therefore, the Fifth Circuit panel certified the following two determinative questions of law to the Supreme Court of Texas:

1. Does the insurance policy provision for coverage of “personal injury,” defined therein as “bodily injury, sickness, or disease including death resulting therefrom sustained by any person,” include coverage for mental anguish, unrelated to physical damage to or disease of the plaintiff’s body?
2. Does the insurance policy provision for coverage of “property damage,” defined therein as “physical injury to or destruction of tangible property, including consequential loss of use thereof, or loss of use of tangible property which has not been physically injured or destroyed,” include coverage for the underlying plaintiff’s loss of use of her deceased mother’s tissues, organs, bones, and body parts?

*Id.*

20. *See infra* Part II and accompanying text.

general heading, “previously litigated or purportedly settled substantive-law controversies.”<sup>21</sup>

## II. FIRST-PARTY INSURANCE DISPUTES INVOLVING STATE SUBSTANTIVE LAWS AND STATUTES

### A. *First-Party Claims—Tangible Residential and Commercial Property Losses*

**Substantive Question:** *Whether under Louisiana and Mississippi law, an all-risk residential property insurer has a duty to pay additional proceeds after the insurer and property owners settled Hurricane Katrina-related property-damage claims.*

#### 1. *A Review of Pertinent Facts in “Concurrent Causation,” “Additional Payment,” and “Double Recovery” Cases*

Comprising a diversity of circuit court and designated district court judges, four Fifth Circuit panels decided a stubbornly recurring substantive question: Whether property insurers have a contractual duty to pay additional proceeds under first-party insurance contracts after homeowners receive a reimbursement for covered Hurricane Katrina-related tangible property losses.<sup>22</sup> This general question appears in the following cases: *Stewart Enterprises, Inc. v. RSUI Indemnity Co.*; *Bayle v. Allstate Insurance Co.*; *Bradley v. Allstate Insurance Co.*; *French v. Allstate Indemnity Co.*; and *Penthouse Owners Ass’n v. Certain Underwriters at Lloyds, London*.<sup>23</sup> A variety of common and unique sub-issues, however, appear among these decisions. Therefore, the relevant facts in each case are outlined below before presenting a discussion of the four panels’ respective findings and holdings.

First, in *Stewart*, the insured was Stewart Enterprises, Inc., an enterprise that owned cemeteries, funeral homes, and other commercial properties in New Orleans, Louisiana.<sup>24</sup> As Hurricane Katrina lambasted the Gulf Coast in 2005, a strong wind and a flood severely damaged Stewart’s properties.<sup>25</sup> And like

21. See *infra* Part II and accompanying text.

22. See *infra* Part II.A.3.

23. See *French v. Allstate Indem. Co.*, 637 F.3d 571 (5th Cir. Apr. 2011) (Panel comprised of Circuit Judges Jennifer Walker Elrod, Edward Prado, and Carl Stewart); *Bradley II*, 620 F.3d 509 (Panel comprised of Circuit Judges Patrick Higginbotham and Carl Stewart, as well as the U.S. District Court for the Eastern District of Louisiana’s Judge Kurt Engelhardt, sitting by designation); *Stewart Enters., Inc. v. RSUI Indem. Co.*, 614 F.3d 117 (5th Cir. Aug. 2010) (per curiam) (Panel comprised of Circuit Judges Fortunato Benavides, W. Eugene Davis, and Patrick Higginbotham); *Bayle v. Allstate Ins. Co.*, 615 F.3d 350 (5th Cir. Aug. 2010) (Panel comprised of Circuit Judges W. Eugene Davis, Leslie H. Southwick, and Jacques L. Wiener); *Penthouse Owners Ass’n v. Certain Underwriters at Lloyds, London*, 612 F.3d 383 (5th Cir. July 2010) (Panel comprised of Circuit Judges E. Grady Jolly, Priscilla Owen, and Jerry Edwin Smith).

24. *Stewart*, 614 F.3d at 118.

25. *Id.*

many bewildered property owners during that period, Stewart could not easily determine whether wind, flooding, or a combination of the two caused the losses.<sup>26</sup>

Prior to Katrina, Stewart insured its properties and businesses under a primary-insurance policy and two excess-insurance contracts.<sup>27</sup> Lexington Insurance Company (Lexington) sold the all-risk primary policy, which insured Stewart's property against flood and other covered perils up to \$10 million, respectively.<sup>28</sup> Stewart purchased an all-risk excess-coverage policy from Certain Underwriters at Lloyd's of London (Lloyd's).<sup>29</sup> Under the first excess insurance contract, Lloyd's insured Stewart's commercial properties against flood and other covered perils up to \$15 million, respectively.<sup>30</sup> Stewart also bought a second excess-insurance contract from RSUI Indemnity Company (RSUI).<sup>31</sup> Under RSUI's policy, the maximum coverage was \$225 million, which would serve as the excess after Lexington and Lloyd's paid their collective \$25 million for covered property losses.<sup>32</sup>

In the wake of Katrina, Stewart concluded that wind and flooding damaged its properties; therefore, the company asked the primary and two excess insurers to pay for the allegedly covered losses.<sup>33</sup> Both Lexington and Lloyd's paid the full amount under their respective primary and first excess-insurance policies.<sup>34</sup> RSUI refused to pay, concluding that its second excess policy did not cover any flood-related property losses.<sup>35</sup> In addition, RSUI argued: Even assuming that flooding was a covered peril, an anti-concurrent

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26. *Id.* at 118-19 (“This [inability to establish whether a covered peril or an excluded peril was the efficient/dominant or concurrent cause of a loss] has proven to be a significant roadblock for many of the victims attempting to recover compensation from their insurance carriers, of which Stewart is only the latest.”). Or stated slightly differently, under an insurance law definition of coverage, insurance consumers like Stewart often have difficulty determining whether a property loss is covered under an all-risk or a specified-risk property-insurance contract. *See, e.g.,* *Warrilow v. Norrell*, 791 S.W.2d 515, 527 (Tex. App.—Corpus Christi 1989, writ denied) (explaining that coverage analysis of a property insurance claim examines the relationship between “covered perils” and “excluded perils”). “Property insurance, unlike liability insurance, is unconcerned with establishing negligence or otherwise assessing tort liability.” *Id.* (quoting *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 710 (Cal. 1989)). “Coverage in a property policy is commonly provided by reference to causation, such as ‘loss caused by . . .’ certain enumerated forces. . . . It is precisely these physical forces that bring about the loss.” *Id.* (first omission in original) (quoting *Garvey*, 770 P.2d at 710). “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.” *Warrilow*, 791 S.W.2d at 527 (citing *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 162 (Tex. 1971)).

27. *Stewart*, 614 F.3d at 118.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 119.

34. *Id.*

35. *Id.*

causation clause (ACC)<sup>36</sup> in RSUI's excess-insurance contract excluded any claim if a flood caused, completely or partially, any property damage.<sup>37</sup>

Stewart filed a declaratory judgment action in the United States District Court for the Eastern District of Louisiana, asking the district judge to declare that RSUI had a duty to pay the claim.<sup>38</sup> Ultimately, both parties petitioned the court for summary relief.<sup>39</sup> Both motions were denied.<sup>40</sup> Instead, the district court found that RSUI's excess policy covered flood damage up to \$25 million, subject to a proviso: RSUI's payment could be reduced by the amount that either Lexington or Lloyd's paid to cover Stewart's losses.<sup>41</sup> But, the district court also made two additional findings: (1) The ACC clause barred any recovery *if wind and flooding jointly* caused the property damage; and (2) The policy permitted a maximum recovery of \$25 million *if wind or flooding exclusively* caused the property losses.<sup>42</sup> Dissatisfied with the findings, Stewart and RSUI appealed.<sup>43</sup>

*Bayle v. Allstate Insurance Co.* also presents a recurring question that is very similar to the general question appearing in the prior case. First, consider the relevant facts. William and Darlene Bayle are siblings, and they own property in Chalmette, Louisiana.<sup>44</sup> Hurricane Katrina severely damaged the Bayles' property.<sup>45</sup> "[N]o one was present in the house when eight to ten feet of water (mixed with escaped oil from a nearby Murphy Oil storage tank) flooded the Bayles' one-story house."<sup>46</sup> Additionally, little evidence in the record suggested that wind caused a significant amount of damage.<sup>47</sup>

When Katrina arrived, the Bayles' property was insured under an Allstate homeowners' policy against "wind damage."<sup>48</sup> Allstate also insured the property against floods under a separate National Flood Insurance Policy (NFIP).<sup>49</sup> As the administrator of the federal flood policy, Allstate paid the full

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36. See *Penthouse Owners Ass'n v. Certain Underwriters at Lloyds, London*, 612 F.3d 383, 385 (5th Cir. July 2010).

37. See *Stewart*, 614 F.3d at 119.

38. *Id.* at 125 ("At issue is the interpretation of two ACC clauses contained within . . . the Lexington policy . . . [which were embraced under] the RSUI policy's *following form* provision." (emphasis added)).

39. *Id.* at 119.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Bayle v. Allstate Ins. Co.*, 615 F.3d 350, 352 (5th Cir. Aug. 2010).

45. *Id.* at 353.

46. *Id.*

47. See *id.* ("Ms. Bayle testified that, when she returned to view the wreckage, she saw just one cracked window pane in one of the bedrooms and that she was not able to look in the attic for roof damage. In his deposition testimony, Mr. Bayle noted that, when he viewed the damage in November 2005, he saw one or perhaps two small window panes that were broken, but conceded that these could have been damaged by vandals.").

48. *Id.*

49. *Id.* In a nutshell, Congress enacted the National Flood Insurance Act of 1968 because the average homeowner cannot afford to purchase private insurance at near prohibitively high prices. See National Flood Insurance Act of 1968, Pub. L. No. 90-448, 82 Stat. 587 (codified as amended at 42 U.S.C. §§ 4001-4129).



policy limits of \$105,000—\$75,000 for structural damage and \$30,000 for damaged contents.<sup>50</sup> Under the terms and conditions of the homeowners' policy, Allstate gave the Bayles \$17,560.73 for wind damage—\$3,628.87 for the roof's structural damage, \$8,804.22 for personal-property losses, and \$5,127.64 for additional living expenses.<sup>51</sup> Briefly put, when the Bayles received those 2005 payments, they did not identify any additional, uncompensated structural damage.<sup>52</sup> Furthermore, they did not identify any wind-damaged items with repair costs exceeding Allstate's payments.<sup>53</sup>

In the end, the Bayles decided not to repair the severely damaged house.<sup>54</sup> Consequently, they "sold" the "unrepaired" house and the lot to Murphy Oil for \$64,000.<sup>55</sup> The oil company purchased the property to settle the Bayles' petroleum-pollution claim.<sup>56</sup> Murphy completely demolished the house.<sup>57</sup> Although the record does not indicate that the Bayles objected to Allstate's 2005 adjustments and payments, the Bayles and twenty-eight homeowners sued Allstate in August 2007.<sup>58</sup> The suit originated in a state court but was removed to the United States District Court for the Eastern District of Louisiana.<sup>59</sup>

Three years after Katrina, the district court severed the cases, and the Bayles filed an individual action against Allstate.<sup>60</sup> The *Bayle* opinion does not clearly state whether the Bayles filed a breach-of-contract or a declaratory-judgment *action*.<sup>61</sup> The homeowners' *claims*, however, were unmistakable. The Bayles alleged that (1) Allstate did not pay sufficient consideration to cover the wind-caused structural damage to their property; and (2) Allstate improperly used the "actual cash value" (ACV) of the damaged property rather than a "building structure reimbursement" standard to determine the correct payment

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(2006)). The Act established the National Flood Insurance Program (NFIP) and the Federal Emergency Management Agency (FEMA), an agency of the Department of Homeland Security that administers the program. *See id.* NFIP has two components: (1) a flood insurance program and (2) a unified national plan for flood management. *See id.* § 4001(b)-(c). In 1977, the Secretary of the Department of Housing and Urban Development (HUD) gave the primary responsibility for operating NFIP to FEMA. *See id.* § 4071. To attain the stated goals, FEMA enacted regulations and created the Standard Flood Insurance Policy (SFIP). *See* 44 C.F.R. §§ 61.4(b), 61.13(d). The agency also encourages private insurers, so-called "Write Your Own" (WYO) insurers like Allstate, to market and sell flood insurance. *See* §§ 4071(a)(1), 4081(a). In addition, WYO insurers may sell SFIP contracts in their own names. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-504, NATIONAL CATASTROPHE INSURANCE: ANALYSIS OF A PROPOSED COMBINED FEDERAL FLOOD AND WIND INSURANCE PROGRAM 11-13 (2008), available at [www.gao.gov/new.items/d08504.pdf](http://www.gao.gov/new.items/d08504.pdf).

50. *Bayle*, 615 F.3d at 353.

51. *Id.*

52. *See id.*

53. *Id.*

54. *Id.* at 353-54.

55. *Id.*

56. *Id.* at 354.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *See id.* at 352.

for the wind-caused structural damage.<sup>62</sup> Allstate filed a motion for summary judgment, asking the district court to dismiss the action.<sup>63</sup> Among other conclusions, the district court found that the Bayles did not identify any uncompensated, wind-caused property losses.<sup>64</sup> After the court granted the insurer's motion, the Bayles appealed.<sup>65</sup>

During the 2009–2010 session, the Fifth Circuit Court of Appeals decided, and the author reviewed, *Bradley v. Allstate Insurance Co. (Bradley I)*.<sup>66</sup> In that case, the central question was whether property insurers had a contractual duty to pay additional proceeds after Hurricane Katrina destroyed “covered” tangible property and the homeowners were compensated for the “covered loss.”<sup>67</sup> This term, the Fifth Circuit reconsidered the question in *Bradley I*, vacated its prior rulings, withdrew *Bradley I*, and replaced it with *Bradley II*.<sup>68</sup>

Reconsider the facts in *Bradley I*. Felton and Lucille Bradley were residents of New Orleans, Louisiana.<sup>69</sup> Allstate insured the Bradleys' house under a homeowners' insurance contract, which excluded flood-related losses.<sup>70</sup> In the event of losses, Allstate had a contractual duty to pay \$105,600 or less for structural damage, \$73,920 or less for damaged contents, and \$10,560 or less for other structural damages.<sup>71</sup> To insure the property that Allstate's policy excluded, the Bradleys purchased flood insurance from Fidelity National Insurance Company (Fidelity).<sup>72</sup> Both insurance contracts were current when Hurricane Katrina arrived in New Orleans.<sup>73</sup> Katrina totally destroyed the Bradleys' house, leaving only a “few badly damaged concrete blocks . . . on the property.”<sup>74</sup>

After filing a timely notice of loss, Allstate's engineers concluded that a “combination of hurricane winds and flooding” totally destroyed the structure.<sup>75</sup> After reviewing a second engineer's report, Allstate's adjusters, however, determined that “[c]atastrophic [w]ind [d]amage” made the dwelling unlivable.<sup>76</sup> After negotiations, Allstate and the insureds settled the claim, and the property insurer “paid \$41,339.06 for structural damage and \$10,632 for

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62. *Id.*

63. *Id.* at 354.

64. *Id.*

65. *Id.* at 352-53.

66. *Bradley v. Allstate Ins. Co. (Bradley I)*, 606 F.3d 215 (5th Cir. May 2010), *vacated and superseded on denial of reh'g*, 620 F.3d 509 (5th Cir. 2010) (Panel comprised of Circuit Judges Patrick Higginbotham and Carl Stewart, as well as the U.S. District Court for the Eastern District of Louisiana's Judge Kurt Engelhardt, sitting by designation); *see Rice, supra* note 6, at 971.

67. *Bradley I*, 606 F.3d at 221.

68. *Bradley II*, 620 F.3d 509, 514 (5th Cir. Sept. 2010).

69. *Bradley I*, 606 F.3d at 221.

70. *Id.*

71. *Id.*

72. *Id.*

73. *See id.*

74. *Id.*

75. *Id.*

76. *Id.*

[unsalvageable] contents.”<sup>77</sup> Significantly, those payments were substantially lower than the respective policy limits for a destroyed structure and its contents.<sup>78</sup> In contrast, the Bradleys received the policy limits under the flood-insurance contract—\$63,800 for structural damage and \$6,200 for destroyed contents.<sup>79</sup> Thus, the insurers paid collectively a total payment of \$105,139.06 for the structural damages.<sup>80</sup>

The Bradleys, however, wanted to build another house.<sup>81</sup> Allstate appraised the pre-Katrina market value of the Bradleys’ destroyed home at \$85,000.<sup>82</sup> The Bradleys determined that “the pre-storm value of the home was between \$85,000 and . . . \$97,000.”<sup>83</sup> Moreover, their expert estimated that the Bradleys would need \$265,427 to rebuild their house.<sup>84</sup> Allstate refused to satisfy the Bradleys’ request for additional payments, and the homeowners sued the insurer in a Louisiana state court.<sup>85</sup> Their complaint raised several claims and causes of action sounding in contract and in tort.<sup>86</sup> In particular, the Bradleys cited Louisiana’s Value Policy Law (VPL) and asserted that their house was a “total loss.”<sup>87</sup> They also claimed that Allstate had a duty to pay the policy limits without deductions or offsets.<sup>88</sup> Additionally, the homeowners argued that Allstate had a contractual duty to pay additional proceeds to cover their personal-property losses and additional living expenses.<sup>89</sup>

Citing diversity jurisdiction, Allstate removed the case to the United States District Court for the Eastern District of Louisiana.<sup>90</sup> Ultimately, the district court awarded some damages for the Bradleys’ “additional living expenses,” but the award was less than the requested amount.<sup>91</sup> Regarding the homeowners’ other claims, the district court granted Allstate’s motions for

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77. *Id.*

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

79. *Id.*

80. *Id.*

81. *See id.*

82. *Id.*

83. *Id.*

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

85. *Id.*

86. *See id.* at 221-22 & n.1 (“The Bradleys claimed that Allstate breached the insurance contract, acted negligently, and acted in bad faith. . . . [Thus, they sought] compensation for mental anguish and emotional distress . . . [as well as] damages for Allstate’s alleged bad faith pursuant to LA. REV. STAT. § 2:1220 and 22:658 [recodified as § 22:1892 (2009)].”).

87. LA. REV. STAT. ANN. §§ 22:1318, 22:695(A) (2009); *Bradley I*, 606 F.3d at 221.

88. *Bradley I*, 606 F.3d at 221.

89. *Id.*

90. *Id.*

91. *Id.* at 220, 222.

summary judgment.<sup>92</sup> In particular, the Eastern District of Louisiana concluded that the Bradleys could only receive the actual cash value of their destroyed house.<sup>93</sup> Of course, that sum was less than the total payment (\$105,139.06) that the Bradleys received for structural damages under their homeowners' and flood policies.<sup>94</sup>

Also, the district court dismissed the "total loss" claim.<sup>95</sup> The lower court wrote: "[A]lthough the Bradleys 'allege that the property was damaged by wind and flood and that the home is a total loss, there is no allegation that the total loss was *caused by wind or any other peril covered* under the homeowners' policy.'"<sup>96</sup> Accordingly, there are no disputed issues of material fact, and Allstate is entitled to judgment as a matter of law that Louisiana's VPL does not apply.<sup>97</sup> The Bradleys appealed.<sup>98</sup> Again, given that the Fifth Circuit vacated its prior rulings in *Bradley I*, withdrew the case, and replaced *Bradley I* with *Bradley II*,<sup>99</sup> a discussion of the appellate court's newest rulings in the latter case appears below.

The relevant facts in *French v. Allstate Indemnity Co.* are simple and familiar.<sup>100</sup> In 2003, Kathryn French and Malcolm Sutter (French) built a lakefront house in Slidell, Louisiana.<sup>101</sup> French insured the property under an Allstate homeowners' insurance contract.<sup>102</sup> The policy outlined several payment schedules: \$338,000 or less for damage to dwelling, \$33,800 or less for damage to other structures, and \$253,500 or less for destroyed contents.<sup>103</sup> Furthermore, under an additional living expense (ALE) clause, the insurer promised to pay additional money for twelve months or less if certain conditions were satisfied.<sup>104</sup> French also purchased a twenty percent endorsement—a "Building Structure Reimbursement Extended Limits Endorsement"—that added more coverage for the dwelling.<sup>105</sup> Finally, to

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92. *Id.* at 222.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* (emphasis added).

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

98. *See Bradley II*, 620 F.3d 509, 514 (5th Cir. Sept. 2010).

99. *See id.*

100. *See French v. Allstate Indem. Co.*, 637 F.3d 571, 574-75 (5th Cir. Apr. 2011) (Panel comprised of Circuit Judges Jennifer Walker Elrod, Edward Prado, and Carl Stewart).

101. *Id.* at 574.

102. *Id.*

103. *Id.* at 575.

104. *Id.* at 583.

105. *Id.* at 575.

insure the property against floods, the insured bought an Allstate-administered NFIP.<sup>106</sup>

After Katrina, French's lakefront property was seriously damaged.<sup>107</sup> French filed a property-loss claim, asking Allstate to pay for wind and flood damages under the homeowners' and flood insurance policies, respectively.<sup>108</sup> Between September 2005 and August 2008, Allstate paid \$215,292.88 and \$91,926.37, respectively, to cover the wind-caused damage to French's dwelling and contents.<sup>109</sup> The insurer also paid \$2,100 to cover French's additional living expenses.<sup>110</sup> Moreover, under the terms of a settlement agreement, French received \$171,708 for the flood-caused damage to the dwelling.<sup>111</sup> The insurers' compensation under the homeowners' policy was about half (49.5%) of the insurance contract's total limits of coverage.<sup>112</sup>

Unhappy with the payments, French apparently filed a breach-of-contract action against Allstate in a Louisiana state court.<sup>113</sup> Among other remedies, the plaintiff sought additional payments for the wind-damaged properties.<sup>114</sup> Ultimately, the dispute was removed to the United States District Court for the Eastern District of Louisiana, where the district judge conducted a three-day bench trial in February 2009.<sup>115</sup> Ultimately, the judge concluded: (1) Allstate had a duty to pay \$338,000 to cover the wind-damaged dwelling because French's repair costs would exceed that amount;<sup>116</sup> (2) The property insurer had a duty to pay an *additional \$123,000 to cover the wind-damaged dwelling*;<sup>117</sup> and (3) Allstate had a duty to pay \$10,000 to repair French's "other structures."<sup>118</sup> On the other hand, the district judge concluded that French (1) could not recover *additional living expenses* and (2) could not collect money under the Extended Limits Endorsement.<sup>119</sup>

Allstate filed a motion to modify the judgment.<sup>120</sup> The insurer argued that the additional \$123,000 wind-damage award was unwarranted because French

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106. *Id.* at 574.

107. *Id.* at 575.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 576.

113. *See id.* The French opinion does not state clearly whether French filed a breach-of-contract or a declaratory-judgment action. *See id.* at 575.

114. *Id.* ("Before trial, [French] settled [the] flood claims and the flood insurer was dismissed from [the lawsuit], leaving only the wind-damage claims to be tried.")

115. *See id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *See id.* at 575-76 ("[In addition], the district court found that Allstate was [liable for] penalties under Louisiana Revised Statute § 22:658 because Allstate . . . failed to timely pay an undisputed portion of [French's] claim. Concluding that the older, 2003 version of § 22:658 applied, the district court calculated penalties as 25 percent of the total amount it found was due, or 25% of \$348,000.")

120. *Id.* at 576.

failed to prove that element by a preponderance of the evidence.<sup>121</sup> Even more interestingly, Allstate asserted that French's total insurance compensation, at least \$510,000.88, violated Louisiana's "double recovery" rule because the award exceeded the value of French's house.<sup>122</sup> The district court denied Allstate's motion, concluding that French presented sufficient evidence to support the additional payments award.<sup>123</sup> Allstate appealed.<sup>124</sup>

*Penthouse Owners Ass'n v. Certain Underwriters at Lloyds, London* is the final opinion in this initial series of first-party cases.<sup>125</sup> In *Penthouse*, the pertinent facts are extremely sparse. The insured is Penthouse Owner's Association (Penthouse).<sup>126</sup> The corporation owns a complex of condominiums in Pass Christian, Mississippi.<sup>127</sup> Before Hurricane Katrina, the property was insured under an undisclosed insurer's flood-insurance contract.<sup>128</sup> In addition, certain underwriters at Lloyd's of London (Underwriters) insured the commercial/residential property under an all-risk insurance contract.<sup>129</sup> The policy limit was \$3,568,000.<sup>130</sup> Katrina completely destroyed Penthouse's property, leaving only the slab.<sup>131</sup> "Penthouse recovered the policy limit (\$3,610,000) from its flood insurer, and made a claim under the Underwriters' policy."<sup>132</sup> The Underwriters denied the claim, asserting that the all-risk policy's flood-exclusion and ACC clauses barred the claim.<sup>133</sup> According to the Underwriters' engineers, flooding destroyed the condos.<sup>134</sup>

Nearly two years after Katrina, Penthouse sued the Underwriters in the United States District Court for the Southern District of Mississippi.<sup>135</sup> The complaint raised several theories of recovery—breach of contract, negligence, and bad-faith breach of contract.<sup>136</sup> More generally, the complaint alleged that Katrina-related winds destroyed the condos several hours before the storm surge (flooding).<sup>137</sup> Therefore, according to Penthouse, the *sole dominant or*

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121. *Id.*

122. *See id.* at 580.

123. *Id.* at 576.

124. *Id.*

125. *See Penthouse Owners Ass'n v. Certain Underwriters at Lloyds, London*, 612 F.3d 383, 385 (5th Cir. July 2010).

126. *Id.* at 384-85.

127. *Id.* at 385.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *See id.*

136. *See id.*

137. *See id.*

*efficient proximate cause*<sup>138</sup> of the property loss was wind rather than flooding.<sup>139</sup>

The Underwriters filed a motion for summary judgment, arguing that wind was not the sole cause of the property loss.<sup>140</sup> Alternatively, the insurers argued that flooding was an excluded peril in the all-risk policy's *windstorm deductible clause*.<sup>141</sup> Therefore, the Underwriters insisted that Penthouse could not receive any compensation because the windstorm deductible clause was essentially "a reverse anti-concurrent causation clause"<sup>142</sup> and both wind and flooding caused the insured's loss.<sup>143</sup> The district court denied the Underwriters' summary judgment motion and concluded that the windstorm deductible clause extended "coverage" for Katrina-related damages regardless of whether wind or a flood caused the losses.<sup>144</sup> Thus, Penthouse received a judgment as a matter of law, based on the district court's interpretation of the windstorm deductible clause.<sup>145</sup> The Underwriters appealed.<sup>146</sup>

## 2. Fifth Circuit Panels' "Concurrent Causation," "Anti-Concurrent Causation," and "Reverse Anti-Concurrent Causation" Opinions

As stressed earlier, the definition of "coverage" under an all-risk or a specified-risk property insurance contract is rather unique.<sup>147</sup> Under both Louisiana's and Mississippi's laws, an insured's destroyed property is covered, and the insurer is liable if a peril listed in the insurance contract "caused" the loss.<sup>148</sup> But, the Supreme Courts of Louisiana and Mississippi have been extremely clear: A "covered peril" must be the *dominant and efficient proximate cause* of an insured's property loss.<sup>149</sup> Thus, if a "peril insured

138. See *infra* Part II.A.2.

139. *Penthouse*, 612 F.3d at 385.

140. See *id.*

141. See *id.*

142. See *supra* Part I.A.2.

143. *Penthouse*, 612 F.3d at 385.

144. See *id.*

145. See *id.* at 386.

146. *Id.*

147. See *supra* text accompanying note 29.

148. See *Hosp. Serv. Dist. No. 1 of Plaquemines Parish v. Delta Gas, Inc.*, 141 So. 2d 925, 927 (La. Ct. App. 1962) ("Here we are not concerned with a liability policy; there is no coverage for bodily injury and [no one] was insured against negligence. This insurance is against loss or damage to the property by explosion, or the other perils covered, during the time the policy was in force and effect regardless of the presence or absence of negligence. . . . Under the policy, Agricultural was required to pay for damage done by an explosion during the term of the policy. . . . The damage did not occur during that time; it occurred . . . at which time the policy was no longer in existence. There can be no liability [of the insurer]."); *Commercial Union Ins. Co. v. Byrne*, 248 So. 2d 777, 780 (Miss. 1971) (embracing the principle that under an extended coverage policy or an all peril policy, "the insurer cannot be held liable for any part of the damage caused by the excluded hazard").

149. See, e.g., *Lorio v. Aetna Ins. Co.*, 232 So. 2d 490, 493 (La. 1970) (stressing that "a review of . . . authorities on the subject reveals that courts of last resort [including the Supreme Court of Louisiana] have consistently interpreted the term 'direct loss,' as used in a windstorm insurance policy, to be a *loss*

against” does not meet those criteria, an insured may not recover property-insurance proceeds. Furthermore, in both jurisdictions, the *concurrent causation doctrine* reinforces the efficient proximate cause doctrine and allows an insured to collect insurance payments if a covered peril and an “excluded peril” collectively or simultaneously produce a loss.<sup>150</sup>

On the other hand, an insurer may defend itself against a duty-to-pay or a duty-to-indemnify claim by (1) showing that an ACC clause appears in the contract and (2) arguing that the insured’s *failure to segregate covered-peril and excluded-peril damages* precludes the insured from recovering any insurance compensation.<sup>151</sup> In *Stewart* and *Penthouse*, the commercial and residential insurers raised the first defense against the disgruntled Louisiana and Mississippi property owners, respectively.<sup>152</sup> And, in *Bayle*, Allstate raised the second defense.<sup>153</sup>

Again, in *Stewart*, the Eastern District of Louisiana ruled against the insured, concluding that the ACC clause barred any recovery *if wind and flooding jointly* caused the property damage within RSUI’s excess-insurance policy’s \$25 million limit.<sup>154</sup> On appeal, *Stewart* argued that “the district court’s reading of the ACC clause created an absurd result”—permitting recovery if wind exclusively or flooding exclusively caused the property damage, but barring recovery when a combination of the two perils caused the damage.<sup>155</sup>

First, *Stewart* is a Fifth Circuit per curiam opinion; therefore, the author is unknown.<sup>156</sup> But, at the outset, the panel observed that a “following form”

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*proximately caused by the peril insured against*, [and concluding that the term has] essentially the same meaning as ‘proximate cause’ applied in negligence cases” (emphasis added)); *Providence Wash. Ins. Co. v. Weaver*, 133 So. 2d 635, 637 (Miss. 1961) (“The phrase ‘direct loss’ means a loss occurring directly from . . . immediate or proximate cause, as distinguished from remote. If [a covered risk] in the policy is the dominant and efficient cause of the loss, the right of the insured to recover will not be defeated . . . .” (citations omitted)).

150. See, e.g., *Roach-Strayhan-Holland Post No. 20, Am. Legion Club, Inc. v. Cont’l Ins. Co.*, 112 So. 2d 680, 682-83 (La. 1959) (“[S]ince in a great number of factual situations it has been shown that wind is often not the sole contributing cause of the loss or damage, [courts have embraced] the view that [to recover under a property insurance contract,] it is sufficient . . . that the wind was the proximate or efficient cause of the loss or damage, *notwithstanding other factors contributing thereto*. This is in line with the jurisprudence of our own State.” (emphasis added) (footnote omitted)); *Weaver*, 133 So. 2d at 637 (“In short the proximate cause to which the loss is to be attributed may be the dominant or efficient cause, although other and incidental causes may be nearer in time to the result and operate more immediately in producing the loss.”) (embracing the principle that “if [a covered risk] in the policy is the dominant and efficient cause of the loss the right of the insured to recover will not be defeated because there were contributing causes”).

151. See *Stewart Enters. v. RSUI Indem. Co.*, 614 F.3d 117, 118-19 (5th Cir. Aug. 2010) (per curiam); *Bayle v. Allstate Ins. Co.*, 615 F.3d 350, 354-56 (5th Cir. Aug. 2010).

152. See *Stewart*, 614 F.3d at 118-19; *Penthouse Owners Ass’n v. Certain Underwriters at Lloyds, London*, 612 F.3d 383, 385 (5th Cir. July 2010).

153. See *Bayle*, 615 F.3d at 354-56.

154. See *Stewart Enters. v. RSUI Indem. Co.*, No. 07-4514, 2009 WL 1668502, at \*6 (E.D. La. June 15, 2009).

155. *Stewart*, 614 F.3d at 125.

156. *Id.* at 118.



clause appeared in the excess insurer's policy.<sup>157</sup> Put simply, it stated that RSUI's policy "is subject to the same warranties, terms[,] and conditions . . . as the Lexington primary policy."<sup>158</sup> And Lexington's insurance contract contained two ACC clauses.<sup>159</sup> In relevant part, the perils-excluded provisions read:

#### 10. PERILS EXCLUDED

This policy does not insure against loss or damage caused directly or indirectly by any of the excluded perils. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:

. . .

P. loss or damage caused by or resulting from:

. . .

(2) Flood, unless specified in [a prior section] and then only for such specified amount;

(3) any and all loss from any other cause when occurring concurrently or sequentially with Earthquake, Volcanic Eruption or Flood, except Fire.<sup>160</sup>

The district court's "most straightforward reading" of P.(3) produced this controversial conclusion: RSUI was liable if flooding or wind solely caused the property damage, but the excess insurer had no duty to indemnify if flooding and wind jointly caused the loss.<sup>161</sup>

At the beginning of its short analysis, the *Stewart* panel acknowledged that insurers insert ACC clauses into property-insurance contracts to avoid disputes like the one between *Stewart* and RSUI.<sup>162</sup> But the appellate court stressed that RSUI used its ACC clause to bar recovery after two *covered perils*—wind and flooding—damaged property.<sup>163</sup> Simply put, the panel concluded that the excess insurer's defense was "untenable," "awkward," and generating confusion about the precise purpose of the ACC.<sup>164</sup> Therefore, applying the

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157. *Id.* at 121.

158. *Id.*

159. *Id.* at 125.

160. *Id.* at 120 n.7.

161. *Id.*

162. *See id.* at 126.

163. *See id.* "[F]or damage up to the \$25 million sublimit, flood is an included peril." *Id.* at 127.

164. *See id.* ("RSUI's reading turns the rationale for including an ACC clause on its head, creating difficult causation determinations where none otherwise exist. RSUI's interpretation would force the insured to demonstrate that damage was caused exclusively by one of the two included perils. This reading is untenable and can only be the result of an awkward use of terms that assumes a full exclusion of flood damage. We will not read the policy to force *Stewart* to prove a windless flood. We read the ACC clause to only apply to damage in excess of the \$25 million aggregate limit.").

doctrine of ambiguity under Louisiana's law, the *Stewart* panel declared that RSUI had a duty to indemnify.<sup>165</sup>

To repeat, in *Penthouse*, the Underwriters insured the Penthouse Owners Association's condominiums under an all-risk policy.<sup>166</sup> Under the policy's exclusion clause, the insurers had no duty to indemnify if the following perils caused a loss: "flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not."<sup>167</sup> An ACC also appeared in the contract.<sup>168</sup> It read: A water-caused "loss or damage is excluded *regardless of any other cause of loss or event that contributes concurrently or in any sequence to the loss.*"<sup>169</sup> Finally, a "Windstorm or Hail Deductible" provision appeared in the insurance contract's endorsement.<sup>170</sup> The deductible was five percent, and the clause stated, in relevant part:

The Windstorm or Hail Deductible . . . applies to loss or damage to Covered Property caused directly or indirectly by windstorm or hail, regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage. If loss or damage from a covered weather condition other than windstorm or hail occurs, and that loss or damage would not have occurred but for the windstorm or hail, such loss or damage shall be considered to be caused by windstorm or hail and therefore part of the windstorm or hail occurrence.

. . .  
The Windstorm or Hail Deductible applies whenever there is an occurrence of windstorm or hail.<sup>171</sup>

In *Penthouse*, the Southern District of Mississippi concluded that the "Windstorm Deductible endorsement effectively canceled the policy's exclusion for [water-related] losses."<sup>172</sup> More specifically, the district court declared that the deductible endorsement was essentially a reverse anti-concurrent cause clause.<sup>173</sup> Therefore, the deductible provision did not limit

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165. *Id.* ("Read objectively, the policy at best does not answer the present claims with sufficient clarity to escape the principle that such uncertainty is to be resolved in favor of the insured. Reading in favor of the insured, we find the RSUI policy covers flood to the extent the aggregate limits under the Lexington and Lloyd's policies have not been fully paid."); *see also* Succession of Fannaly v. Lafayette Ins. Co., 805 So. 2d 1134, 1138 (La. 2002) (repeating that "the ambiguous contractual provision is construed against the insurer who furnished the contract's text and in favor of the insured").

166. *Penthouse Owners Ass'n v. Certain Underwriters at Lloyds, London*, 612 F.3d 383, 385 (5th Cir. July 2010).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*; *see also* Camden Fire Ins. Ass'n v. New Buena Vista Hotel Co., 24 So. 2d 848, 850-51 (Miss. 1946) ("[An insurance contract's endorsement] controls the policy insofar as it enlarges, modifies or restricts the terms [of the policy]," and if there is any conflict between the rider and the policy, "the rider controls in construing the contract expressly where the provisions of the rider are the more specific.").

171. *Penthouse*, 612 F.3d at 385.

172. *Id.* at 386.

173. *Id.* at 387.

coverage.<sup>174</sup> Instead, the Southern District of Mississippi stated that the purportedly reverse ACC clause expanded Penthouse's coverage to include any concurrent or sequential windstorm or hail damage, even if the policy itself did not cover flood-related property damage.<sup>175</sup> Quite simply, the district court concluded that the policy and its endorsement produced conflicting language about whether water-related losses were covered or excluded.<sup>176</sup>

Circuit Judge Jolly wrote the opinion for the *Penthouse* panel.<sup>177</sup> He began his analysis by stressing three important points: (1) "The purpose of a deductible is to shift some of the insurer's [covered] risk . . . to the insured," by stating formally the percentage of a covered loss, which the insurer will not pay;<sup>178</sup> (2) A deductible clause can be applied logically only "after a covered loss has been established";<sup>179</sup> and (3) A deductible clause does not increase the insurer's risk by expanding the scope of coverage.<sup>180</sup>

In *Corban v. United Services Automobile Ass'n*, the Mississippi Supreme Court embraced the principle that insurers may defend themselves by citing unambiguous language in a policy's ACC clause.<sup>181</sup> In addition, under Mississippi's law, an ACC clause does not require an insurer to indemnify an insured if covered and excluded perils concurrently cause property loss.<sup>182</sup> On the other hand, in Mississippi, an ACC provision does not completely extinguish an insurer's duty to indemnify if an excluded and a covered peril individually and sequentially cause a property loss.<sup>183</sup>

Conversely, in *Penthouse*, the central question was whether a property insurance contract's deductible provision can be reasonably construed as being a reverse ACC clause.<sup>184</sup> As Circuit Judge Jolly correctly observed, the Supreme Court of Mississippi had never addressed this narrow question,<sup>185</sup>

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174. *Id.*

175. *See id.*

176. *Id.* at 386-87 ("The district court held that conflict in the Policy . . . is created by the language in the Windstorm Deductible . . . . The deductible 'applies to loss or damage . . . caused directly or indirectly by windstorm or hail, regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage.' The emphasized phrase exactly tracks the language of the ACC clause in the 'Exclusions' portion of the policy, which extends the water exclusion to damage caused directly or indirectly by water, 'regardless of any other cause or event that contributes concurrently or in any sequence to the loss.'").

177. *See id.* at 384.

178. *Id.* at 387; *see also* LEE R. ROSS & TOMAS F. SEGALLOR, 12 COUCH ON INSURANCE 3D § 178:1, at 178:6 (3d ed. 2005) ("A provision commonly found in automobile collision policies is the so-called 'deductible clause,' whereby a stated sum is deductible from the amount for which the insurer would otherwise be liable"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 589 (3d ed. 1993) (defining a "deductible" as "a clause in an insurance policy relieving the insurer of responsibility for an initial specified small loss of the kind insured against").

179. *Penthouse*, 612 F.3d at 387.

180. *Id.*

181. *See Corban v. United Servs. Auto. Ass'n*, 20 So. 3d 601, 615-16 (Miss. 2009).

182. *Id.*

183. *See id.*

184. *See Penthouse*, 612 F.3d at 386-87.

185. *See id.* at 388 ("Although the Mississippi Supreme Court has not interpreted a deductible

although, the *Penthouse* litigants concluded otherwise.<sup>186</sup> Thus, was the windstorm-deductible endorsement a “reverse anti-concurrent cause” provision, which effectively canceled the policy’s exclusion for water-related losses?<sup>187</sup> Again, the district court said, “Yes.”<sup>188</sup> Judge Jolly said, “No.”<sup>189</sup> Explaining his declaration, the learned circuit judge wrote:

[T]he plain language of the Windstorm Deductible only describes when the deductible applies, and does not purport to describe, or even mention, the scope of the policy’s coverage. The purpose of the broad language, which the district court read as a “reverse anti-concurrent cause” clause, . . . [prevents an insured from escaping] the applicability of the higher deductible for windstorm and hail damage . . . . [T]he clause operates only when deciding whether to apply the deductible to a loss, *after* determining that [a covered-perils provision obligates the insurer to compensate the insured for a loss]. . . . The deductible endorsement does not create or extend coverage.<sup>190</sup>

Therefore, citing and applying the laws of the Fifth Circuit panels, Circuit Judge Jolly declared that the district court’s “reverse anti-concurrent causation” ruling was erroneous.<sup>191</sup> Additionally, the circuit judge vacated the district

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endorsement clause like the one at issue here, this court has done so, applying Mississippi law to hold that a hurricane deductible endorsement did not affect the policy’s scope of coverage.” (footnote omitted) (citing *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 355 (5th Cir. 2007)).

186. *See id.* at 388 n.4 (“Each party contends that the Mississippi Supreme Court has answered the question here to its advantage, but we think neither is correct. The Underwriters argue that the Mississippi court addressed the issue in *Corban* when it held that a ‘wind and hail’ deductible did not provide coverage for all hurricane-related losses, including water damage. However, *Corban* does not provide a definitive answer because the issue in that case was narrower than the one here. The argument the court addressed in *Corban* was that the mere existence of a ‘wind and hail’ deductible indicated that hurricanes were covered events, such that all hurricane-related losses were covered. Further, the deductible in *Corban* was not found in an endorsement and did not contain any of the same language as the one here.” (citation omitted) (citing in part *Corban*, 20 So. 3d at 614 n.21)).

187. *See id.* at 387-88.

188. *See id.* at 387.

189. *See id.* at 387-88.

190. *Id.* (footnote omitted).

Contrary to the district court’s conclusion, the phrase “This endorsement changes the policy,” found as a header to the Windstorm Deductible endorsement, does not refer to the *scope of coverage* under the policy. To be sure, this endorsement does . . . “change the policy”: it changes the standard deductible (which is \$5000 for other types of losses) to 5 % of the total loss when the loss is caused by windstorm or hail.

*Id.* at 387 n.2.

191. *See id.* at 388-89 (“We first addressed a deductible like the one here—but under Louisiana law—in *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 220 (5th Cir. 2007). In that case, we concluded that several deductible endorsements similar to the one in this case did not render the policies’ ACC clauses ambiguous. Those deductibles included the same broad language stating that they applied ‘regardless of any other cause or event contributing concurrently or in any sequence to the loss.’ We noted that ‘[n]othing in the language of the endorsements purports to extend coverage for floods or to restrict flood exclusions,’ and held that the deductibles’ plain language ‘indicates that they do nothing more than alter the deductible for damage caused by a hurricane.’ We adopted the reasoning of *Katrina* in *Tuepker*, in which we held that, under Mississippi law, a hurricane deductible did not affect the scope of a policy’s coverage. After discussing *Katrina* and citing *Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F. Supp. 2d 1312 (M.D. Fla. 2002), both of

court's certified order, which granted Penthouse's motion for a judgment as a matter of law.<sup>192</sup>

### 3. *Fifth Circuit Panels' "Additional Payment" and "Double Recovery" Opinions*

On several occasions, Louisiana's appellate courts have decided property-insurance disputes involving the following substantive questions: (1) whether an insured may recover damages for segregable covered-peril losses under both a homeowners' policy and a flood-insurance contract; (2) whether an insured may receive "additional payment" for a covered loss under, say, a homeowners' policy or a flood policy; and (3) whether an insured's additional compensation is an impermissible double recovery.<sup>193</sup> At first blush, one might easily conclude that these three questions are unrelated. But, upon a closer analysis, one would discover that "segregation of losses," additional compensation, and double recovery are prongs of a general theory of recovery under a property-insurance contract.<sup>194</sup>

To illustrate, under Louisiana's general "segregation" or "segregable damages" doctrine,<sup>195</sup> an insured may recover for her segregable wind and flood damages.<sup>196</sup> In addition, the insured may recover any previously uncompensated damages for losses.<sup>197</sup> But there are two provisos: (1) the insured's combined compensation under her homeowners' and flood insurance contracts may not exceed the *value* of her property;<sup>198</sup> and (2) the insured may not recover twice for the same wind-related or flood-related loss under the respective insurance contracts.<sup>199</sup> Without doubt, the second proviso is designed to prevent double recovery, which is not sanctioned in Louisiana.<sup>200</sup>

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which involved deductible endorsements that were nearly identical to Penthouse's, we concluded that "[l]ike the hurricane deductible at issue in *In re Katrina*, this clause clearly only applies to the deductible, and does not affect the scope of coverage under the policy." (alterations in original) (citation omitted).

192. *Id.* at 389.

193. *See Bradley II*, 620 F.3d 509, 514 (5th Cir. Sept. 2010).

194. *See id.* at 524-26.

195. *See id.* at 523 n.14 ("As we explained in *Dickerson*: 'Under Louisiana law, the insured must prove that [his] claim . . . is covered . . . [under] his policy. Once [that occurs], the insurer has the burden of demonstrating that the [loss] is excluded from coverage. Thus, once [the insured] proved his home was damaged by wind, the burden shifted to [the insurer] to prove that flooding caused the damage at issue, thereby excluding coverage under the homeowners policy. As no one disputes that at least some of the damage to the [the insured's] home was covered by the homeowners policy, [the insurer] had to prove how much of that damage was caused by flooding and was thus excluded from coverage under its policy.'" (third and fourth sentences' alterations in original) (quoting *Dickerson v. Lexington Ins. Co.*, 556 F.3d 290, 294 (5th Cir. 2009))).

196. *See, e.g., Johnson v. State Farm Fire & Cas. Co.*, No. 07-1226, 2008 WL 2178059, at \*2 (E.D. La. May 19, 2008) (citing *Weiss v. Allstate Ins. Co.*, No. 06-3774, 2007 WL 891869, at \*2 (E.D. La. Mar. 21, 2007)).

197. *Id.*

198. *Id.*

199. *Id.*

200. *See, e.g., Cole v. Celotex*, 599 So. 2d 1058, 1080 (La. 1992) (concluding that an insured in

But, Louisiana's law is extremely clear regarding an insured's right to receive additional or multiple payments under several insurance contracts: Homeowners' and flood insurance policies protect an insured's property against two different covered perils.<sup>201</sup> Thus, in the event of losses from both perils, both insurers have a duty to pay.<sup>202</sup> And neither insurer may use a double-recovery defense to evade their respective contractual obligation.<sup>203</sup>

In light of those settled principles, reconsider the homeowners' claims in *Bayle*. Allstate used the ACV of the Bayles' house to determine the amount of compensated insurance proceeds for the wind-caused structural damage.<sup>204</sup> The insureds, however, insisted that a "replacement cost value" (RCV) formula was the proper equation to calculate the financial loss.<sup>205</sup> Thus, the Bayles asked Allstate to pay additional funds to cover the structural damage.<sup>206</sup> Allstate requested and the Eastern District of Louisiana granted a motion for summary judgment.<sup>207</sup> The court held: (1) Under Louisiana's law, the insured has the burden of segregating covered and noncovered losses; (2) The Bayles did not identify any additional uncompensated, wind-caused property losses; (3) An ACV rather than an RCV was the proper measure for calculating the damages; and (4) Allstate had no contractual obligation to pay any additional compensation for previously compensated wind-caused losses.<sup>208</sup>

Circuit Judge Wiener crafted the *Bayle* opinion, addressing thoughtfully general and ancillary appellate questions.<sup>209</sup> Again, the broad "recurring"

Louisiana may recover insurance proceeds "under all available coverages provided that there is no double recovery" (quoting 15A COUCH ON INSURANCE § 56:34 (2d ed. 1983)); *Albert v. Farm Bureau Ins. Co.*, 940 So. 2d 620, 622 (La. 2006) (reaffirming the principle that Louisiana law does not allow property owners to receive double compensation for perils-caused losses under property insurance contracts).

201. See, e.g., *Ferguson v. State Farm Ins. Co.*, No. 06-3936, 2007 WL 1378507, at \*4 (E.D. La. May 9, 2007); see also *Berkshire Mut. Ins. Co. v. Moffett*, 378 F.2d 1007, 1011 (5th Cir. 1967) (reaffirming the fundamental principle that a property insurance contract promises to indemnify an owner against a covered-peril loss and to put an insured in the same position that she occupied before a loss).

202. See, e.g., *Ferguson*, 2007 WL 1378507, at \*4.

203. *Id.* ("[And even if an insured purchases two policies—one homeowners and one flood—and recovers under both], that [is] not . . . double coverage. . . . The flood policy is not excess insurance. Instead, it covers a loss [which is] not covered [under] the homeowner policy."); see also *Celotex*, 599 So. 2d at 1080 ("[W]hile an insured may not recover in excess of his actual loss, an insured may recover under each policy providing coverage until the total loss sustained is indemnified.").

204. *Bayle v. Allstate Ins. Co.*, 615 F.3d 350, 352 (5th Cir. Aug. 2010)

205. See *id.* at 354.

206. See *id.* at 352 n.2 ("In the district court, the Bayles also challenged the amount that they recovered for damage to contents and 'additional living expenses' ('ALE') . . . but they appear to have waived entirely their contents and ALE claims on appeal.").

207. *Id.* at 354 ("In opposing Allstate's motion for summary judgment, the Bayles' only submission was a report prepared by Steven Hitchcock, a claims adjuster who estimated the total cost of repairing and replacing the house. He based his conclusions on interviews with the Bayles and computer software [that he] used to estimate insurance, restoration, and remodeling costs. After offering a line-item listing of the materials and labor needed to restore the entire property, irrespective of whether the cause of the damage was wind or flood, or a combination of both, Hitchcock concluded that the total replacement cost value ('RCV') of the Bayles' house was \$182,863.13. He ventured no ACV.").

208. See *id.* at 354-55.

209. See *id.* at 352.

question was whether an insured or an insurer must segregate covered-risk damage from excluded-risk damage when both covered and excluded perils—wind and flooding, respectively—are the concurrent causes of a loss.<sup>210</sup> The district court awarded summary relief to Allstate because the insurer advanced a convincing argument: The Bayles failed to prove that wind—rather than flooding—was the sole and efficient cause of the uncompensated or under-compensated property losses.<sup>211</sup> The homeowners, however, asserted that Allstate had the burden to segregate the losses and damages.<sup>212</sup>

At the outset, Judge Wiener noted that both Allstate and the Bayles were apparently confused about the significant difference between a litigant's *burden of persuasion* and a litigant's *burden of production* under Louisiana's law.<sup>213</sup> In *Jones v. Estate of Santiago*, the Supreme Court of Louisiana concluded that an insured has the *initial burden* to prove that his insurance contract covers a loss.<sup>214</sup> Once that occurs, *the burden shifts to the insurer*, who must prove that the policy's exclusion clause bars insurance compensation for the insured's loss or injury.<sup>215</sup>

The *Jones* court found that the insurer satisfied its burden by presenting sufficient prima facie evidence to justify its summary judgment award.<sup>216</sup> Therefore, the Louisiana Supreme Court concluded that the *burden shifted to the insured to present sufficient evidence*, which demonstrated that a material issue of fact remained regarding whether the exclusion clause barred the claim.<sup>217</sup> In 2009, the Fifth Circuit decided *Dickerson v. Lexington Insurance Co.*, a case in which the district court granted the insured's motion for summary judgment after a bench trial.<sup>218</sup> On appeal, Lexington challenged the

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210. *See id.*; *see also id.* at 355-56 ("Neither party contends that any applicable provision of the Allstate policy is ambiguous, and the Bayles do not seek—as have insureds in other cases—additional benefits under a *named peril* policy or under a policy that contains an *anti-concurrent cause* provision. And, unlike many hurricane-damaged properties, the Bayles' house was not reduced to its foundations or to but a slab.")

211. *Id.* at 356.

212. *Id.* at 355 n.15 ("The Bayles also assert in the alternative that federal law requires the insurer to 'segregate' or 'allocate' damage. The Bayles point to federal law governing private insurers who administer federal flood insurance policies, and contend that particular provisions require such private insurers to adjust both flood and wind claims simultaneously. The Bayles fail to take into account that no federal 'single adjuster' program was ever created. As the Bayles cite no authority to support the proposition that this federal program was intended to displace state law governing the burdens of proof and production in breach of insurance contract claims, we do not address this contention." (citation omitted)).

213. *Id.* at 358.

214. *Jones v. Estate of Santiago*, 870 So. 2d 1002, 1010 (La. 2004).

215. *Id.*; *see also* LA. STAT. ANN. REV. § 22:658(2)(B) (2007) (redesignated § 22:1893(2)(B) by Acts 2008, No. 415, § 1 (effective Jan. 1, 2009)) ("If damage to immovable property is covered, in whole or in part, under the terms of the policy of insurance, the burden is on the insurer to establish an exclusion under the terms of the policy.")

216. *Jones*, 870 So. 2d at 1011-12.

217. *Id.*

218. *Dickerson v. Lexington Ins. Co.*, 556 F.3d 290 (5th Cir. 2009); *see also Bayle*, 615 F.3d at 357 ("Like the Bayles, the insured in *Dickerson* filed suit against the provider of his homeowners insurance, Lexington, alleging that it had breached the insurance contract by failing to pay the full amount owed under the policy. Also like the Bayles, the insured in *Dickerson* sought damages and statutory penalties for bad faith under Louisiana law. And, like the Bayles' policy with Allstate, *Dickerson's* policy with Lexington excluded

sufficiency of the insured's summary judgment evidence.<sup>219</sup> In the end, the Fifth Circuit resolved the *Dickerson* dispute by applying the burden-shifting principles outlined in *Jones*.<sup>220</sup>

On appeal during the Fifth Circuit's 2010–2011 term, the Bayles cited the analyses and rulings in *Jones* and *Dickerson* and argued that at the outset, both Allstate and the Bayles agreed that Katrina-related winds—the covered peril—caused *some* property loss; therefore, the burden shifted to Allstate to prove that flooding—the excluded risk—also caused the uncompensated property loss.<sup>221</sup> On appeal, Allstate argued, however, that the *Dickerson* panel did not formally adopt Louisiana's burdens-of-proof rules, which are outlined in *Jones*.<sup>222</sup> Allstate insisted that the panel's statement in *Dickerson* was dicta.<sup>223</sup> In *Bayle*, Judge Wiener stated succinctly: “[O]ur articulation of the allocation of the burden of proof in *Dickerson* was not dictum, although Allstate was correct that it did not alter the rule . . . in *Jones*.”<sup>224</sup> But the circuit judge also rejected the Bayles' assertion and concluded: “*Dickerson* [does not] stand for the proposition . . . that [an] insurer alone must bear the burden of producing evidence to segregate covered losses from excluded losses, *at least not at the summary judgment stage*.”<sup>225</sup>

More specifically, Judge Wiener stressed that Louisiana's law imposes the burden of persuasion on an insured to establish that a covered peril was the efficient proximate cause of an uncompensated or an under-compensated loss.<sup>226</sup> And if the insurer wants to avoid liability by relying on a policy's

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coverage of damage from flood. Unlike the district court in [*Bayle*], however, the district court in *Dickerson* adjudicated the claim after a bench trial, ruling in favor of *Dickerson*.” (footnote omitted)).

219. *Dickerson*, 556 F.3d at 290.

220. *Id.* at 294-95.

221. *See Bayle*, 615 F.3d at 357.

222. *Id.* at 356.

223. *Id.* at 356-57.

224. *Id.* at 358 (“[I]n *Dickerson* we were not ruling on an appeal from a grant of summary judgment—where, “[i]f the burden at trial rests on the non-movant, the movant must merely demonstrate an absence of evidentiary support in the record for the non-movant’s case” . . . [still, the sufficiency of the evidence must be reviewed necessarily to properly allocate and determine litigant’s] burden of proof, . . . because “[t]he judge must view the evidence presented through the prism of the substantive evidentiary burden.” (second and fourth alterations in original)).

225. *Id.*

226. *See id.* at 358-59 (“Simply put, this [rule means] that the insured must prove *coverage* under the policy.”); *see also* *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 123-24 (La. 2000) (“When determining whether . . . a policy affords coverage for an incident, it is the burden of the insured to prove the incident falls within the policy’s terms. On the other hand, the insurer bears the burden of proving the applicability of an exclusionary clause within a policy.” (citation omitted)); *Whitham v. La. Farm Bureau Cas. Ins. Co.*, 34 So. 3d 1104, 1107 (La. Ct. App. 2d Cir. 2010) (“In an action under an insurance contract, the insured bears the burden of proving the existence of policy and coverage. The insurer, however, bears the burden of showing policy limits or exclusions.”); *Comeaux v. State Farm Fire and Cas. Co.*, 986 So. 2d 153, 154 (La. Ct. App. 5th Cir. 2008) (“[A]lthough the insurer has the burden to show an exclusion applies, we find that State Farm here is not relying on an exclusion to avoid paying the claim [because] State Farm acknowledges that ALE was due pursuant to the homeowners policy and paid accordingly.”); *Lee v. Taylor*, 808 So. 2d 407, 410 (La. Ct. App. 1st Cir. 2000) (“The insured bears the burden of proof to establish every fact essential to a cause of action under the policy coverage.”); *Stewart v. La. Farm Bureau Mut. Ins. Co.*, 420 So. 2d 1217, 1219 (La. Ct.



exclusion clause, the insurer has the burden of persuasion to establish that an uncompensated or under-compensated loss is excluded.<sup>227</sup> Even more importantly, Judge Wiener emphasized that under Louisiana's law, the parties' respective burdens of *persuasion* do not shift between the parties.<sup>228</sup> Conversely, during a summary judgment proceeding, the burden of *production* shifts.<sup>229</sup> If an insurer files a summary judgment motion, the insurer must produce sufficient prima facie evidence to prove that an excluded peril was the cause of an uncompensated or under-compensated loss.<sup>230</sup> And if the insurer achieves that end, "the burden shifts to the [insured] to *present evidence* demonstrating that a material factual issue [still] remains."<sup>231</sup>

Again, on appeal, the Bayles asked the Fifth Circuit to declare that the disparity—between their estimated gross damages and the amount received for wind-caused losses—required Allstate to pay additional insurance proceeds.<sup>232</sup> The Bayles also asked the panel to declare that Allstate had to segregate wind- and flood-caused losses before receiving summary relief.<sup>233</sup> But, writing for the panel, Judge Wiener rejected the Bayles' pleas.<sup>234</sup> Instead, he concluded that the Eastern District of Louisiana summary judgment was proper.<sup>235</sup> The panel found that Allstate produced evidence identifying excluded-flood-caused and covered-wind-caused losses.<sup>236</sup> The burden of production, however, shifted to the Bayles, and the homeowners had to offer sufficient rebuttal evidence, which created a genuine issue of material fact regarding whether any uncompensated, wind-cause loss remained.<sup>237</sup> Conversely, the panel found that the Bayles did not satisfy their burden of production.<sup>238</sup>

The Bayles also challenged "the sufficiency of the payment they received for structural damage, claiming that their damages should have been calculated under the policy's 'building structure reimbursement' provision."<sup>239</sup> The district court rejected the Bayles' argument and granted Allstate's request for

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App. 3d Cir. 1982) ("[T]he insurer has the burden of proving facts which limit its coverage.").

227. See *Bayle*, 615 F.3d at 359.

228. See *id.*

229. See *id.*

230. See *id.*

231. *Id.* at 359 n.33; *id.* at 359 ("[These rules apply,] [b]ecause *at trial* the defendant-insurer has the ultimate burden of persuasion that the exclusion is applicable.") (quoting *Jones v. Estate of Santiago*, 870 So. 2d 1002, 1010 (La. 2004)); see also ROSS & SEGALLOR, *supra* note 178, § 175:9 ("It is the insured's burden to produce evidence that would afford a reasonable basis for estimating the amount of damage or the proportionate part of damage caused by the covered peril and that by the excluded peril.").

232. See *Bayle*, 615 F.3d at 360.

233. See *id.*

234. See *id.*

235. See *id.* at 361.

236. See *id.*

237. See *id.*

238. See *id.* ("[T]he Bayles fail to recognize that when Allstate adduced evidence sufficient to establish a prima facie case that flood, not wind, caused any uncompensated or under-compensated damage complained of by the Bayles, the burden of production shifted to the Bayles to offer rebuttal evidence sufficient to create a genuine issue of material fact as to which, if any, uncompensated items of damage were caused by wind.").

239. *Id.*

summary relief, finding that the ACV of the Bayles' house was the proper compensation for the loss.<sup>240</sup> Thus, concluding that the homeowners failed to prove the existence of a genuine issue of material fact involving the "building structure reimbursement clause," Judge Wiener held that the district court did not err.<sup>241</sup>

Finally, the Bayles and Allstate also disagreed about the sufficiency of the ACV reimbursement and about whether prior payments fully indemnified the Bayles for their wind-caused losses.<sup>242</sup> Although the Bayles produced sufficient evidence of the house's RCV, they did not produce sufficient evidence of the house's ACV.<sup>243</sup> On the other hand, Allstate presented evidence of two ACVs.<sup>244</sup> In the end, the panel held that this issue was immaterial in light of its overarching ruling about Allstate's and the Bayles' shifting evidentiary burdens of production and persuasion.<sup>245</sup> Still, the panel upheld the district court's ruling that Allstate had no duty to pay any additional proceeds to cover the Bayles' wind-caused losses.<sup>246</sup>

Several weeks after deciding *Bayle*, the Fifth Circuit decided *Bradley II*.<sup>247</sup> Again, the homeowners in *Bradley II* argued that Allstate had a contractual duty to pay additional proceeds to cover their personal-property losses and

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240. *See id.*

241. *Id.* at 362 ("It is undisputed that the Bayles neither repaired their damaged property nor replaced it on the same lot. And, although they did purchase a condominium, it was at a different location. Moreover, for the Bayles to recover under the 'building structure reimbursement' clause, the condominium must have been purchased within 180 days of Allstate's last actual cash value payment to the Bayles. [No one] contests that the condominium was not purchased within 180 days of Allstate's last actual cash value payment to the Bayles. 'Louisiana law . . . places the burden on the [insured] to establish every fact essential to recovery and to establish that the claim falls within the policy coverage,' and the Bayles failed to adduce any evidence that their condominium was purchased within the requisite 180-day period." (omission and second alteration in original)).

242. *See id.*

243. *See id.* at 362-63 ("[The Bayles argued that] [t]he mere existence of . . . two competing figures . . . signals [the existence of] a genuine issue of material fact which precludes summary judgment. Allstate [argues] that . . . the Bayles recovered \$132,628.87 in structural damages to their property, which exceeds both figures that Allstate produced in connection with its motion for summary judgment."). Again the Bayles recovered compensation for flood- and wind-caused losses as well as from the sale of their property to Murphy Oil. *See id.*

244. *See id.* at 362 ("In an early report submitted to the NFIP, a copy of which was included in Allstate's summary judgment evidence, the ACV of the home was listed as \$74,284.80 . . . [, and] in its summary judgment briefs, Allstate advanced another ACV sum, which was calculated by its expert . . . to be \$108,220.").

245. *See id.* at 363.

246. *See id.* ("As we explained earlier, Allstate [presented] sufficient evidence [to] support . . . its motion for summary judgment [by establishing] that all wind-caused structural damage to the Bayles' house was fully compensated. Not only did the Bayles fail to counter with any rebuttal evidence to establish the existence of as-yet uncompensated damage caused by wind, the Bayles *also* failed to proffer any evidence that the *quantum* of damages they had already received from Allstate for wind-caused damage was insufficient. The Bayles have cited no authority, and we have found none, to support the proposition that the shifting evidentiary burden of production in these insurance suits somehow absolves the insureds from the traditional rule '[u]nder Louisiana law, [that] the plaintiff must prove damages with reasonable certainty . . .'" (fourth and fifth alteration in original)).

247. *See Bradley II*, 620 F.3d 509 (5th Cir. Sept. 2010).

additional living expenses in the wake of Hurricane Katrina.<sup>248</sup> Allstate argued that the Bradleys had no contractual right to recover any additional payment under their homeowners' policy because they recovered the ACV of the property.<sup>249</sup> Allstate insisted and the Eastern District Court of Louisiana agreed that additional compensation would be a double recovery and a windfall for the Bradleys.<sup>250</sup> On appeal, the Fifth Circuit disagreed.<sup>251</sup>

Writing for the panel, Circuit Judge Stewart outlined the panel's initial findings and rulings.<sup>252</sup> First, the panel found that the district court calculated the ACV incorrectly by using the pre-storm market value of the house.<sup>253</sup> Furthermore, the district judge held that there were no disputed issues of material fact regarding the ACV of the Bradleys' home.<sup>254</sup> The Fifth Circuit panel, however, concluded that the latter holding was reversible error.<sup>255</sup> Citing Louisiana's law, Judge Stewart stressed that "ACV is computed [by determining] the cost of replacing the building as it existed at the time of the accident, [while] taking into account the replacement costs within a reasonable time after the accident . . . [and deducting any] depreciation."<sup>256</sup>

Thus, the panel remanded the case to allow the district court to calculate properly the ACV of the Bradleys' house.<sup>257</sup> The following instruction and ruling also appeared in Judge Stewart's opinion:

Upon remand, the fact-finder must arrive at the proper figure for ACV to establish the amount of actual loss. As long as the Bradleys' combined

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248. *Bradley I*, 606 F.3d 215, 221 (5th Cir. May 2010).

249. *Bradley II*, 620 F.3d at 521.

250. *See id.* ("The [district] court held that because the Bradleys had already collected \$105,139.06 from flood and homeowners coverage combined, any additional recovery would amount to a double recovery. Relying upon *Cole v. Celotex*, the district court . . . held that the Bradleys were not entitled to further recovery as a matter of law.")

251. *See id.* at 528.

252. *See id.* at 519-28.

253. *Id.* at 520-21.

254. *See id.*

255. *See id.* at 521.

256. *Id.* at 520; *see also* *Hackman v. EMC Ins. Co.*, 984 So. 2d 139, 143 (La. Ct. App. 5th Cir. 2008) (reiterating that a homeowners' policy does not define ACV and that Louisiana law defines ACV as "reproduction cost less depreciation"); *Bingham v. St. Paul Ins. Co.*, 503 So. 2d 1043, 1045 (La. Ct. App. 2d Cir. 1987) (stressing that the test for "determining actual cash value is [based on the] principle that an adequately insured person should incur neither economic gain nor loss when his property is destroyed").

257. *See Bradley II*, 620 F.3d at 521 n.9 ("[T]he correct measure of ACV under Louisiana law is replacement cost minus depreciation. Further, Allstate's position that actual loss for purposes of double recovery should be based on the pre-storm market value of the home would effectively invalidate the total loss provision of the policy. The policy limits and premium for the policy reflect Allstate's estimate of the home's pre-storm value. Yet according to Allstate's interpretation, if the home were completely destroyed by wind, then Allstate would *still* not be required to pay the policy limits (\$105,600) because the payment would exceed the pre-storm value (\$97,000). This reads the total loss provision out of the contract and amounts to a windfall for Allstate. Such a construction does not reflect the intent of the parties, as expressed by the words of the policy." (citation omitted)); LA. CIV. CODE ANN. art. 2049 (1985) ("A provision susceptible of different meanings must be interpreted with a meaning that renders it effective and not with one that renders it ineffective.").

recovery under their homeowners and flood policies is less than their actual loss, then the double recovery rule does not preclude the Bradleys from receiving additional compensation under their homeowners policy.<sup>258</sup>

*French* is another “double recovery” controversy that the Fifth Circuit decided this survey period.<sup>259</sup> To repeat, the Eastern District of Louisiana ordered Allstate to pay an additional \$123,000 for French’s Katrina-related, wind-damaged lakefront property.<sup>260</sup> Before the Fifth Circuit, Allstate maintained that the record contained insufficient evidence to support the finding that Allstate had a contractual duty to pay additional money to cover French’s loss.<sup>261</sup> Allstate also argued that the combined prior and additional payments (\$510,000.88) exceeded the value of French’s house.<sup>262</sup> Therefore, according to the insurer, the additional payments violated Louisiana’s “double recovery” rule.<sup>263</sup>

Circuit Judge Stewart wrote the *French* opinion.<sup>264</sup> And, at the outset, he reviewed the controversial ACV provision in the homeowners’ policy that French purchased from Allstate.<sup>265</sup> That provision, titled “How We Pay For A Loss,” reads in pertinent part:

**Actual Cash Value.** *If you do not repair or replace the damaged . . . property, payment will be on an actual cash value basis.* This means there may be a deduction for depreciation. *Payment will not exceed the limit of liability* shown on the Policy Declarations for the coverage that applies to the damaged . . . property, regardless of the number of items involved in the loss.<sup>266</sup>

As Judge Stewart stressed, various Fifth Circuit panels have interpreted the meaning of the ACV clause in Allstate’s homeowners’ insurance contracts.<sup>267</sup> And applying Louisiana’s law, the panels have issued consistent rules: (1) Insured homeowners may not receive payments for structural damage that exceed the ACV of their damaged or destroyed property unless the insureds

258. *Bradley II*, 620 F.3d at 525.

259. *See French v. Allstate Indem. Co.*, 637 F.3d 571, 576 (5th Cir. Apr. 2011).

260. *See id.*

261. *Id.* at 578.

262. *Id.* at 580 (“As the district court noted in its oral ruling, by the start of [the] trial Allstate had paid [French] \$215,292.88 for wind damage to the dwelling, and the flood insurer had paid \$171,708 for flood damage to the dwelling. The [Frenches] had thus recovered a total of \$387,000.88 in insurance proceeds for Katrina-related damage to their home. With the district court’s award of \$123,000, the [Frenches] total recovery for [the damaged property] climbed to \$510,000.88. Allstate argues that \$510,000.88 exceeds the [Frenches] actual loss . . . and therefore the award [was] a double recovery.”).

263. *See id.* at 578-79.

264. *Id.* at 574.

265. *See id.* at 579.

266. *Id.*

267. *See id.* (citing *Nunez v. Allstate Ins. Co.*, 604 F.3d 840, 846 (5th Cir. 2010)); *Bradley II*, 620 F.3d 509, 520 (5th Cir. Sept. 2010); *Bayle v. Allstate Ins. Co.*, 615 F.3d 350, 362 (5th Cir. Aug. 2010).

repair or replace their damaged property;<sup>268</sup> and (2) The ACV is computed “as the cost of replacing the building as it existed at the time of the accident, taking into account the replacement costs within a reasonable time after the accident, minus depreciation.”<sup>269</sup> On the other hand, a homeowner may receive payments to cover additional expenses if an insured homeowner repairs or replaces the covered property within 180 days.<sup>270</sup>

Addressing Allstate’s double-recovery defense, the panel’s findings and conclusion were stated clearly: (1) The district court had authority to calculate French’s actual financial damages—the ACV of the insured’s damaged property;<sup>271</sup> (2) Sufficient evidence appeared in the record to support the district court’s award;<sup>272</sup> and (3) The district court’s award was not an impermissible double recovery under Louisiana’s law.<sup>273</sup> Therefore, finding no clearly reversible error, the *French* panel affirmed the Eastern District of Louisiana’s additional-payment award.<sup>274</sup>

There is more. French paid an additional premium and purchased an “Extended Limits Endorsement,” which was attached to the Allstate policy.<sup>275</sup> The endorsement modifies certain parts of the insurance contract, and in a paragraph titled “How We Pay for A Loss,” the endorsement reads in relevant part:

**Building Structure Reimbursement.** Under Coverage A—Dwelling Protection and Coverage B—Other Structures Protection, we will make additional payment to reimburse you for cost in excess of actual cash value if

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268. See *Nunez*, 604 F.3d at 846; *Bradley II*, 620 F.3d at 525; *Bayle*, 615 F.3d at 362.

269. *Bradley II*, 620 F.3d at 520.

270. See *French*, 637 F.3d at 579.

271. See *id.* at 581 (citing *Bradley II*, 620 F.3d at 522 (“The fact-finder must determine, or the parties may stipulate, the ACV of the property.”)).

272. *Id.*

We reiterate that the district court was best positioned to make credibility determinations of the witnesses to ascertain the Plaintiffs’ actual loss. Moreover, there was sufficient evidence at trial—as Allstate itself points out—that the ACV of the Plaintiffs’ dwelling, and the Plaintiffs’ corresponding actual loss, exceeded \$510,000.88.

*Id.*

The parties submitted as a joint exhibit at trial the flood damage worksheet of Allstate’s adjuster . . . , in which he assessed the ACV of the Plaintiffs’ dwelling at \$571,975.81. Similarly, the parties submitted a 2003 appraisal of the Plaintiffs’ home as another joint exhibit, and that appraisal lists the home’s replacement value at \$533,925. [There was testimony] at trial that this figure likely underestimated the replacement value of the dwelling.

*Id.* at 581 n.9.

273. *Id.* at 579-81 (“Allstate raised this very argument in the district court both before trial, in its proposed findings of fact, and after trial, in its Rule 52(b) motion. Both times the argument was rejected: the district court declined to adopt Allstate’s position at the close of trial; and, in denying Allstate’s Rule 52(b) motion, the district court implicitly reaffirmed that the Plaintiffs’ pre-trial recovery fell short of indemnifying them for their loss—sufficiently so that the additional award for wind damage did not constitute a double recovery. We cannot say that this finding was clearly erroneous.”).

274. See *id.* at 581.

275. See *id.*

*you repair, rebuild or replace damaged, destroyed or stolen covered property* within 180 days of the actual cash value payment.

....

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

- a) the replacement cost . . . ;
- b) the amount actually and necessarily spent to repair or replace the damaged building structure(s) . . . ; or
- c) the limit of liability applicable to the building structure(s) as shown on the Policy Declarations

....

Building Structure Reimbursement payment will be limited to the difference between any actual cash value payment made for the covered loss to building structures and the smallest of 1), 2) or 3) above.<sup>276</sup>

As stated earlier, the district judge concluded that French could not collect money under the endorsement.<sup>277</sup> Thus, on appeal, French challenged the district court's ruling, asserting that the ruling was erroneous.<sup>278</sup> In part, the district court's finding was based on the following language in the endorsement:

This endorsement applies only if:

- 1) You insure your dwelling, attached structures and detached building structures to 100% replacement cost as determined by:
  - a) an Allstate Home Replacement Cost Estimator completed and based on the accuracy of information you furnished; or
  - b) our inspection of your residence premises.<sup>279</sup>

Judge Stewart's analysis of this issue was short but sufficient.<sup>280</sup> Like the district court, he found and stressed the following indisputable fact: The homeowners did not repair or replace their damaged property.<sup>281</sup> In addition, Judge Stewart cited and embraced the *Bayle* panel's analysis and conclusion

276. *Id.* In addition, "[t]he [e]ndorsement, where applicable, substitutes the following language into section (3): '3) 120% of the limit of liability applicable to the building structure(s) as shown on the Policy Declarations . . . .' All other policy terms and conditions remain the same." *Id.* at 582 (omission in original).

277. *Id.* at 575.

278. *Id.* at 581.

The district court rejected [the Frenches'] argument that the Extended Limits Endorsement applied to [the homeowners'] wind-damage claim. To prevail . . . , the district court concluded, [the Frenches], at the threshold, had to show that they had repaired or replaced their damaged property, and it was undisputed at trial that the [homeowners] had not made any permanent repairs to their dwelling. The district court [also] concluded that the Extended Limits Endorsement did not apply [because the homeowners] had not insured their property to a hundred percent of its replacement cost, as required under the Endorsement.

*Id.* at 582.

279. *Id.* at 582 n.10.

280. *See id.* at 578-82.

281. *Id.* at 579.

surrounding the same question.<sup>282</sup> In the end, the circuit judge concluded that Allstate had no duty to pay any building structure reimbursement.<sup>283</sup> Judge Stewart also concluded that Allstate had no duty to pay any proceeds to cover French's additional living expenses.<sup>284</sup>

*B. First-Party Claims—Intangible Commercial Property Losses*

**Substantive Question:** *Whether under Louisiana's law, commercial property insurers have a contractual duty to pay property owners for the latter's Hurricanes Katrina- and Gustav-related business-interruption losses.*

A week after Hurricane Katrina destroyed a substantial amount of commercial property along the Gulf Coast, a prescient article appeared in the *Wall Street Journal* about the types of insurance disputes that would arise.<sup>285</sup> In relevant part, the article read:

Insurance disputes over payments for flooding and other storm damage could extend far beyond homeowners, as businesses of all sizes begin to confront insurers over lost profits from Hurricane Katrina.

Billions of dollars . . . for so-called *business-interruption* insurance—which reimburses owners for some expenses and lost profits—will hinge on

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282. *See id.* at 582.

The Bayles sought damages under the “building structure reimbursement” provision of their policy with Allstate, but it was “undisputed that the Bayles neither repaired their damaged property nor replaced it on the same lot.” The district court thus “rejected the proposition that any of the Bayles’ structural damage should be calculated under the ‘building structure reimbursement’ provision, maintaining that the Bayles were limited to the ACV of the property.” We affirmed in that case, holding that “[t]he district court did not err in concluding that the Bayles are not entitled to any payments for structural damage in excess of the ACV of their house.”

*Id.* (alteration in original) (quoting *Bayles v. Allstate Ins. Co.*, 615 F.3d 352, 361-62 (5th Cir. Aug. 2010)).

283. *Id.* (“We agree with the district court’s legal conclusion and therefore do not address its alternative factual determination. As is plainly evident from the text of the Extended Limits Endorsement, it modifies only the Building Structure Reimbursement provision, and therefore an insured may benefit from the Endorsement only if she is entitled to Building Structure Reimbursement.”).

284. *See id.* at 583 (“The district court concluded that because the [homeowners] had not introduced evidence of any additional living expenses *actually* incurred, they were not entitled to payments under the ALE provision. Were the [homeowners] to later commence repairs that required them to vacate their home, and thereby incur ALE, the district court stated, they could then claim payment under the provision. On appeal, the [homeowners] do not dispute that they have not established the predicate requirement of actually incurring ALE. Indeed, it is undisputed that the [homeowners] have continuously resided at their house since 2003 and have not commenced any permanent repairs to their home. Instead, the [homeowners] again argue that their failure to repair should be excused under Article 1772 of the Louisiana Civil Code. And again, we decline to address this argument raised for the first time on appeal. We do note our agreement with the district court that under the homeowners’ policy, it appears that the [homeowners] may later claim ALE payment once they have actually incurred those expenses.”).

285. Theo Francis, *In Katrina's Wake: Businesses Face Insurance Disputes—Billions of Dollars to Hinge On a Host of Murky Issues; Parsing Policy Language*, WALL ST. J., Sept. 9, 2005, at A13.

many of the same issues facing homeowners, including whether damage was caused by flooding or by wind and rain.

....  
[The estimated cost to cover losses is] \$100 billion, [and] private-sector insurers [are] expected to [pay] between \$17 billion and . . . \$50 billion.

. . . Disputes are particularly likely [to arise] over *the complexities of business-interruption insurance*. . . . In addition to reimbursing business owners for some continuing business expenses and profit *lost from direct storm damage*, such policies also provide some coverage when business is lost as a *result of orders of civil authority*.

When business-interruption payments are triggered by direct damage to a property, they can continue for months, sometimes until business returns to normal. [Insurance compensation, for say] . . . the mandatory evacuation of New Orleans . . . [is] typically less generous, ending after two weeks or a month . . . . Some civil-authority [insurance payments start only] if the order stemmed from a peril covered under the [insurance contract's property-loss clause] . . . .

Claims decisions are expected to hinge on the specific policy language, with *some disputes stretching out years*.<sup>286</sup>

A search of reported insurance-law decisions reveals that the article's forecast was accurate: Insurers and insured commercial enterprises have litigated numerous business-interruption disputes in Louisiana's state courts.<sup>287</sup>

On the other hand, only a few of the Katrina-related business-interruption controversies have reached the Fifth Circuit. In early 2010, the court of appeals decided two disputes, *Versai Management Corp. v. Clarendon America Insurance Co.* and *Catlin Syndicate Ltd. v. Imperial Palace of Mississippi, Inc.*<sup>288</sup> And, in late 2010, the Fifth Circuit decided and published another Katrina-related case, *Consolidated Companies, Inc. v. Lexington Insurance Co.*<sup>289</sup> The court of appeals decided *Dickie Brennan & Co. v. Lexington Insurance Co.* in early 2011.<sup>290</sup> But, *Dickie* is a Hurricane Gustav-related business-interruption conflict.<sup>291</sup> Here, a review of *Consolidated* and *Dickie* is presented. And, as the reader will discover, *Dickie* and *Consolidated* address variations of a recurring question that the Fifth Circuit decided in *Versai*, *Catlin*, and *Finger Furniture Co. v. Commonwealth Insurance Co.*: What triggers an insurer's duty to pay proceeds when a hurricane and civil

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286. *Id.* (emphasis added). Twenty-one cases were generated by searching Westlaw's LAIN-CS database on September 2, 2011, using the query "business interruption." To be sure, that number is significant because the aggregate of all disputes involved millions of dollars.

287. *See id.*

288. *Versai Mgmt. Corp. v. Clarendon Am. Ins. Co.*, 597 F.3d 729, 733 (5th Cir. 2010); *Catlin Syndicate Ltd. v. Imperial Palace of Miss., Inc.*, 600 F.3d 511, 512 (5th Cir. 2010).

289. *Consol. Cos., Inc. v. Lexington Ins. Co.*, 616 F.3d 422, 424 (5th Cir. Aug. 2010).

290. *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 684 (5th Cir. Mar. 2011).

291. *See id.* at 687.



authorities' accompanying mandatory evacuation orders interrupt an insured's business?<sup>292</sup>

*1. A Review of Pertinent Facts in "Business-Interruption" Cases*

First, consider the most pertinent facts surrounding the dispute in *Consolidated*. Consolidated Companies, Inc. (Conco) owned a warehouse located in Harahan, Louisiana.<sup>293</sup> On August 28, 2005, Conco received a commercial property insurance contract from Lexington Insurance Company (Lexington).<sup>294</sup> The policy limit was \$25 million, and it insured Conco against business interruption and other covered perils.<sup>295</sup> On August 29, 2005, Hurricane Katrina—an undisputed covered peril—damaged Conco's property and equipment.<sup>296</sup> "Conco resumed partial operations within ten days."<sup>297</sup> Fifteen months later, Conco's operations were completely restored.<sup>298</sup> During the interruption of normal business activities, however, Conco earned \$205,840,489 in revenues and incurred \$205,561,483 in debt.<sup>299</sup> Conco's small profit was \$279,006.<sup>300</sup>

Conco submitted a notice-of-loss claim to the insurer.<sup>301</sup> After investigating and adjusting the claim, Lexington determined that Conco's total loss was \$3,247,070.<sup>302</sup> Conco accepted a check for \$3,000,000, but the insured refused Lexington's check for the \$247,070.<sup>303</sup> Later, Conco asserted that Lexington had a contractual duty to pay \$24,970,551 for covered losses.<sup>304</sup> Of the latter amount, the total business-interruption claim was \$19,379,642—purportedly \$7,071,120 for lost profits and \$12,308,522 for "charges and expenses."<sup>305</sup> Ultimately, Lexington refused to pay.<sup>306</sup> Conco filed a breach-of-contract action against Lexington in the district court for the Eastern District of Louisiana.<sup>307</sup> Conco received a jury award, which was substantially greater

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292. See *Finger Furniture Co. v. Commonwealth Ins. Co.*, 404 F.3d 312, 313 (5th Cir. 2005).

293. *Consol. Cos., Inc.*, 616 F.3d at 424.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.* ("Conco filed this action alleging Lexington breached the insurance contract. Conco also alleged that Lexington violated Louisiana's insurance bad-faith statutes by failing to pay the full amount of Conco's damages within the statutes' prescribed time periods."); see also LA. REV. STAT. §§ 22:1973, :1892 (2009) (recodifying LA. REV. STAT. §§ 22:1220, :658 (2008), respectively).

than Lexington's offer.<sup>308</sup> After the district judge entered the judgment, Lexington appealed.<sup>309</sup>

Lexington was also the defendant in *Dickie*.<sup>310</sup> Hurricane Gustav and subsequent governmental orders, however, allegedly caused the insured's business-interruption losses.<sup>311</sup> "As Hurricane Gustav approached Louisiana on August 30, 2008, New Orleans Mayor Ray Nagin issued a mandatory evacuation order."<sup>312</sup> In pertinent part, the order stated that the "Governor and Mayor Nagin were declaring a state of emergency 'because of anticipated high lake and marsh tides due to the tidal surge, combined with the possibility of intense thunderstorms, hurricane force winds, and widespread severe flooding.'"<sup>313</sup>

When Gustav arrived in the Gulf of Mexico, Dickie Brennan & Company (Brennan) and several of its affiliates owned and operated restaurants in New Orleans.<sup>314</sup> Gustav-related winds and flooding did not seriously damage Brennan's properties.<sup>315</sup> But, Brennan asked Lexington to pay insurance proceeds to cover business-interruption losses, arguing that it could not conduct business during a mandatory evacuation.<sup>316</sup> Lexington refused to pay for the Brennan's interrupted-business losses.<sup>317</sup> Brennan sued Lexington in the district court for the Eastern District of Louisiana.<sup>318</sup> The district court awarded the insurer's request for summary relief.<sup>319</sup> Brennan appealed.<sup>320</sup>

## 2. Fifth Circuit Panels' "Business-Interruption" Opinions

Did Lexington have a contractual obligation under Conco's and Brennan's commercial insurance contracts to indemnify those companies?<sup>321</sup> The *Consolidated* jury ruled in favor of Conco, finding that Lexington had a duty to

308. See *Consol. Cos., Inc.*, 616 F.3d at 425.

309. *Id.*

310. See *Dickie Brennan & Co., Inc. v. Lexington Ins. Co.*, 636 F.3d 683, 684 (5th Cir. Mar. 2011).

311. *Id.* at 684-85.

312. *Id.* at 684 (ordering "the evacuation of the West Bank commencing at 8:01 a.m. on August 31, 2008 and of the East Bank commencing at noon on August 31, 2008"); *id.* at 684 n.2 (announcing "On September 2, 2008, Mayor Nagin issued an Amended Evacuation Order announcing that the evacuation would end on September 4, 2008. Plaintiffs do not argue that the Amended Order triggered coverage.").

313. *Id.* at 684 ("When the evacuation order was issued, Hurricane Gustav was approaching New Orleans from the Gulf of Mexico.").

314. See, e.g., *id.* at 684 n.1 ("Cousins Restaurant, Inc. (doing business as Palace Café); Seven Sixteen Iberville, L.L.C. (doing business as Dickie Brennan's Steakhouse); and Brasserie, L.L.C. (doing business as Bourbon House)").

315. *Id.* at 684.

316. *Id.*

317. *Id.*

318. *Id.* at 683.

319. *Id.* at 684.

320. *Id.* at 683.

321. See *id.* at 683-85; *Consol. Cos., Inc. v. Lexington Ins. Co.*, 616 F.3d 422, 424 (5th Cir. Aug. 2010).

reimburse Conco for its business-interruption expenses and losses.<sup>322</sup> The district court did not accept the entire verdict.<sup>323</sup> Therefore, the district judge reduced the business-interruption award, other damages, and penalties.<sup>324</sup> In the final judgment, Conco received \$19,379,642 for interrupted-business damages.<sup>325</sup> Lexington appealed.<sup>326</sup>

Circuit Judge Southwick wrote the *Consolidated* opinion.<sup>327</sup> And right away, he framed the business-interruption controversy this way: “The meaning of ‘charges and expenses’ is a central dispute in this appeal.”<sup>328</sup> More specifically, Lexington asserted that the district court erred by failing to give proper jury charges.<sup>329</sup> Conversely, Conco maintained that the district court correctly interpreted the policy, and therefore the jury correctly awarded \$12,308,522 for business-interruption “charges and expenses.”<sup>330</sup>

The commercial insurance contract that Conco purchased from Lexington contained a business-interruption clause.<sup>331</sup> It read:

EXPERIENCE OF BUSINESS: In determining the amount of net profit (or loss), *charges and expenses* covered hereunder for the purpose of ascertaining the amount of loss sustained, due consideration shall be given to *the experience of the insured’s business* before the date of damage or destruction and to the *probable experience* thereafter had no loss occurred.<sup>332</sup>

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322. *Consol. Cos., Inc.*, 616 F.3d at 425 (“The jury awarded Conco \$19,586,239 for business-interruption loss, a figure later slightly reduced by the district court.”); *id.* at 425 n.2 (“The jury also awarded damages for losses to inventory, physical damage to Conco’s warehouse, and extra expenses, but only the business-interruption damages are at issue on this appeal.”). The jury “also found that Lexington violated the Louisiana bad-faith statutes by withholding payment arbitrarily, capriciously, or without probable cause. This resulted in statutory damages of \$2.5 million under Section 22:1220 and a statutory penalty of \$5,365,797.50 under Section 22:658.” *Id.* at 425. This particular “penalty represents twenty-five percent of the total amount the jury found that Lexington failed to pay arbitrarily, capriciously, or without probable cause.” *Id.* at 425 n.3. Initially, the “penalty was \$6,167,446.75, but it was reduced to reflect the district court’s post-trial modifications to the total damages.” *Id.* Furthermore, “[t]he jury also assessed \$2.5 million in penalties (in addition to \$2.5 million in damages) under Section 22:1220. The district court set aside this \$2.5 million penalty, and Conco does not challenge the ruling.” *Id.* at 425; *see also* LA. REV. STAT. ANN. § 22:658 (2009) (recodifying § 22:1220).

323. *Consol. Cos., Inc.*, 616 F.3d at 425.

324. *Id.* (“[The court reduced] the jury verdict by \$3 million to account for an alleged failure by jurors to deduct the amount Lexington had advanced to Conco. Second, the business-interruption award was reduced by \$206,597 based on the conclusion that the jury improperly included inventory mark-ups and discounts in computing the loss. Third, the district court proportionately reduced the penalties to reflect the reductions.”). In the end, Conco received \$21,463,190 in compensatory damages, \$5,365,797.50 in statutory penalties, and \$2,500,000 in statutory damages. *Id.*

325. *Id.* (\$19,586,239 for business-interruption loss minus \$206,597).

326. *Id.*

327. *Id.* at 424.

328. *Id.*

329. *Id.* at 425.

330. *Id.* at 424-25.

331. *Id.* at 431.

332. *Id.* at 421 (emphasis added).

In addition, a conditions clause appeared in Lexington's insurance contract.<sup>333</sup> The conditions provision stated:

- (1) RESUMPTION OF OPERATIONS: It is a condition of this insurance that if the insured could reduce the loss resulting from the interruption of business,
- (a) by a complete or partial resumption of operations, or
  - (b) by making use of other available stock, merchandise or location
- such reduction will be taken into account in arriving at the amount of loss hereunder, but only to the extent that the business interruption loss covered under this policy is thereby reduced.<sup>334</sup>

The Fifth Circuit panel reviewed the business-interruption and conditions provisions in light of Louisiana's rules of contract construction and interpretation.<sup>335</sup> And writing for the panel, Judge Southwick concluded: (1) The insurance contract required Lexington to pay proceeds, which returned a completely shutdown Conco to the same financial position that the company occupied before Katrina; (2) Conco could recover lost profits that it could have made but for Katrina; and (3) Conco could recover "usual expenses" that the company incurred during the interruption through not operating.<sup>336</sup> The panel, however, found, and Judge Southwick stressed: Conco's business did not close

333. *Id.* at 427.

334. *Id.*

335. *See id.* at 426; LA. CIV. CODE ANN. art. 2045 (2008) (providing that a contract should be interpreted to determine the "common intent of the parties"); LA. REV. STAT. ANN. § 22:881 (2009) (stating that an insurance policy must be "construed according to the entirety of its terms and conditions as set forth in the policy"). Section 22:881 cites Louisiana's law and the Fifth Circuit's analysis in *In re Katrina Canal Breaches Litigation*, 495 F.3d 191 (5th Cir. 2007), and is significant because the appellate court outlined how district courts should apply Louisiana rules and interpret an insurance contract that contains potentially ambiguous language:

The words of a contract must be given their generally prevailing meaning. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. If the policy wording at issue is clear and unambiguously expresses the parties' intent, the insurance contract must be enforced as written.

Where, however, an insurance policy includes ambiguous provisions, the ambiguity . . . must be resolved by construing the policy as a whole; one policy provision is not to be construed separately at the expense of disregarding other policy provisions. . . . Words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract. A provision susceptible of different meanings must be interpreted with a meaning that renders it effective and not with one that renders it ineffective.

Ambiguity may also be resolved through the use of the reasonable-expectations doctrine—i.e., by ascertaining how a reasonable insurance policy purchaser would construe the clause at the time the insurance contract was entered. The court should construe the policy to fulfill the reasonable expectations of the parties in light of the customs and usages of the industry. A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties.

*In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 207 (5th Cir. 2007) (alteration and first omission in original) (citations omitted) (internal quotation marks omitted).

336. *Consol. Cos., Inc.*, 616 F.3d at 427.

completely.<sup>337</sup> Ten days after Katrina, Conco's operations began and continued for fifteen months.<sup>338</sup> And, Conco made a net profit of \$279,006.<sup>339</sup>

Again, based on evidence extrapolated from past experiences, Conco argued that Lexington had a duty to pay \$12,308,522 to cover business-interruption charges and expenses.<sup>340</sup> Interpreting the insurance contract and applying the doctrine of ambiguity, the Eastern District of Louisiana concluded that funds to cover charges and expenses were not excluded under the policy.<sup>341</sup> The district court declared: "The policy does not address 'charges and expenses' in the event of a resumption of operations and does not clearly state the effect that a resumption of operations has on the calculation of charges and expenses."<sup>342</sup>

Put simply, the *Consolidated* panel refused to embrace the district court's interpretations and analysis.<sup>343</sup> Ultimately, the panel concluded: (1) No ambiguity appeared in the policy about whether Lexington had a duty to pay for business-interruption charges and expenses,<sup>344</sup> (2) Conco earned a net profit of

337. *Id.* at 428.

338. *Id.*

339. *Id.*

340. *Id.* at 425. Also using past earnings, Conco's expected profit before Katrina was \$7,350,126. *Id.* at 428. That difference between actual and expected profit—\$279,006 and \$7,350,126—was after subtracting the actual, post-Katrina profit from the expected profit; the yield was \$7,071,120. *Id.* The Fifth Circuit concluded that the difference was recoverable. *See id.*

341. *See id.* at 429 ("The district court was referring to the absence of any mention of 'charges and expenses' in the resumption-of-operation section of the policy. We note, though, that the section similarly fails to mention profits. Instead, it refers to whether 'the insured can reduce the loss' by some level of resumption. The district court then relied on the maxim that 'ambiguity in an insurance policy is construed against the insurer,' and determined that no reduction in charges and expenses was permitted.")

342. *Id.* (quoting *Consol. Cos., Inc. v. Lexington Ins. Co.*, No. 06-4700, 2009 WL 211751, at \*9 (E.D. La. Jan. 23, 2009)).

343. *See id.*

344. *See id.* Because Judge Southwick's explanation of the panel's conclusion is fairly instructive, a large section appears below:

We disagree with the district court's analysis. . . . [T]he first question . . . is whether the relevant language is ambiguous on its face. Some of the relevant wording is in the resumption-of-operations clause. As a condition of coverage, operations had to be resumed "if the insured could reduce the loss resulting from the interruption of business" by such a resumption. The policy states that "such reduction will be taken into account in arriving at the amount of loss hereunder, but only to the extent that the business interruption loss covered under this policy is thereby reduced."

This clause does not elaborate on what the "loss resulting from the interruption of business" means. Meaning is found in the general section immediately before the "Resumption of Operations" subparagraph. There, "actual loss" from an interruption of business is said to consist of the net profit that the interruption prevented the insured from earning plus "all charges and expenses (excluding ordinary payroll), but only to the extent that they must necessarily continue during the interruption of business, and only to the extent to which they would have been incurred had no loss occurred." Three paragraphs later, the policy addresses the effect of the insured's resuming operations: "if the insured could reduce the *loss* resulting from this interruption of business . . . by a complete or partial resumption of operations . . . such reduction will be taken into account in arriving at the amount of loss." This is the same "loss" that is defined as being expected net profit plus charges and expenses. There is no ambiguity.

*Id.* at 429 (last two omissions in original) (citations omitted).

\$279,006, which was sufficient; and (3) The Eastern District of Louisiana's erroneous jury instructions would have allowed Conco to receive a windfall.<sup>345</sup> Therefore, the *Consolidated* panel vacated the district court's business-interruption charges and expenses award, vacated the award of statutory damages and penalties against Lexington, and affirmed the district court's judgment in all other respects.<sup>346</sup>

In *Dickie*, the Eastern District of Louisiana ruled in favor of Lexington after reviewing the language in Brennan's commercial insurance contract.<sup>347</sup> The business-interruption clause read:

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by *action of civil authority that prohibits access to the described premises* due to direct physical loss of or *damage to property, other than at the described premises*, caused by or resulting from any Covered Cause of Loss. This coverage will apply for a period of up to two consecutive weeks from the date of that action.<sup>348</sup>

Consider carefully the italicized phrases in the business-interruption provision. Before the district court, Brennan argued: "[D]amage to property" occurred at a place "*other than at the described premises*" when Mayor Nagin issued the evacuation order.<sup>349</sup> The insured stressed that Hurricane Gustav caused property damage in the Caribbean before it reached New Orleans.<sup>350</sup> Therefore, according to Brennan, the conditions were satisfied and Lexington had a duty to pay business-interruption proceeds.<sup>351</sup> The Eastern District of Louisiana rejected Brennan's argument and granted Lexington's motion for summary relief.<sup>352</sup> Briefly, the district court found no nexus between the evacuation order and the property damage that satisfied the conditions in the insurance contract.<sup>353</sup>

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345. *See id.* at 429-30 ("The district court's calculation method required jurors to give Conco a windfall. If the charges and expenses had already been paid by the revenue of the business, requiring the policy also to pay them is not placing Conco in the same position it would have been had no damage been suffered . . . . Only if revenue did not offset the charges and expenses would the insurance policy be called upon for payment. We acknowledge that the district court informed jurors that this 'policy is designed to place the insured in the position that it would have been in if there had been no interruption,' but the court did not allow jurors to make the reduction for charges and expenses necessary to do that. Conco was placed in a better position than if there had been no interruption. Because Conco was able to pay all of its charges and expenses with revenue during the restoration period, we vacate the award of \$12,308,522 in charges and expenses. No part of that amount can be recovered in this case.").

346. *See id.* at 424, 428.

347. *See Dickie Brennan & Co., Inc. v. Lexington Ins. Co.*, 636 F.3d 683, 684 (5th Cir. Mar. 2011).

348. *Id.* at 685 (emphasis added).

349. *Id.* at 684-85 (emphasis added).

350. *See id.* at 684 ("The Brennans allege that Hurricane Gustav had already damaged property in the Caribbean nations of Cuba, Jamaica, the Dominican Republic, and Haiti when Nagin issued the evacuation order.").

351. *See id.* at 685.

352. *See id.* at 684.

353. *See id.*

Circuit Judge Davis fashioned the opinion for the *Dickie* panel.<sup>354</sup> And at the outset, Judge Davis applied Louisiana's law to decide the case.<sup>355</sup> Then, he cited the on-point or highly relevant conclusion in *Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, LLP v. National Fire Insurance Co. of Hartford*.<sup>356</sup> In *Kean*, a district court considered a nearly identical civil-authority provision as the one in Lexington's insurance policy.<sup>357</sup> Before receiving business-interruption compensation under a civil-authority provision, the *Kean* court declared that an insured must establish a loss of business income.<sup>358</sup> In particular, an insured must prove four elements:

- (1) [civil authorities' action caused the interruption]; (2) the action of civil authority [prohibited the insured's] access to the described premises . . . ; (3) the action of civil authority prohibiting access to the described premises must be caused by direct physical loss of or damage to property other than at the described premises; and (4) the loss or damage to property other than the described premises must be caused by or result from a covered cause of loss as set forth in the policy.<sup>359</sup>

Briefly put, Lexington's and Brennan's disagreement centered on whether Mayor Nagin's mandatory evacuation order satisfied the third element.<sup>360</sup> Brennan argued that the third element was established if (1) civil authorities responded to a peril that causes property damage elsewhere and (2) the same peril threatened to cause damage in a local vicinity where the insured's property was located.<sup>361</sup> Citing the prior damage in the Caribbean and Hurricane Gustav's then-projected path toward New Orleans, Brennan insisted that it had satisfied this element.<sup>362</sup> Lexington, on the other hand, argued that (1) "the policy require[d] a causal link between the prior damage and the civil authority action" and (2) "the damage must be near . . . the insured premises to satisfy that link."<sup>363</sup>

Disposing this controversy quickly and efficiently, Judge Davis emphasized that (1) Mayor Nagin's evacuation order did not mention any earlier property damage in the Caribbean; (2) the order only listed "possible future storm surge, high winds, and flooding based on Gustav's predicted path"; and (3) no property damage had occurred in Louisiana when the civil

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354. *See id.*

355. *See id.* at 685.

356. *Id.* (discussing *Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, LLP v. Nat'l Fire Ins. Co. of Hartford*, No. 06-770-C, 2007 WL 2489711, at \*1 (M.D. La. Aug. 29, 2007)).

357. *See Kean*, 2007 WL 2489711, at \*1.

358. *See id.* at \*3.

359. *Id.*

360. *See Dickie*, 636 F.3d at 685.

361. *See id.*

362. *See id.*

363. *Id.*

authorities issued the evacuation.<sup>364</sup> Therefore, Brennan failed to persuade the *Dickie* panel that a nexus existed between any prior property damage and the evacuation order.<sup>365</sup> And because Brennan did not meet its burden of proof, the panel affirmed the judgment of the district court.<sup>366</sup>

### III. THIRD-PARTY CLAIMS: SOCIAL GUESTS, PROPERTY OWNERS, AND INDEPENDENT CONTRACTORS' PERSONAL-INJURY CLAIMS AND COMMERCIAL AUTOMOBILE INSURERS' DUTY TO DEFEND AND INDEMNIFY INSUREDS

**Substantive Question:** *Whether under Mississippi's and Texas's laws, automobile liability insurers have a duty to defend and indemnify insureds against social guests, property owners, and independent contractors' personal-injury claims and lawsuits.*

During the 2010–2011 term, Fifth Circuit panels devoted a considerable amount of judicial resources to decide three quarrels among consumers and their automobile insurers.<sup>367</sup> The cases are: *Employers Mutual Casualty Co. v. Bonilla*, *Canal Insurance Co. v. Coleman*, and *Capital City Insurance Co. v. Hurst*.<sup>368</sup> To be sure, the substantive questions in these declaratory judgment

364. *Id.* at 685-86.

365. *See id.* at 686 (“We are persuaded . . . that the district court correctly accepted Lexington’s argument that [Brennan] failed to establish a link between the property damage in the Caribbean and the issuance of Nagin’s evacuation order so as to trigger coverage under the Lexington policy.”) (citing *S. Tex. Med. Clinics, PA v. CNA Fin. Corp.*, No. H-06-4041, 2008 WL 450012, at \*10 (S.D. Tex. 2008)). In *South Texas*, authorities predicted that Hurricane Rita would arrive in Wharton County, Texas. *See South Texas*, 2008 WL 450012, at \*2. They issued a mandatory evacuation order, which the insured obeyed. *Id.* Rita reached Florida and damaged property before the mandatory evacuation order was issued in Texas. *Id.* Although the insured’s property in Wharton County was not damaged, the evacuation caused business-interruption losses. *Id.* The insurance policy contained a civil authority provision identical to the provision in the Lexington policy. *Id.* Judge Rosenthal concluded that the insured did not establish the necessary nexus between the damage and issuance of the order. *Id.* Instead, the judge found that the civil official issued the evacuation order because Hurricane Rita was threatening the Texas coast and not because Hurricane Rita had already caused property damage in Florida. *See id.* at \*10.

366. *See Dickie*, 636 F.3d at 686-87 (“The general rule is that ‘[c]ivil authority coverage is intended to apply to situations where access to an insured’s property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured’s property.’ Although it does not expressly address the proximity issue, the Lexington policy requires proof of a causal link between prior damage and civil authority action. The record in this case demonstrates no such link, which leads us to conclude that the district court correctly found no coverage for the Brennans’ loss of revenue because of the business interruption.” (footnote omitted)).

367. *See, e.g., Emp’rs Mut. Cas. Co. v. Bonilla*, 613 F.3d 512 (5th Cir. July 2010) (discussing whether injuries from a fire in a truck constituted use of the vehicle for insurance purposes).

368. *Id.* (Panel comprised of Circuit Judges W. Eugene Davis, Leslie Southwick, and Jacques L. Wiener); *Canal Ins. Co. v. Coleman*, 625 F.3d 244 (5th Cir. Nov. 2010) (Panel comprised of Circuit Judges Fortunato Benavides, Harold DeMoss, and Jennifer Elrod); *Capital City Ins. Co. v. Hurst*, 632 F.3d 898 (5th Cir. Feb. 2011) (Panel comprised of Circuit Judges Harold DeMoss, Carolyn King, and Edward Prado).



cases are recurring and extremely familiar.<sup>369</sup> Furthermore, the three panels did not surprise the reader by employing a new or more creative methodology to address the litigants' disputes.<sup>370</sup> In fact, it is arguable that two panels simply used an "old" template or a routine methodology to decide these automobile-insurance controversies. And, that is arguably the source of the problems in two opinions. Although the opinions in *Coleman* and *Hurst* are lengthy and somewhat predictable, the analysis in each is less than stellar. In each opinion, the panel either discussed major issues superficially or failed to discuss major issues, period.<sup>371</sup> Below, the panels' findings and analyses as well as some of their questionable conclusions and declarations are outlined and discussed more fully.

*A. A Review of Pertinent Facts in Automobile-Related Duty-to-Defend and Duty-to-Indemnify Cases*

The legal row in *Bonilla* evolved from a terrible accident.<sup>372</sup> Jolly Chef Express, Inc. (Jolly Chef) is a Texas corporation.<sup>373</sup> Dallas, Texas is its principle place of business.<sup>374</sup> Jolly Chef's business may be categorized under the heading "mobile catering" or "[r]etail [t]rade [d]rinking and [e]ating [p]laces."<sup>375</sup> Regularly, Juan Miguel Bonilla (Bonilla) leased a mobile-catering truck from Jolly Chef.<sup>376</sup> Bonilla also "leased a space on Jolly Chef's commissary and parking lot[.]" and he typically hired a driver and a cook for each leased truck.<sup>377</sup> And, at the end of each day, the driver and cook returned the leased truck to the commissary, cleaned the truck, and prepared it for the next day's operation.<sup>378</sup>

In the course of events, Bonilla leased Truck 219.<sup>379</sup> He employed Fabricio Fernandez and Isabel Molina—driver and cook, respectively—to operate and sell items from the truck.<sup>380</sup> After completing their route on one fateful day in 2002, Molina and Fernandez returned Truck 219 to Jolly Chef's

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369. Compare *Bonilla*, 613 F.3d at 513-14 (asking whether injuries sustained resulted from use of the vehicle and the insurance company was liable), with *Coleman*, 625 F.3d at 246 (discussing whether an accident was covered by an insurance policy).

370. See *infra* text accompanying notes 464-85.

371. See, e.g., *infra* text accompanying notes 515-25 (noting the validity of the defense raised in *Coleman* left for future panel consideration).

372. *Bonilla*, 613 F.3d at 514.

373. *Jolly Chef Express, Inc.*, CORPORATION WIKI, <http://www.corporationwiki.com/Texas/Irving/jolly-chef-express-inc/32682399.aspx> ("Updated 10/27/2011 - This profile of Jolly Chef Express, Inc. was created using data from Texas Secretary of State.") (last visited Mar. 6, 2012).

374. *Id.*

375. See *Bonilla*, 613 F.3d at 517; *Jolly Chef Express, Inc.*, ISHCC, <http://www.ishcc.org/TX/Grand-Prairie/jolly-chef-express-inc> (last visited Mar. 6, 2012).

376. *Bonilla*, 613 F.3d at 514.

377. *Id.*

378. *Id.*

379. *Id.*

380. See *id.*

lot.<sup>381</sup> They parked it and began to clean the vehicle.<sup>382</sup> Fernandez poured a flammable substance on the floor of the truck to loosen the grease.<sup>383</sup> Then, he left the truck to complete another task.<sup>384</sup> Molina was in the truck and began to wash dishes.<sup>385</sup> Suddenly, a pilot light on the stove ignited the substance on the floor, causing an explosion.<sup>386</sup> Flames engulfed Molina, and she was severely injured.<sup>387</sup> Molina sued Bonilla and Jolly Chef in a Texas state court.<sup>388</sup>

When the accident occurred involving Truck 219, Bonilla's small enterprise was not insured.<sup>389</sup> Truck 219, however, was listed as insured property on Jolly Chef's three insurance policies.<sup>390</sup> Put simply, Employers Mutual Casualty Company (Employers Mutual) insured Jolly Chef's trucks under a commercial general liability (CGL) insurance contract and under a commercial umbrella policy.<sup>391</sup> Additionally, Emcasco Insurance Company (Emcasco) insured Jolly Chef under a commercial automobile liability policy.<sup>392</sup> Jolly Chef's entire fleet of trucks was covered under the Emcasco auto insurance policy.<sup>393</sup>

After Molina filed her personal-injury suit, both Emcasco and Employers Mutual (EEM) reserved their respective rights and began to defend Jolly Chef and its lessee (Bonilla).<sup>394</sup> Later, Molina secured a \$1,832,933.58 judgment against Bonilla.<sup>395</sup> She did not prevail, however, against Jolly Chef.<sup>396</sup> Even though EEM defended Jolly Chef and Bonilla, both insurers refused to pay the judgment.<sup>397</sup> Instead, EEM filed a declaratory judgment action in the district court for the Northern District of Texas.<sup>398</sup> Bonilla and Molina—the third party who burned in Truck 219—were defendants.<sup>399</sup> In due course, all parties filed motions for summary judgment.<sup>400</sup> The district court granted EEM's motion.<sup>401</sup> Bonilla and Molina appealed.<sup>402</sup>

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381. *Id.*

382. *See id.*

383. *See id.*

384. *Id.*

385. *Id.*

386. *See id.*

387. *See id.*

388. *Id.*

389. *See id.*

390. *Id.*

391. *See id.* at 514-15.

392. *Id.* at 515.

393. *Id.*

394. *See id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.*

399. *See id.* at 514-15.

400. *Id.* at 515.

401. *Id.*

402. *Id.*

The *Coleman* litigants are Bernetta and Glen Coleman, P.S. Transport, Inc. (P&S), and Canal Insurance Company (Canal).<sup>403</sup> P&S “was a for-hire [interstate] motor carrier engaged in transporting property.”<sup>404</sup> More specifically, “P&S specializes in flatbed traffic, primarily in lanes between the Southeast, the Northeast, Texas, California and the Midwest.”<sup>405</sup> Even more relevant, P&S has a fleet consisting of “275 company owned tractors[,] . . . 75 owner operators, and 425 platform trailers.”<sup>406</sup> Timothy Briggs, Jr. was one of those owner-operator truckers.<sup>407</sup> In fact, Briggs was P&S’s trucker-employee.<sup>408</sup> But, Briggs also was a lessor, since he leased his tractor-truck to P&S.<sup>409</sup>

Without a doubt, P&S spent money to construct a large commercial facility—with driver accommodations—to park company-owned and leased tractors, trailers, and trucks.<sup>410</sup> Yet, P&S did not require Briggs to park the leased vehicle at P&S’s commercial facilities.<sup>411</sup> Instead, each evening, P&S allowed Briggs to drive the leased tractor-truck to his residential community, where Briggs parked the large tractor-truck.<sup>412</sup> In July 2004, a collision occurred between the tractor-truck and a Toyota Camry as Briggs was backing the tractor-truck into the driveway at his house.<sup>413</sup> “At the time of the accident, Briggs was returning home from work. He was driving the truck ‘bobtail[,]’ . . . meaning that the truck had no trailer attached.”<sup>414</sup> Glen and Bernetta Coleman—driver and passenger, respectively—occupied the Camry.<sup>415</sup> The Colemans filed a tort-based cause of action against Briggs and P&S in a Mississippi state court.<sup>416</sup>

Before the accident, Canal insured P&S’s fleet of trucks and trailers under a basic automobile liability insurance contract.<sup>417</sup> The Canal-issued auto policy, however, did not list Briggs’s leased tractor-truck as P&S’s “covered motor

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403. See *Canal Ins. Co. v. Coleman*, 625 F.3d 244, 246 (5th Cir. Nov. 2010).

404. See Brief for the Defendant, *Canal Ins. Co. v. Coleman*, 625 F.3d 244 (5th Cir. Nov. 2010) (No. 10-60196), 2010 WL 4621659 at \*1.

405. *About Us*, P&S TRANSP., INC., <http://www.pstransportinc.com/aboutus/index.php> (last visited Mar. 6, 2012).

406. *Id.*

407. See *Coleman*, 625 F.3d at 245.

408. *Id.*

409. See Brief for the Defendant, *supra* note 404, at \*1; see also *Coleman*, 625 F.3d at 246-47 (“P.S. Transport did not own the truck Briggs was driving at the time of the accident. Rather, the truck was under a ‘lease-and-employment’ agreement, meaning that Briggs owned the truck but leased it to P.S. Transport as part of his employment contract.”).

410. *About Us*, *supra* note 405 (“P&S is based in Alabama in company-owned facilities located in the Ensley area of Birmingham. The facility consists of the general offices, terminal yard with fuel storage and warehouse facilities, including driver accommodations.”).

411. See Brief for the Defendant, *supra* note 404, at \*1-2.

412. *Id.* at \*7.

413. *Id.* at \*6, 7.

414. *Coleman*, 625 F.3d at 246.

415. *Id.*

416. *Id.*

417. *Id.*

vehicle.”<sup>418</sup> On the other hand, a federally mandated MCS-90 Endorsement<sup>419</sup> was attached to the automobile policy because P&S was a “for-hire motor carrier,” which operates “motor vehicles” and transports “property in interstate or foreign commerce.”<sup>420</sup> Therefore, after learning about the Colemans’ underlying personal-injury suit, Canal commenced a declaratory judgment action in the United States District Court for the Northern District of Mississippi.<sup>421</sup> Citing P&S’s automobile policy and the MCS-90 Endorsement, Canal asked the district court to declare that the liability insurer had no duty to indemnify if the Colemans prevailed against P&S and Briggs.<sup>422</sup> Both Canal and Bernetta Coleman moved for summary judgment.<sup>423</sup> The district court granted Canal’s motion and denied Coleman’s.<sup>424</sup> Coleman appealed.<sup>425</sup>

Finally, *Hurst* also presents terribly familiar and uncomplicated facts. Lecedrick and Latasha Hurst were married and lived in Gloster, Mississippi.<sup>426</sup> Pinewood Logging, Inc. (Pinewood) is a logging company.<sup>427</sup> Liberty, Mississippi is its principle place of business.<sup>428</sup> When this legal dispute evolved, Darral Bell was Pinewood’s employee.<sup>429</sup> In late October 2004, Lecedrick struck Bell, and each threatened the other at an acquaintance’s house.<sup>430</sup> After the incident, Bell left the house, driving a Pinewood-owned Ford F-350 truck.<sup>431</sup> Driving his Yamaha four-wheeled vehicle, Lecedrick

418. See Brief for the Defendant, *supra* note 404, at \*2.

419. 49 C.F.R. § 387.7(d) (2010) states: “The proof [of the required financial responsibility] shall consist of—(1) ‘Endorsement(s) for Motor Carrier Policies of Insurance for Public Liability Under Sections 29 and 30 of the Motor Carrier Act of 1980’ (Form MCS-90) issued by an insurer(s) . . .” (emphasis added). Finally, 49 C.F.R. § 387.15 (2010) provides the text required for the “Form MCS-90” required by § 387.7(d).

420. 49 C.F.R. § 387.3(a) (2010) (captioned “Applicability”) states: “(a) This subpart applies to for-hire motor carriers operating motor vehicles transporting property in interstate or foreign commerce.” 49 C.F.R. § 387.5 (2010) (captioned “Definitions”) defines “Motor carrier” as follows: “Motor carrier means a for-hire motor carrier or a private motor carrier.” 49 C.F.R. § 387.7(a) (2010) (captioned “Financial responsibility required”) states: “No motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as set forth in § 387.9 of this subpart.”

421. *Coleman*, 625 F.3d at 246.

422. *Id.* at 246 n.2 (“Initially, the suit also involved a second Canal-issued insurance policy, . . . which Canal issued to Timothy Briggs (‘Briggs Policy’). Canal first sought a judgment that it was not required under either the P.S. Policy or the Briggs Policy to pay a judgment arising from the accident. Canal eventually amended its complaint to exclude the Briggs Policy from this action. Coleman makes a number of arguments about the interrelationship of the two policies. She ‘fears that, under the facts of this case, any adjudication that Canal is obligated to pay damages under the Briggs policy’ might have a preclusive effect on her argument that Canal is obligated to pay under the P.S. Policy. The Court does not consider Coleman’s arguments regarding the Briggs Policy because it is no longer part of this lawsuit.”).

423. *Id.* at 247.

424. *Id.*

425. *Id.*

426. *Capital City Ins. Co. v. Hurst*, 632 F.3d 898, 900-01 (5th Cir. Feb. 2011).

427. *Id.* at 900.

428. Pinewood Logging, Inc., POWERPROFILES.COM, <http://www.powerprofiles.com/profile/00005153912860/PINEWOOD+LOGGING,+INC-LIBERTY-MS> (last visited Mar. 6, 2012).

429. *Hurst*, 632 F.3d at 900.

430. *Id.* at 900-01.

431. *Id.* at 901.

followed Bell.<sup>432</sup> Apparently, Lecedrick drove alongside Bell, trying to pass Bell.<sup>433</sup> But, the Pinewood-owned Ford collided with the Yamaha.<sup>434</sup> The impact propelled Lecedrick Hurst from his Yamaha, and he died.<sup>435</sup>

A Mississippi jury convicted Darral Bell of “manslaughter, *without malice aforethought*, in the heat of passion.”<sup>436</sup> On the other hand, the jury returned a not-guilty verdict following the judge’s murder instructions.<sup>437</sup> Latasha Hurst and others brought a wrongful-death action against Bell and Pinewood because when the collision occurred, Bell was driving a Pinewood-owned vehicle.<sup>438</sup> When the accident occurred, Capital City Insurance Company (Capital City) insured Pinewood under a commercial automobile insurance contract.<sup>439</sup> Therefore, in the wake of the accident and Bell’s criminal conviction, Capital City filed a declaratory judgment action in the Southern District Court of Mississippi.<sup>440</sup> Although Capital City defended Pinewood against the wrongful-death action, the automobile insurer asserted that the insurance contract’s “expected or intended” injury exclusion clause precluded coverage for wrongful-death claims and injuries.<sup>441</sup> Capital City’s motion for summary judgment was granted.<sup>442</sup> The wrongful-death plaintiffs appealed.<sup>443</sup>

*B. Fifth Circuit Panels’ Automobile-Related Duty-to-Defend and Duty-to-Indemnify Opinions*

Again, in *Bonilla*, EEM decided not to pay the judgment that Molina secured against Bonilla, Jolly Chef’s lessee.<sup>444</sup> In its summary judgment ruling, the Northern District of Texas supported EEM’s decision.<sup>445</sup> In a nutshell, the district court found the following: (1) Bonilla and Molina were not “insureds” under Employers Mutual’s CGL insurance contract; (2) Emcasco’s commercial automobile liability policy did not cover the accident in Truck 219 because the fire did not arise out of the “use” or “maintenance” of a covered vehicle; and (3) Employers Mutual’s commercial umbrella policy did not cover the accident

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432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.* at 900 (emphasis added).

437. *Id.* at 902.

438. *Id.* at 900. The plaintiffs in the underlying wrongful-death action were Latasha Hurst, individually and as administratrix of the estate of Lecedrick Hurst, and Diondrick Hurst and Lecedrick Hurst, minors by and through their parent and natural guardian, Latasha Hurst. *Id.* at 898.

439. *Id.* at 898.

440. *Id.*

441. *Id.*

442. *Id.* at 900.

443. *Id.*

444. *See* Emp’rs Mut. Cas. Co. v. Bonilla, 613 F.3d 512, 514 (5th Cir. July 2010).

445. *Id.* at 514.

because the definition of “use” in the umbrella policy was identical to the definition in Emcasco’s automobile insurance contract.<sup>446</sup>

Molina challenged the district court’s ruling before the Fifth Circuit.<sup>447</sup> Circuit Judge Southwick wrote the opinion for the panel, and he began the analysis by highlighting relevant provisions in the three liability insurance contracts.<sup>448</sup> First, the umbrella policy covered injuries, which “[arise] out of the ownership, maintenance, operation, use or entrustment to others” of an automobile.<sup>449</sup> But a proviso appeared in the policy: an automobile also had to be covered under a primary insurance contract.<sup>450</sup> Additionally, “[t]he coverage [under the umbrella policy could] not be broader than the coverage [under a] ‘primary’ insurance policy.”<sup>451</sup>

Second, under the automobile liability policy, Emcasco promised to “pay all sums an insured legally must pay as damages because of bodily injury or property damage.”<sup>452</sup> But a condition precedent also appeared in Emcasco’s primary policy: An “accident” had to cause the injury or property damage, and the accident had to evolve “from the ownership, maintenance or use of a covered auto.”<sup>453</sup> Finally, the CGL insurance contract covered “bodily injury” and “property damage” arising from “occurrences” or “accidents” within the “coverage territory.”<sup>454</sup> The CGL auto policies dovetailed, “excluding coverage for bodily injury and property damage ‘arising out of the ownership, maintenance, use or entrustment to others of any . . . auto . . . owned or operated by or rented or loaned to any insured.’”<sup>455</sup>

Because Molina and Bonilla were not “insured” under the CGL insurance contract, the Northern District of Texas found that the CGL policy did not apply.<sup>456</sup> Furthermore, on appeal, Molina did not challenge that finding.<sup>457</sup> Still, Judge Southwick and the panel concluded that the CGL was relevant.<sup>458</sup> Put simply, EEM argued that Molina’s accident was excluded under the auto

446. *Id.* at 515 (“No issues [were] raised on appeal about the CGL policy.”).

447. *See id.*

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.* (“The Umbrella Policy also provided coverage in the absence of coverage under a primary policy [if one used a] vehicle with the permission of a named insured. The reach of this additional coverage [was not] contested . . .”).

452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.* at 515-16.

456. *Id.* at 516.

457. *Id.*

458. *Id.* (“That decision is not challenged on appeal. Though coverage by the CGL Policy is not an issue, the policy itself is relevant. Had an insured under both the CGL and the Auto Policy been [Jolly Chef, for example], the dispute would have had a much different form. If the Auto Policy did not cover the occurrence because the injury did not arise from the use of a covered auto, then the CGL Policy exclusion of injuries arising from the use would not have applied and the claim would have been covered—absent another exclusion. The two policies together created a range of coverage for Jolly Chef.”).

policy because the accident was covered under the CGL policy.<sup>459</sup> To decide whether the language in multiple liability insurance contracts should determine the outcome in *Bonilla*, Judge Southwick reviewed Texas law.<sup>460</sup> In fact, the learned judge relied heavily on the Texas Supreme Court's analysis and conclusion in *Mid-Century Insurance Co. of Texas v. Lindsey*.<sup>461</sup>

Quite simply, *Lindsey* established a three-pronged test to determine whether an injury arose from the "use" of an automobile policy.<sup>462</sup> The elements are: (1) "the accident must have arisen out of the *inherent nature* of the automobile"; (2) "the accident must have arisen within the *natural territorial limits* of an automobile, [during] the actual use . . ."; and (3) the automobile must produce the injury, rather than simply causing the condition that produces the injury.<sup>463</sup> But, the *Lindsey* court cited a definition of an "inherent use" in a treatise, which is arguably awkward: "[A "use"] means the use of a vehicle as such[;] and ["use"] does not include a use which is foreign to a vehicle's *inherent purpose* but to which a vehicle might conceivably be put."<sup>464</sup>

Focusing on the first element, Judge Southwick restated the litigants' positions: EEM argued that a "use" refers to a vehicle's "simple," although "broadly defined, transportation capabilities."<sup>465</sup> And *Bonilla* and *Molina* insisted that the auto policy covered "accidents arising from [the] use of a mobile catering truck *qua* mobile catering truck."<sup>466</sup> Stated slightly differently, the litigants clashed over whether a covered automobile must be "used" for generic or special purposes.<sup>467</sup> The panel concluded, however, that the insurers' argument demanded "an unnatural reading of the policy language."<sup>468</sup> But, the *Bonilla* panel could not find a Texas case to support that conclusion.<sup>469</sup> Therefore, the Fifth Circuit panel made a "slight *Erie* guess" of how the Texas Supreme Court might interpret "use" under a *commercial* automobile insurance

459. *Id.* To help make that argument, EEM cited *Travelers Indemnity Co. v. Citgo Petroleum Corp.*, stating: "When language of coverage in a business auto policy is virtually identical to language of exclusion in a CGL policy, '[s]ome accidents would be covered by the auto policy, others by the CGL. A single accident could not be covered by both.'" *Id.* (alteration in original) (quoting *Travelers Indem. Co. v. Citgo Petroleum Corp.*, 166 F.3d 761, 769 (5th Cir. 1999)).

460. *See id.* at 517-18.

461. *See id.* (citing *Mid-Century Ins. Co. of Tex. v. Lindsey*, 997 S.W.2d 153, 156 (Tex. 1999)).

462. *Bonilla*, 613 F.3d at 518 (discussing the test established by *Lindsey*).

463. *Lindsey*, 997 S.W.2d at 157 (emphasis added) (quoting 8A COUCH ON INSURANCE § 119:37 (3d ed. 2009)).

464. *Id.* at 156 n.12 (emphasis added) (quoting 6B JOHN A. APPLEMAN, INSURANCE LAW & PRACTICE § 4316, at 356 (Buckley ed. 1979)).

465. *Bonilla*, 613 F.3d at 518.

466. *Id.*

467. *See id.*

468. *Id.* at 517 ("No definition of 'use' appears in the Auto Policy. The district court held that coverage under the Auto Policy was not affected by the special use that Jolly Chef's mobile catering trucks served. Instead, the district court required the use of the vehicle to be [activity that involves] transportation.").

469. *Id.* at 519.

contract.<sup>470</sup> Ultimately, the panel concluded “that a business vehicle policy covers the intended and identified uses of that business vehicle.”<sup>471</sup> Therefore, Molina satisfied the first element of the *Lindsey* test.<sup>472</sup>

Did Molina prove the other two factors? The panel found that “Truck 219 was parked on Jolly Chef’s lot at the time of the accident, and the injury occurred while Molina was inside of the truck.”<sup>473</sup> Consequently, the panel decided that the accident “occurred within the natural territorial limits of the automobile,” thereby satisfying *Lindsey*’s second element.<sup>474</sup> And, to repeat, the third element is “[proof that] the vehicle produced the injury.”<sup>475</sup> EEM argued that Molina did not prove that the truck, per se, produced Molina’s injuries.<sup>476</sup> Instead, EEM insisted that a pilot light ignited a flammable substance and produced Molina’s injury.<sup>477</sup> But, the *Bonilla* panel refused to embrace EEM’s argument.<sup>478</sup> In the end, the panel concluded: (1) The test in *Lindsey* had been satisfied;<sup>479</sup> (2) The automobile and umbrella insurance

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470. *Id.* at 518-19 (“The ‘inherent purpose’ of a mobile catering truck certainly could be seen as including the use and maintenance of its kitchen facilities, though the inherent purpose of a usual vehicle would not include cooking. . . . There is nothing in the caselaw to suggest that Texas would interpret ‘use’ under a business auto policy, in which the stated purpose of the vehicles being insured was for mobile catering, in a way that did not include the hazards that arise from maintaining the mobile catering equipment. Cleaning a mobile kitchen was not simply a speculative event that might conceivably occur, nor was the cleaning foreign to the vehicle’s inherent purpose. We acknowledge finding no published Texas caselaw so holding. We conclude, though, that the Texas Supreme Court if presented with this precise issue would take as a natural next step from *Lindsey* that this accident occurred from ‘the inherent nature’ of this mobile catering truck. The vehicle intended is not some mystical, generic vehicle, but the one specifically insured by the parties to the policy. The special nature of this vehicle was not hidden or otherwise unknown—it literally was in black and white in the policy.”).

471. *Id.* at 519. The panel also noted that “insurance policies [must] be interpreted as written, with assumptions favoring coverage when conditions for those assumptions exist, and reliance upon the intent of the actual parties to the policies when necessary.” *Id.* at 517 (citing and applying Texas law).

472. *Id.* at 519-20 (“The ‘injury-producing act’ was cleaning the floor of the truck so that food could safely be prepared. The cleaning was a natural, expected, and necessary use of mobile catering Truck 219 and was covered by the Auto Policy.”).

473. *Id.* at 520.

474. *Id.* (citing *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153, 157 (Tex. 1999)).

475. *Id.* (“The *Lindsey* court found this factor troublesome because it is difficult to decide what role a vehicle plays in producing an injury.”) (citing *Lindsey*, 997 S.W.2d at 157-58).

476. *Id.*

477. *Id.* (“EMC supports this argument with language from *Lindsey* that ‘a firearm discharge . . . does not arise out of the use of the vehicle merely because the gun rack is permanently attached. Rather, the purpose and circumstances of the injury-producing act are determinative.’”) (citing *Lindsey*, 997 S.W.2d at 163).

478. *Id.*

479. *Id.* (“We are not persuaded by this reasoning. Most of the strength of EMC’s argument is lost once we define ‘inherent nature’ in the way that we have. This policy provided coverage for the uses of this mobile catering truck as just such a truck. The known and expected uses of this vehicle included activities relating to cooking. The cleaning and pouring of the substance on the floor and the resulting fire from the stove’s pilot light produced the injury. . . . Each of the *Lindsey* factors is satisfied. There was coverage under the Auto Policy for injuries arising from use and maintenance of the vehicle.”). The panel also noted that “[i]here is a distinction between situations where the vehicle is only incidentally involved—it is the ‘mere situs’ of an accident that could have occurred anywhere—and those ‘where the injury-producing act involved the use of a vehicle as a vehicle.’” *Id.* (quoting *Tex. Farm Bureau Mut. Ins. Co. v. Sturrock*, 65 S.W.3d 763, 767 (Tex. App.—Beaumont 2002)).



contracts covered Molina's injury,<sup>480</sup> and (3) EEM's employee-injury-exclusion defense on appeal was precluded.<sup>481</sup> In the end, the *Bonilla* panel concluded that the district court's summary judgment was erroneous, reversed the ruling, and remanded the case for further proceedings.<sup>482</sup>

Undeniably, the *Bonilla* analysis is reasonably thorough; the panel thoughtfully addressed the main question as well as important corollary issues.<sup>483</sup> And, as stated above, the panel tried to find and carefully apply Texas's law.<sup>484</sup> But even more importantly, the *Bonilla* panel correctly recognized implicitly that a declaratory judgment trial is an action in equity.<sup>485</sup> And, when a district court—sitting in equity—issues a questionable summary judgment, an appellate court has the authority to (1) address the summary judgment issue, (2) conduct an *independent* and *in-depth* review of the facts and relevant law, and (3) make a just and commonsensical declaration based on those facts and laws.<sup>486</sup>

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480. *Id.* (“The Commercial Umbrella Policy can apply in two instances. First, if there is coverage under the Auto Policy, there is coverage under the Umbrella Policy. Second, if there is no coverage under the Auto Policy, then there may be excess coverage of the retained limit under the Umbrella Policy provided the occurrence is ‘otherwise covered by’ the Umbrella Policy. There are substantial arguments made regarding this policy that understandably focus on the harder question of coverage if the Auto Policy does not apply. Because we have concluded that the Auto Policy provides coverage, the Umbrella Policy does as well. . . . Bonilla was using Truck 219 with Jolly Chef’s permission.”).

481. *Id.* at 520-21 (“In the district court and now on appeal, EMC claimed that even if we find there was ‘use’ of Truck 219 as required under the Auto Policy, coverage is still excluded under the Employee Injury Exclusion. The referenced exclusion prevents coverage for bodily injury to ‘[a]n employee of the insured arising out of and in the course of employment by the insured.’ The ‘insured’ was Bonilla, and the potential ‘employee’ was Molina. There is certainly Texas law to apply on the issue. ‘The test to determine whether a worker is an employee or an independent contractor is whether the employer has the right to control the progress, details, and methods of operations of the employee’s work. The employer must control not merely the end sought to be accomplished, but also the means and details of its accomplishment as well.’ [EEM] claims that if there is no coverage under the Auto Policy because of the Employee Injury Exclusion, there is likewise no coverage under the Umbrella Policy. Though [EEM] raised this issue in the district court, the court did not rule on it because of its decision on issues regarding ‘use’ of the vehicle. . . . We confine our analysis to the issues that were evaluated by the district court. This Employee Injury Exclusion can be considered by the district court should the issue again be pressed.”) (quoting *Thompson v. Travelers Indem. Co.*, 789 S.W.2d 277, 278 (Tex. 1990)).

482. *Id.* at 514.

483. *See id.* at 515-21.

484. *See supra* notes 461-82 and accompanying text.

485. *See Bonilla*, 613 F.3d at 515; *Septum, Inc. v. Keller*, 614 F.2d 456, 463 (5th Cir. 1980).

486. *See, e.g., Bonilla*, 613 F.3d at 515 (“We review each of the rulings on cross-motions for summary judgment *de novo*. We *independently examine the evidence and inferences* from the perspective *favoring the non-moving party*, in order to determine if there are any disputes of material fact.” (emphasis added)) (citing *Ford Motor Co. v. Tex. Dep’t of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001); FED. R. CIV. P. 56(e)(2)); *see also* Willy E. Rice, *Questionable Summary Judgments, Appearances of Judicial Bias, and Insurance Defense in Texas Declaratory-Judgment Trials: A Proposal and Arguments for Revising Texas Rules of Civil Procedure 166a(a), 166a(b), and 166a(i)*, 36 ST. MARY’S L.J. 535, 638-39 (2005) (stressing that a judge—sitting in equity without a jury—should exercise her authority and conduct a full-blown declaratory-judgment trial, rather than simply denying or granting summary judgment motions without giving intelligible, meticulous, or studious explanations of her ruling). Again, a declaratory-judgment trial is an action in equity, and more often than not, judges make declarations. *See Rice, supra*, at 648-49. And in most instances, the amount of judicial resources required to conduct a full-blown declaratory-judgment trial are commensurate with or less than those required to deny or grant a motion for summary judgment—again, which often

In light of such authority, Judge Southwick and the circuit judges issued a well-reasoned declaration in *Bonilla*, even though a questionable district court's summary judgment was the impetus for the appeal.<sup>487</sup> In contrast, the respective analyses in *Canal* and *Hurst* are less than exceptional, even though (1) those actions also involved a litigant's request for equitable relief—a declaration of rights and obligations under automobile liability insurance contracts;<sup>488</sup> (2) each case challenged a district court's summary judgment on appeal; and (3) the *Coleman* and *Hurst* panels also conducted de novo reviews.<sup>489</sup>

To help illustrate why the Fifth Circuit's analysis in *Coleman* is problematic, reconsider briefly the Northern District of Mississippi district court's ruling.<sup>490</sup> After Canal filed its declaratory judgment action, P&S did not respond.<sup>491</sup> Consequently, the district court entered a default judgment against P&S.<sup>492</sup> Both Canal and Coleman moved for summary judgment on various issues, including the issue on appeal: Whether the MCS-90 endorsement covered the Colemans' injuries after Briggs's tractor-truck collided with Coleman's Toyota Camry.<sup>493</sup> Again, the district court granted Canal's motion, but it denied Coleman's.<sup>494</sup> Coleman appealed.<sup>495</sup>

Circuit Judge Benavides fashioned the opinion for the *Coleman* panel.<sup>496</sup> The seasoned judge began his analysis by examining the language in the Canal-issued automobile insurance contract.<sup>497</sup> It read in relevant part:

SECTION A—BASIC AUTOMOBILE LIABILITY INSURANCE

I. COVERAGE A—BODILY INJURY LIABILITY

COVERAGE B—PROPERTY DAMAGE LIABILITY:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of *bodily injury or property damage* to which this insurance applies, caused by an occurrence

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contains no explanation of the ruling as well as *no declaration of the litigants' rights or obligations*. See *id.* To be sure, such summary judgment practice in declaratory-judgment trials is expensive, highly inefficient, and redundant because a judge sitting in equity has the authority to resolve both questions of law as well as questions of fact. See *id.*

487. See *Bonilla*, 613 F.3d at 514.

488. See *Canal Ins. Co. v. Coleman*, 625 F.3d 244, 245 (5th Cir. Nov. 2010) (“Canal Insurance Company seeks a declaratory judgment . . . .”); *Capital City Ins. Co. v. Hurst*, 632 F.3d 898, 902 (5th Cir. Feb. 2011) (“Capital City filed a declaratory judgment action in district court.”).

489. See *Coleman*, 625 F.3d at 247 (“We review the grant of summary judgment *de novo*. . . .” (quoting *In re Egleston*, 448 F.3d 803, 809 (5th Cir. 2006) (internal quotation marks omitted))); *Hurst*, 632 F.3d at 902.

490. See *Coleman*, 625 F.3d at 246-47.

491. *Id.* at 247.

492. *Id.*

493. *Id.*

494. *Id.*

495. *Id.*

496. *Id.* at 245.

497. See *id.* at 246-48.

and arising out of the *ownership*, maintenance, or use . . . of an *owned automobile* . . . .<sup>498</sup>

Again, P&S did not own the truck that Briggs was driving when the accident occurred.<sup>499</sup> Instead, P&S leased Briggs's truck under a "lease-and-employment" agreement.<sup>500</sup> Therefore, Judge Benavides concluded that "Briggs's truck was not an 'owned automobile' within the meaning of the policy," and, as a consequence, the automobile policy did not cover the Colemans' bodily injuries or property damage.<sup>501</sup>

But, as stated earlier, a federally mandated endorsement—the MCS-90—was attached to the Canal-issued automobile insurance contract.<sup>502</sup> The Motor Carrier Act creates a "financial responsibility" mandate.<sup>503</sup> Section 30 of the Motor Carrier Act reads:

The Secretary of Transportation shall prescribe regulations to require *minimum levels of financial responsibility* sufficient to satisfy liability amounts established by the Secretary covering public liability, property damage, and environmental *restoration for the transportation of property* by motor carrier or motor private carrier (as such terms are defined in section 13102 of this title) in the United States between a place in a State and—

- (A) a place in another State;
- (B) another place in the same State through a place outside of that State;
- or
- (C) a place outside the United States.<sup>504</sup>

Therefore, Judge Benavides framed the summary judgment controversy in *Coleman* this way: "[T]he issue before us today is simply whether Briggs's truck was 'subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980.'"<sup>505</sup> Of course, an answer was precluded until the panel reviewed the attached MCS-90.<sup>506</sup> That boilerplate endorsement provides:

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498. *Id.* at 246 (emphasis added) (omissions in original).

499. *Id.*

500. *Id.*

501. *Id.* at 247.

502. *Id.*

503. *Id.* at 245.

Section 30 of the Motor Carrier Act is codified as amended at 49 U.S.C. § 31139(b). *See* Motor Carrier Act of 1980, Pub. L. No. 96-296, § 30, 94 Stat 793 (1980). Section 29—which is referenced in the MCS-90—is not relevant in this case, as it simply amended part of the previous statute by "striking out 'approved by the Commission' and inserting in lieu thereof 'approved by the Commission, in an amount not less than such amount as the Secretary of Transportation prescribes pursuant to, or as is required by, the provisions of section 30 the Motor Carrier Act of 1980.'" *Id.* § 29.

*Id.* at 248 n.5.

504. *Id.* at 248-49 (quoting 49 U.S.C. § 31139(b) (2006)).

505. *Id.* at 248.

506. *See id.*

In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. Such insurance as is afforded, for public liability, does not apply to injury to or death of the insured's employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.<sup>507</sup>

After applying the plain meaning to the words and phrases in the MCS-90 and § 30, the *Coleman* panel concluded that “the endorsement covers vehicles only when they are presently engaged in the transportation of property in interstate commerce.”<sup>508</sup> How did Circuit Judges Benavides, DeMoss, and Elrod reach that conclusion? In part, they simply cited and highlighted a phrase in the Motor Carrier Act § 30: “[M]inimum levels of financial responsibility . . . must be sufficient to ‘satisfy liability . . . for the transportation of property in interstate commerce.’”<sup>509</sup> But, the learned judges also based their conclusion on a stipulation.<sup>510</sup> Judge Benavides tells the reader: “[T]he parties stipulate[d] that Briggs was not engaged in the ‘transportation of property’” when the accident occurred.<sup>511</sup> Therefore, in light of the stipulation and the “plain text [in] the endorsement,” the *Coleman* panel embraced the district court’s ruling and concluded that the MCS-90 did not apply because Briggs “was not engaged

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507. *Id.* (emphasis omitted) (citing 49 C.F.R. § 387.15, ILLUSTRATION 1).

508. *Id.* at 249.

509. *Id.* (emphasis added) (second omission in original) (“Thus, the MCS-90 is a way of conforming with statutory minimum-financial-responsibility requirements. And because those requirements exist to ‘satisfy liability . . . for the transportation of property,’ it follows that the MCS-90 must cover liabilities ‘for the transportation of property.’ Nothing in the MCS-90’s text indicates that it covers *other* kinds of liabilities, i.e., liabilities incurred outside of the transportation of property.” (omission in original)).

510. *See id.* at 247.

511. *Id.*

in the transportation of property at the time of the accident.”<sup>512</sup> The panel’s analysis, however, is less than stellar, because the panel admitted and Judge Benavides reported the following: “Given the [Motor Carrier Act’s] broad terms, it is at least arguable that Briggs’s conduct at the time of the accident could be termed ‘transportation of property.’”<sup>513</sup>

The Motor Carrier Act § 30 states that “terms are defined in section 13102 of this title.”<sup>514</sup> Now, consider the definition of “transportation” as it appears in § 13102:

(23) Transportation.—The term “transportation” includes—

(A) a *motor vehicle*, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind *related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use*; and

(B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property.<sup>515</sup>

To be sure, the definition of “transportation” is exceedingly broad under the Motor Carrier Act from which the MCS-90 evolved.<sup>516</sup> The panel did not reach the question of whether § 13102(23) applied in this case “because the district court accepted Coleman’s stipulation that it [did] not.”<sup>517</sup> Judge Benavides wrote: “Had Coleman not explicitly conceded that Briggs’s liability was not ‘for the transportation of property,’ the district court would have needed to ask what that phrase means.”<sup>518</sup> But, with all due respect to the panel of judges, there is a reasonable counterview: Even though the Northern District of Mississippi allowed a *stipulation rather than a federal statute* to control its limited analysis and determine the outcome in this case, the *Coleman* panel certainly did not have to follow suit. And the reason is categorically uncomplicated.

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512. *Id.* at 249.

[T]he district court held: Congress empowered the Secretary of Transportation to “prescribe regulations to require minimum levels of financial responsibility sufficient to satisfy liability amounts . . . covering public liability, property damage, and environmental restoration for the *transportation of property* by motor carrier . . . .” Similarly, the regulations are applicable to “for-hire motor carriers operating motor vehicles *transporting property* in interstate or foreign commerce.” In the present case, there is no dispute that Briggs was not transporting property at the time of the accident.

*Id.* at 252 (quoting, respectively, 49 U.S.C. § 31139(b)(1) (2006) and 49 C.F.R. § 387.3(a) (2010)).

513. *Id.*

514. 49 U.S.C. § 31139(b) (2006).

515. *Id.* § 13102(23) (emphasis added).

516. *See id.* § 31139(b).

517. *Coleman*, 625 F.3d at 252.

518. *Id.*

Canal and Coleman's summary judgment conflict arose in an equitable proceeding—a declaratory judgment trial.<sup>519</sup> Thus, because the *Coleman* panel conducted a de novo review, there was no impediment in equity or in law to prevent the Fifth Circuit panel from conducting a thoughtful and comprehensive review of the original question: Whether Canal had a duty to indemnify under the MCS-90 endorsement.<sup>520</sup> And a proper de novo review would have included an intelligible analysis of whether § 13102's definition of "transportation" applied in this case. After all, the *Coleman* panel stressed: "Neither this Court nor most federal courts have ever directly addressed the precise question before us."<sup>521</sup> And as of this writing, the issue still has not been addressed satisfactorily, or otherwise, because the panel allowed a stipulation to block a serious and independent de novo review of the *Coleman* controversy.<sup>522</sup>

But even more importantly, the analysis in *Coleman* is terribly wanting because future Fifth-Circuit litigants still do not know whether the "transportation of property" defense *is a truly sound defense*.<sup>523</sup> Unfortunately,

519. *Id.* at 245.

520. *Id.* at 247.

521. *Id.* at 249.

522. See *Braxton v. United States*, 500 U.S. 344, 349-50 (1991) ("The Court of Appeals affirmed the District Court's judgment that this 'specifically established' a violation of [the statute] primarily because it believed that . . . the District Court was not 'clearly erroneous' in so concluding. That is[,] . . . the standard applied . . . to findings of fact. *Determination of the meaning and effect of a stipulation, however, is not a factual finding*: We review that just as we would review a determination of meaning and effect of a contract, or consent decree, or proffer for summary judgment. . . . *The question, therefore, is not whether there is any reasonable reading of the stipulation that supports the District Court's determination, but whether the District Court was right.*" (emphasis added) (citations omitted)); *United States v. Lucas*, 157 F.3d 998, 1000 (5th Cir. 1998) ("We review de novo a determination of the meaning and effect of any factual stipulations on a sentence." (emphasis added)); *Wash. Hosp. v. White*, 889 F.2d 1294, 1299 (3d Cir. 1989) ("[T]he legal resolution of any particular ambiguity in the stipulation's construction is not possible in the absence of factual findings by the district court as to what the parties intended the ambiguous provisions to mean. Hence, ambiguous provisions in the stipulation must be interpreted by the factfinder, here the district court, as an initial matter."); *Frost v. Davis*, 346 F.2d 82, 83, 86 (5th Cir. 1965) ("[T]he case was submitted to the trial court on a stipulation, and involved simply and solely the construction of a written contract in the light of other written contracts embodied by reference. . . . There was no effort made to show what other duties, liabilities and obligations there were on the part of the percentage participants in the project other than the obligation to pay for the drilling costs and the share of the termination payment, if made. *We, therefore, are required to look at the language of the contract*, and, of course, in doing so we look at the entire contract *with an effort to understand the true meaning of the parties.*" (emphasis added)).

523. See *Coleman*, 625 F.3d at 252. Briefly put, the panel did not explain why it *legally* could not give a comprehensive analysis of this issue. See *id.* To be sure, judicial efficiency and future litigants deserve more. See, e.g., *Doe v. Stegall*, 653 F.2d 180, 188 (5th Cir. 1981) (Gee, J., dissenting) ("We advance no hard and fast formula for ascertaining whether a party may sue anonymously. . . . The Does should have been permitted to proceed under fictitious names. . . . Intending no offense, it seems to me that such a startling procedure as an anonymous lawsuit *deserves better underpinnings than are offered here*. The majority tells our courts below little more than that, in future, we will decide the matter when it gets to us. *Nothing objective is offered, 'no hard and fast formula.'* But it is just such formulas, or at least a sketching of their outlines, that we sit to provide." (emphasis added)); *Burke v. Ripp*, 619 F.2d 354, 360 (5th Cir. 1980) (Goldberg, J., concurring) ("I write to clarify the relationship between the court's holding in this case and those of the prior decisions discussed in the majority opinion. In particular, *I write to ensure that future potential indemnitors and indemnitees understand which steps will make proof of actual liability necessary*, and those which will

that question has been left needlessly for the full court or another panel to resolve judiciously, despite the *Coleman* panel's highly questionable conclusion: "In sum, the weight of authority from this Circuit *and beyond* supports our conclusion that the MCS-90 does not cover vehicles *when they are not presently transporting property* in interstate commerce."<sup>524</sup> Put simply, that conclusion evolved from thin air rather than from the application of rulings that address squarely the § 13102 issue. Furthermore, that ruling clashes with the clear purpose of MCS-90 liability insurance—to cover third-party victims' bodily injuries and property damages.<sup>525</sup>

The last case involving an automobile-insurance dispute is *Hurst*.<sup>526</sup> To recap, Darral Bell's and Lecedrick Hurst's vehicles collided.<sup>527</sup> Lecedrick died.<sup>528</sup> A Mississippi jury convicted Bell of involuntary manslaughter, using in part a voluntary statement that Bell gave to the police.<sup>529</sup> Bell reported that "he was driving in the middle of the road to prevent Hurst from passing" when the collision occurred.<sup>530</sup> Latasha Hurst and other survivors commenced a wrongful-death action against Bell and Pinewood, the employer.<sup>531</sup> Capital City filed a declaratory judgment suit, asking the Southern District of Mississippi to declare that Pinewood's insurance contract did not cover

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necessitate proof of potential liability." (emphasis added)).

524. *But see Coleman*, 625 F.3d at 246 n.1 ("[W]e do not hold today that a 'bobtail' truck can never be engaged in the transportation of property. *Nor do we take any position as to whether Briggs was actually engaged in 'transportation of property'* at the time of the accident in this case." (emphasis added)); *id.* at 254 ("Because *Coleman* stipulated that Briggs was not engaged in the transportation of property at the time of the accident in this case, *we have no occasion today* to remark on whether the statutory definition reaches this case." (emphasis added)).

525. *See* 49 U.S.C. § 31139 (2006). MCS-90 liability insurance is designed for the benefit of third-party victims. *See, e.g., Carolina Cas. Ins. Co. v. Yeates*, 584 F.3d 868, 884 (10th Cir. 2009) ("[I]f no other insurance policy is available the purposes behind the MCS-90 are clearly implicated. As the majority of circuits have recognized, the '*primary purpose of the MCS-90 is to assure that injured members of the public are able to obtain judgment from negligent authorized interstate carriers.*' Where, for example, a motor carrier fails to obtain insurance on a particular vehicle or driver, no liability policy would extend to cover the carrier's potential negligence on the public highways. *If an injured party obtains judgment*, he or she would be left to rely solely on the financial stability of the motor carrier to satisfy judgment. This is the exact situation the endorsement contemplates and *is designed to address.*" (emphasis added) (citation omitted) (quoting *John Deere, Ins. Co. v. Nueva*, 229 F.3d 853, 857 (9th Cir. 2000)); *Auto-Owners Ins. Co. v. Redland Ins. Co.*, 522 F. Supp. 2d 891, 895 (W.D. Mich. 2007) ("[T]he Auto-Owners policy includes an endorsement, Form MCS-90, required by federal regulations for the *protection of third-party accident victims.* That endorsement requires Auto-Owners to provide coverage for claims like those asserted in the [third-party] litigation, even if Auto-Owners . . . has recourse against another insurer." (emphasis added)); *Nueva*, 229 F.3d at 857 (reiterating and stressing a settled federal legal principle: "The purpose of the MCS-90 is to protect the public, not to create a windfall to the insured. It is well-established that the primary purpose of the MCS-90 is to assure that injured members of the public are able to obtain judgment from negligent authorized interstate carriers." (emphasis added) (citation omitted)).

526. *Capital City Ins. Co. v. Hurst*, 632 F.3d 898, 898 (5th Cir. Feb. 2011).

527. *Id.* at 900.

528. *Id.*

529. *Id.*

530. *Id.* at 902.

531. *Id.* at 900.

Lecedrick's death.<sup>532</sup> Later, Capital City filed a summary judgment motion and the district court granted the motion without "expressly analyzing the preclusive effect of [Bell's involuntary manslaughter] conviction."<sup>533</sup> Instead, the district court simply concluded that Bell's self-reported conduct was intentional; therefore, the automobile-insurance contract did not cover Lecedrick's death.<sup>534</sup>

On appeal, the survivors challenged the district court's ruling.<sup>535</sup> Circuit Judge Prado wrote the opinion for the *Hurst* panel.<sup>536</sup> Before crafting the opinion, however, he reviewed the pertinent provisions in the automobile insurance contract.<sup>537</sup> First, the coverage clause stated in relevant part: "We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'"<sup>538</sup> The insurance contract defined an "accident" as a "continuous or repeated exposure to the same conditions resulting in 'bodily injury' or 'property damage.'"<sup>539</sup> On the other hand, the contract's exclusion clause excluded coverage for "[b]odily injury' or 'property damage' *expected or intended* from the standpoint of the 'insured.'"<sup>540</sup>

Hurst presented two questions for the panel: (1) Whether Bell's attempt to stop Hurst by driving in the middle of the road constituted an "intentional act," which precluded coverage under the insurance contract;<sup>541</sup> and (2) whether Bell's involuntary manslaughter conviction precluded a civil court from relitigating an insurance-law question: whether Bell's conduct was an intentional act under the auto policy.<sup>542</sup> Addressing the first question, Judge Prado wrote: "Under the plain reading of the [automobile insurance contract, the Bell–Hurst] collision is excluded from coverage."<sup>543</sup> Certainly, the *Hurst* panel based its conclusion on more than a simple reading of the insurance contract's coverage and exclusion clauses.<sup>544</sup> In addition, the panel (1) read the jury's charges in the underlying state-court criminal trial,<sup>545</sup> (2) reviewed and assigned a considerable amount of weight to the state-court jury's involuntary-

532. *Id.*

533. *Id.* at 902.

534. *Id.*

535. *Id.* at 900.

536. *Id.*

537. *Id.* at 902.

538. *Id.* (emphasis added).

539. *Id.*

540. *Id.* (emphasis added).

541. *Id.* at 903.

542. *Id.* ("[The third-party victims] essentially argue in both issues that there is a question of fact remaining as to whether Bell intended to kill Hurst, and that Mississippi insurance law requires specific intent to injure—or, in this case, kill—in order for the [p]olicy's coverage exemption for 'expected or intended' bodily injury to apply.").

543. *Id.* at 906.

544. *See infra* notes 558-59, 564 and accompanying text.

545. *See infra* note 552 and accompanying discussion.



manslaughter verdict against Bell;<sup>546</sup> and (3) concluded that the federal district court's conclusion was sound: The Bell–Hurst collision was not an accident under the insurance contract.<sup>547</sup>

Stated clearly, the *Hurst* panel concluded that Capital City's automobile insurance contract did not cover Lecedrick Hurst's death or his survivors' underlying wrongful-death claim.<sup>548</sup> To be clear, standing alone, that conclusion is not, and should not be, a source of concern. The manner in which the Fifth Circuit panel reached that conclusion, however, is troublesome. Why? The *Hurst* panel's less-than-thorough analysis is replete with critical omissions—failing to research, cite, state, and apply carefully Mississippi Supreme Court's insurance-law decisions.<sup>549</sup> Arguably, the most indefensible omission is this one: The Fifth Circuit panel refused or forgot to harmonize ambiguous words and phrases in the state-criminal-court jury charge with the definitions of similar words and phrases that the Mississippi Supreme Court has embraced to declare rights and obligations under liability insurance contracts.<sup>550</sup>

To help prove the point, consider a few uncontroverted facts. Darral Bell was indicted on murder charges and tried.<sup>551</sup> The Mississippi trial judge gave *murder* and *manslaughter* charges to the jury.<sup>552</sup> The murder charge read:

Darral Bell has been charged with the *offense of murder*. If you find from the evidence in this case beyond a reasonable doubt that:

- 1) Darral Bell, on or about October 30, 2004, in Amite County, Mississippi;
- 2) *Wilfully, with a deliberate design* to effect the death of Lecedrick Hurst, killed the said Lecedrick Hurst by running over him with a truck; and
- 3) Darral Bell was not acting in self-defense then you shall find the defendant guilty as charged.

If the prosecution has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find Darral Bell not guilty of murder.<sup>553</sup>

The Mississippi trial court's "deliberate design" charge read:

"[D]eliberate design" . . . means *an intent to kill* without authority of law, and not being legally justifiable, or legally excusable. "Deliberate" always indicates full awareness of what one is doing, and generally implies careful

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546. See *Hurst*, 632 F.3d at 905 ("Turning to the terms of the [insurance contract], [it] provides coverage for bodily injury caused by an 'accident' and expressly excludes coverage for bodily injury 'expected or intended from the standpoint of the 'insured.'" Under any reading of the [p]olicy, Bell's manslaughter conviction negates any finding that Hurst's death was an 'accident.'").

547. See *id.* at 905-06.

548. See *id.* at 906.

549. See *infra* notes 559-62 and accompanying text.

550. See *infra* notes 551-58 and accompanying text.

551. *Hurst*, 632 F.3d at 901.

552. *Id.*

553. *Id.* (emphasis added).

and unhurried consideration of the consequences. “*Design*” means to calculate, plan, or contemplate. “Deliberate design” to kill a person may be formed very quickly, and perhaps only moments before the act of killing the person. However, a “deliberate design” cannot be formed at the very moment of the fatal act.<sup>554</sup>

Furthermore, the judge also instructed the jury to continue deliberating and consider whether Bell was guilty of manslaughter, if the jury concluded that Bell was not guilty of murder.<sup>555</sup> The manslaughter charge stated:

[M]anslaughter is the killing of a human being, *without malice aforethought*, and *in the heat of passion* by the use of a deadly weapon, without authority of law. Thus, if you find from the evidence, that the State has proven beyond a reasonable doubt all of the following material elements that:

1. The defendant, Darral Bell, did *wilfully*, feloniously and without authority of law and *without malice aforethought*, *in the heat of passion*, with the use of an automobile, did run over and kill Lecedrick Hurst, a living person, and further,
2. That the defendant, Darral Bell, had the mental capacity to realize and appreciate the nature and quality of his acts and to distinguish right from wrong at the time he committed these acts;

Then you shall find the defendant, Darral Bell, *guilty of manslaughter*. However, if the State has failed to prove any one of the elements of the charge of manslaughter beyond a reasonable doubt, you may consider whether the death of Lecedrick Hurst was *an accidental homicide*.<sup>556</sup>

There is more: Other instructions stated that a “killing, even though intentional, committed on impulse in the heat of passion is without deliberation and without malice aforethought,” that malice aforethought required “premeditation and deliberation,” and that deliberation [required giving] “consideration to the intent to kill.”<sup>557</sup>

Now consider Judge Prado’s statement that he penned in the *Hurst* opinion:

[Lecedrick Hurst’s survivors] seriously misunderstand the crime of which Bell was convicted. Under Mississippi law, heat-of-passion manslaughter is a *lesser-included offense of murder* because it *lacks malice, not willfulness*. While the jury determined that Bell did not act “[w]ilfully, with a *deliberate design* to effect [Hurst’s] death” or with “*premeditation and deliberation*,” it did find Bell *guilty of manslaughter* on a theory that he killed Hurst “*wilfully . . . without malice aforethought, in the heat of passion*,” and that he had the

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554. *Id.* (emphasis added).

555. *Id.*

556. *Id.* (emphasis added).

557. *Id.* at 902.

“mental capacity to realize and appreciate the nature and quality of his acts.”<sup>558</sup>

So, what is problematic? First, the *Hurst* panel concluded: “Under Mississippi law, heat-of-passion manslaughter is a lesser-included offense of murder . . . .”<sup>559</sup> But the panel did not cite any Mississippi cases to support that assertion.<sup>560</sup> In fact, based on the author’s research, that statement is untrue. The Mississippi Legislature has enacted eleven manslaughter statutes and each has different elements.<sup>561</sup> And those “statutes do not refer to any form of manslaughter being of a varying degree or ‘lesser’ than another form.”<sup>562</sup>

Second, review carefully the following words and phrases that appear in the Mississippi trial court’s *murder* charge: “‘Deliberate design’ . . . means an intent to kill”; “‘Design’ means to calculate, plan, or contemplate”; and “‘willfully, with a deliberate design . . . killed . . . Lecedrick Hurst.’”<sup>563</sup>

558. *Id.* at 903 (emphasis added).

559. *Id.*

560. *See id.*

561. *See* MISS. CODE ANN. §§ 97-3-27 to -47 (West 2006).

562. *Nolan v. State*, 61 So. 3d 887, 904 (Miss. 2011) (Carlson, J., dissenting). Judge Carlson also added the following highly relevant information:

Further, the plain language of Section 97-3-47 [involuntary manslaughter] distinguishes itself from our other manslaughter sections. Section 97-3-47 begins with stating “every *other* killing of a human being . . . .” The word “other” in Section 97-3-47 divides the Section from the remaining ten manslaughter statutes. . . . [T]he Fifth Circuit has found that, under the federal manslaughter statute, *involuntary manslaughter is a lesser-included offense of voluntary manslaughter*. Notably, the wording of the federal statute is different from our state statutes. The federal statute provides:

“(a) Manslaughter is the unlawful killing of a human being *without malice*. It is of two kinds: Voluntary—Upon a sudden quarrel or heat of passion. Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.”

In holding that involuntary manslaughter is a lesser-included offense, the Fifth Circuit stated:

“[I]nvoluntary manslaughter is also necessarily a lesser included offense of voluntary manslaughter. Voluntary manslaughter encompasses all of the elements of murder: it requires proof of the physical act of unlawfully causing the death of another, and of a mental state that *would* constitute malice, but for the fact that the killing was committed in adequately provoked heat of passion or provocation. Involuntary manslaughter requires proof only of a subset of those elements: the same physical act, but only a reduced mental state and no requirement at all for heat of passion or provocation. Thus, under the elements test, involuntary manslaughter under the federal statute is necessarily a lesser included offense of voluntary manslaughter.”

However, of significant import is that, under the federal statute, the punishment for voluntary manslaughter is more severe than the punishment for involuntary manslaughter. . . . On the other hand, in Mississippi, we have eleven manslaughter statutes, all of which provide for . . . imprisonment in the state penitentiary for not less than two years nor more than twenty years. In sum, prior to today, *this Court has not yet addressed the issue of whether general manslaughter is a lesser-included offense of heat-of-passion manslaughter*.

*Id.* at 904-05 (emphasis added) (footnotes omitted) (citations omitted) (citing *United States v. Browner*, 889 F.2d 549, 553 (5th Cir. 1989)); 18 U.S.C. § 1112(b) (Supp. 2010); MISS. CODE ANN. § 97-3-25 (West 2006).

563. *Hurst*, 632 F.3d at 901.

Conversely, the *manslaughter* charge contained these pertinent words and phrases: “without malice aforethought,” “[a] killing, even though intentional . . . is without deliberation and without malice aforethought” and “*wilfully*.”<sup>564</sup> Yes. “Wilfully” appears in both the murder and manslaughter charges.<sup>565</sup> But, on at least one occasion, the Mississippi Supreme Court embraced Black’s definitions and concluded that “*intent*” and “*willful*” are synonymous.<sup>566</sup> Moreover, the Supreme Court of Mississippi also declared that “*malice aforethought*,” “*deliberate design*,” and “*intent*” are synonymous.<sup>567</sup>

In the *Hurst* opinion, Judge Prado wrote: “While the jury determined that Bell did not act ‘[w]ilfully, with a *deliberate design* to effect [Hurst’s] death’ or with ‘*premeditation* and *deliberation*,’ it did find Bell guilty of manslaughter on a theory that he *killed Hurst ‘wilfully . . . without malice aforethought, in the heat of passion.’*”<sup>568</sup> And stressing that the Mississippi Supreme Court upheld Bell’s involuntary-manslaughter conviction, the *Hurst* panel concluded: (1) Bell “*intentionally killed Hurst*”; (2) The intentional killing—bodily injury—was excluded from coverage under the automobile policy; and (3) Capital City had no duty to compensate Hurst’s survivors.<sup>569</sup>

It is important, however, to restate an earlier observation: Mississippi has several manslaughter statutes.<sup>570</sup> And Judge Prado cites and discusses two of those statutes in the opinion.<sup>571</sup> Section 97-3-35 of the Mississippi Code reads:

564. *Id.*

565. *See supra* notes 563-64 and accompanying text.

566. *See Lester v. State*, 692 So. 2d 755, 790 (Miss. 1997), *overruled by Weatherspoon v. State*, 692 So. 2d 755 (Miss. 1999) (citing BLACK’S LAW DICTIONARY 1599 (6th ed. 1990) (holding the word “willfully” means “intentionally”). *But see Johnson v. State*, 44 So. 3d 400, 405 (Miss. Ct. App. 2010) (“Johnson argues [that *Lester*] (overruled on other grounds) ‘conclusively’ establishes that ‘willfully’ means the same as ‘intentionally’ in both ordinary and legal use. In *Lester*, the Mississippi Supreme Court reversed a capital-murder conviction and granted a new trial. However, the defendant unsuccessfully argued that the trial judge erred in overruling an objection to a jury instruction which he argued omitted the intent from the elements of the charge of child abuse. The jury instruction at issue only stated ‘willfully, unlawfully, and feloniously’; and it did not contain the word ‘intentionally,’ so the defendant argued it did not contain the element of intent, allowing the jury to convict him of child abuse for negligently, not criminally, caused injuries. The supreme court held the word ‘willfully,’ in that context, meant ‘intentionally.’ *Lester*, however, is readily distinguishable from the case at bar, as it does not establish the meaning of ‘willfully’ in all contexts, least of all the required intent of the different crime: shooting into a dwelling. In *Lester*, there is no statutory interpretation at issue, but a jury instruction on a different crime—felonious child abuse. *The jury instruction did not contain the word ‘intent,’ but ‘willfully’; however, the court found these two terms synonymous* in that context. Accordingly, *Lester* is not dispositive as argued by Johnson.” (emphasis added) (citations omitted) (citing *Lester*, 692 So. 2d at 789-90)).

567. *See Wilson v. State*, 936 So. 2d 357, 363-64 (Miss. 2006) (“By definition, malice aforethought and deliberate design are synonymous. This [c]ourt has also acknowledged that deliberate design connotes an intent to kill.” (citation omitted)) (citing *Hawthorne v. State*, 835 So. 2d 14, 19 (Miss. 2003)); *Tran v. State*, 681 So. 2d 514, 517 (Miss. 1996) (concluding that the definition of “malice aforethought” is synonymous with the definition of “deliberate design”).

568. *Hurst*, 632 F.3d at 903.

569. *See id.* at 902, 905-06 (emphasis added) (alterations in original) (citing *Bell v. State*, 963 So. 2d 1124 (Miss. 2007)).

570. *See* MISS. CODE ANN. §§ 97-3-27 to -47 (West 2006).

571. *See Hurst*, 632 F.3d at 903-04.

“The killing of a human being, *without malice*, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense, *shall be manslaughter*.”<sup>572</sup> And § 97-3-47 of the Mississippi Code states: “Every other killing of a human being, by the act, procurement, or *culpable negligence* of another, and without authority of law, not provided for in this title, *shall be manslaughter*.”<sup>573</sup>

But note: The following words and phrases do not appear in the two manslaughter statutes, §§ 97-3-35 and 97-3-47: “Wilfully,” “willfully,” “wilful,” “willful,” “intent,” “intentional,” “deliberate design,” and “premeditation.”<sup>574</sup> Thus, did the state criminal court give the wrong charge that the Mississippi jury used to convict Bell of involuntary manslaughter? Or, does the Mississippi Supreme Court allow trial judges to fashion jury charges that deviate from or clash with the words and phrases that appear in criminal statutes? Put simply, a comprehensive and intelligibly de novo review and analysis of this question is sadly absent in the *Hurst* opinion.

There is more. In the underlying criminal case, Darral Bell admitted that he *acted intentionally*—“driving [his truck] in the middle of the road to prevent Hurst from passing him.”<sup>575</sup> But, did Bell *intentionally cause the results*—a collision and Lecedrick Hurst’s death? The *Hurst* panel simply embraced the district court’s conclusion: Capital City insurance policy did not cover the collision or death because Bell “*intentionally killed Hurst*.”<sup>576</sup> But, to repeat, the jury’s manslaughter conviction is highly questionable because the Mississippi Supreme Court has been extremely clear: Mississippi’s involuntary manslaughter statute—§ 97-3-47—does not require a jury to find that a defendant “*willfully killed*” or *had an intent to kill*.<sup>577</sup>

Stated differently, on numerous occasions, the Mississippi Supreme Court has ruled: To secure a manslaughter conviction, a prosecutor must prove “*culpable negligence*,” which is the “conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as the result of the *willful creation of an unreasonable risk*.”<sup>578</sup> Without a doubt, negligence and

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572. § 97-3-35 (emphasis added).

573. § 97-3-47 (emphasis added).

574. §§ 97-3-35, 97-3-47.

575. *Hurst*, 632 F.3d at 902.

576. *See id.* at 906.

577. *See Lester v. State*, 692 So. 2d 755, 789 (Miss. 1997) (comparing elements of § 97-3-27 manslaughter and § 97-3-19(2)(f) capital murder); *Craig v. State*, 520 So. 2d 487, 491 (Miss. 1988) (characterizing § 97-3-47 as an involuntary manslaughter statute).

578. *See Townner v. State*, 726 So. 2d 251, 257 (Miss. App. 1998) (emphasis added) (citing *Campbell v. State*, 285 So. 2d 891, 893 (Miss. 1973)) (“It has been pointed out by this Court on several occasions that involuntary manslaughter by culpable negligence within the meaning of the foregoing Code section may be defined as the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as the result of *the willful creation of an unreasonable risk*.” (emphasis added)); *see also Smith v. State*, 20 So. 2d 701, 706 (Miss. 1945) (“[C]ulpable negligence should be defined as the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as a result of the *willful creation of an unreasonable risk thereof*.” (emphasis added)).

an intentional act are not synonymous.<sup>579</sup> And arguably one's *willfully acting* to create an unreasonable *risk* is not the same as one's *intentionally designing* a specific *result*. Furthermore, the Supreme Court of Mississippi—like most state supreme courts that interpret the meaning of “*expected or intended from the standpoint of the insured*” clauses—accepts the critical distinction between an insured's *intent to act* versus an insured's *intent to harm*.<sup>580</sup> Of course, as the appellants requested, the *Hurst* panel did not discuss thoroughly (1) whether the Capital City insurance contract *excluded intentional act or results*, or (2) whether Bell only created a risk or collided with Hurst with intent to kill Hurst.<sup>581</sup> Again, under Mississippi's law, “a wilful risk” and a “wilful consequence” are not synonymous.<sup>582</sup> Thus, the *Hurst* opinion is also blemished because it fails to provide intelligible discussions of these latter issues.

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579. *Cf. Buchanan v. State*, 427 So. 2d 697, 700 (Miss. 1983) (“The [c]ourt instruct[ed] the jury that if you find from the evidence in this case beyond a reasonable doubt that the defendant . . . unlawfully, *wilfully*, and feloniously cause[d] bodily injury to Joe Parker, a human being, recklessly under circumstances manifesting extreme indifference to the value of human life by driving into Joe Parker and striking him with an automobile, then you shall find the defendant guilty as charged. This instruction *offers no guidelines or distinctions* for the jury to follow so that it could *understand the difference between recklessness* under circumstances manifesting extreme indifference to the value of human life that amounted to *willfulness and ordinary negligence, gross negligence or culpable negligence, all of which are a lesser degree than wilful*. To avoid the possibility that state instruction No. 2 be interpreted by the jury as a peremptory instruction, thereby depriving appellant of his only defense, it became necessary for the court to grant an instruction similar to the one offered by defense instruction No. 3. Although inartfully drawn and the verbiage redundant, this instruction attempted to instruct the jury as to the difference between recklessness or negligence without intent as opposed to such negligence that would be tantamount to willfulness and therefore subject the appellant to criminal responsibility.”) (Lee, J., concurring in part, dissenting in part) (emphasis added) (citation omitted); *Ramon v. State*, 387 So. 2d 745, 751 (Miss. 1980) (“Furthermore, in a prosecution for manslaughter, the charge is the action of ‘culpable negligence’ which is a lesser term than ‘wilful.’ All the instructions adequately informed the jury as to its duties under the law as applied to the evidence in the case.”).

580. *See United States Fid. & Guar. Co. v. Omnibank*, 812 So. 2d 196, 200-01 (Miss. 2002) (adopting the analysis and reasoning in *Moulton*); *S. Farm Bureau Cas. Ins. Co. v. Allard*, 611 So. 2d 966, 968 (Miss. 1992) (concluding that the insurer had a duty to pay because although the insured's act was intentional, the act's result was not intentional); *Allstate Ins. Co. v. Moulton*, 464 So. 2d 507, 509-10 (Miss. 1985) (concluding that the insurer had no duty to pay because the insured intended to act, even though the result was unintended); *see also* Willy E. Rice, *Insurance Contracts and Judicial Discord Over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments—1900-1997*, 47 AM. U. L. REV. 1131, 1183-86 (1998) (presenting an exhaustive analysis of nationwide judicial conflicts over whether an insured's “intent to act” or “intent to injure” determines an insurer's duty to pay a third-party claim or defend an insured against a wrongful-death suit).

581. *See Hurst*, 632 F.3d at 903.

582. *See supra* note 579 and accompanying text.

IV. THIRD-PARTY FEDERAL- AND STATE-LAW POLLUTION CLAIMS AND  
LIABILITY INSURER'S DUTY TO DEFEND AND INDEMNIFY INSUREDS

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>583</sup> Put simply, Congress found that industrial pollution was widespread, producing numerous hazardous-waste sites, causing serious environmental hazards and increasing health risks to dangerous levels.<sup>584</sup> Therefore, CERCLA was designed to promote the “timely cleanup of hazardous waste sites” and to ensure that commercial polluters paid the cleanup costs.<sup>585</sup> To accomplish this end, CERCLA imposes strict liability for environmental contamination upon four broad classes of potentially “responsible parties.”<sup>586</sup>

The Superfund Amendments and Reauthorization Act of 1986 (Superfund) grants broad authority to the Federal Executive Branch to decontaminate hazardous-substances sites.<sup>587</sup> Specifically, if hazardous substances are released or present a threat to the environment, the President may (1) remove or arrange for the removal of hazardous substances,

583. Comprehensive Environmental Response, Compensation, and Liability Act, 94 Stat. 2767 (1980), amended by 42 U.S.C. §§ 9601-9675 (2006).

584. See *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 257-58 & n.5 (3d Cir. 1992) (“In response to widespread concern over the improper disposal of hazardous wastes, Congress enacted CERCLA, a complex piece of legislation designed to force polluters to pay for costs associated with remedying their pollution. . . . As numerous courts have observed, CERCLA is a remedial statute which should be construed liberally to effectuate its goals. . . . Unfortunately, CERCLA was passed in great haste during the waning days of the 96th Congress. As a result, the statute is riddled with inconsistencies and redundancies.”) (citing *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, S. Comm. of Env’t and Pub. Works, S. Doc. No. 97-14, 97th Cong., 2d Sess. 1983, Vol. I, 320 [hereinafter *A Legislative History*] (one of the statute’s principal goals is “assuring that those who caused chemical harm bear the costs of that harm . . . .”)); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1197 (2d Cir. 1992) (“In CERCLA Congress enacted a broad remedial statute designed to enhance the authority of the EPA to respond effectively and promptly to toxic pollutant spills that threaten[] the environment and human health.”); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1150 (1st Cir. 1989) (CERCLA is a “broad response and reimbursement statute”); *A Legislative History, supra*, Vol. I, at 785-87.

585. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996); *Consol. Edison Co. of N.Y. v. UGI Util., Inc.*, 423 F.3d 90, 94 (2d Cir. 2005); *Dedham Water Co.*, 805 F.2d at 1081.

586. See 42 U.S.C. § 9607(a) (2006); *Alcan Aluminum Corp.*, 964 F.2d at 257. The four broad classes of potentially “responsible parties” are:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

§ 9607(a).

587. Superfund Amendment and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. § 9601).

(2) institute remedial actions to decontaminate polluted areas, and (3) institute any other necessary measures to protect the public's health and welfare, and clean up the polluted environment.<sup>588</sup> In the course of events, the President delegated most of his CERCLA authority to the Environmental Protection Agency (EPA).<sup>589</sup> Consequently, the EPA must identify toxic-waste sites, fashion cleanup plans, and collect reimbursements from responsible parties.<sup>590</sup> Additionally, some states have established procedures to decontaminate polluted areas and to secure reimbursements from "responsible entities" or those who polluted land and water over multiple decades.<sup>591</sup>

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588. 42 U.S.C. § 9604(a)(1) (2006).

589. See, e.g., Exec. Order No. 12,580, 61 Fed. Reg. 45,871 (Jan. 23, 1987).

590. See John Seward, *Insurers and Environmental Icebergs*, WALL ST. J., June 16, 2004, at B9D ("A special tax on oil and chemical companies created a fund to pay for cleanups when responsible parties weren't available. The tax was eliminated in 1995 and the trust fund's unallocated balance went from a high of \$3.6 billion in 1995 to zero by the end of 2003. Rather than suggesting the environment has been cleaned, the slowdown at the EPA merely portends a developing backlog of sites to be listed eventually as eligible Superfund sites that may generate insurance claims . . . [F]iscal 2003 saw work under way at 436 Superfund sites, which . . . the second-highest level of activity in the Superfund's 24-year history. . . . The EPA has cleaned up about 900 sites under the Superfund since 1980, with about 1,200 still on the list."). Put simply, the EPA may secure reimbursement for response costs in multiple ways. For example, the EPA can clean the sites itself using monies in the "Superfund." 26 U.S.C. § 9507(b) (2006). In addition, under § 9606(a), the EPA may ask the Attorney General to "secure such relief as may be necessary to abate such danger or threat" by filing a civil action in federal district court. § 9606(a) (1980) (amended 1987). That section also permits the EPA to issue administrative orders "as may be necessary to protect public health and welfare and the environment." *Id.*

591. See Russell Gold, *Uranium Firm, State Strike Financing Deal for Cleanup*, WALL ST. J., Oct. 18, 2000, at T1 (emphasis added):

In an effort to avoid creating a Superfund site that could cost \$12 million to \$18 million to clean, state environmental regulators signed an agreement last week to keep a financially troubled uranium-mining company afloat. The deal allows Dallas-based Uranium Resources Inc. to use its financial-security bonds to restore the groundwater and surface at two mines in South Texas . . . Uranium companies are required by the state to fund financial-security bonds to cover the closing and cleanup of mines if a company goes bankrupt. URI has \$6.2 million in such bonds.

URI will get \$2.3 million over 18 months for the cleanup. After that, URI can negotiate another deal to get the rest of the \$6.2 million. . . . The flap over the URI mines comes at a time when a quarter-century of uranium mining across South Texas has all but ceased—the victim of a recent collapse in the price of uranium, which fuels nuclear plants. As a result, the state has found itself negotiating with companies to avoid an expensive environmental headache, with the URI pact being the first such deal.

When the uranium industry took off in the late 1970s, state officials started requiring companies to post financial-security bonds. The size of the bonds was reviewed annually, and they had to be enough for an independent contractor to perform the required decommissioning work. But the amount was largely guesswork until recently, since most companies completed the work themselves without dipping into the bonds. When companies' financial stability became an issue in the past couple years, state officials quickly realized the cleanup costs were much higher than expected and that the bonds were too small.

URI entered the South Texas uranium-mining industry in the 1980s. . . . By 1988, URI began production in the region using a method called in situ mining. URI used a well field to extract uranium from shallow aquifers, which supply drinking water to nearby ranchers and communities. Gaseous oxygen is pumped into the aquifer, where it reacts with ore and causes uranium and other metals to become soluble. The mineral-rich water is then pumped back to the



But, who should pay federal and state governments after they decontaminate toxic-waste sites? Should the polluters or responsible persons pay, or should their commercial and environmental liability insurers pay? To illustrate the scale and gravity of the problem, consider the following information, which appears in a 1989 *Wall Street Journal* article:

The [cost of remediating] years of pollution is expected to approach \$100 billion. And there's a growing sense among . . . some judges, lawyers and industry executives [ ]that the courtroom is not the best place to decide who should bear most of the cost.

The Comprehensive Environmental Response, Compensation and Liability Act of 1980, [or] Superfund, was designed to set the rules. . . . [T]hose who generated, transported or stored hazardous waste are liable for its cleanup, regardless of whether their actions were legal at the time they took place.

However, it soon became evident that corporations alone were unable to handle the cost of cleaning the nation's waste sites. So they undertook a hugely expensive legal effort to compel their insurance carriers to help foot the bill instead.

Corporate policyholders argue . . . that [they] paid millions of dollars in comprehensive general-liability insurance premiums to protect themselves against business risks. . . . [Thus, they stress that] the carriers . . . accepted the premiums [as well as] . . . the risks . . . and [the insurers] must now pay the price.

The insurance industry counters that general-liability policies were never intended to cover the cleanup of pollution released gradually into the

surface where the uranium is extracted.

.....  
*The state requires that the aquifers be thoroughly cleansed to remove residual uranium as well as other hazardous materials dislodged during mining. This accounts for about 90% of the overall cleanup cost.* Water from the aquifer is cleansed using reverse osmosis and a collection of resins and filters. The process takes tremendous amounts of electricity to run the pumps, but operations are fairly automated.

.....  
 Kingsville, a city of 25,000, draws its water from the aquifer. While groundwater movement in the area is very slow—10 feet a year by some estimates—any movement would quickly escalate the cost of cleanup.

See also *Energy Brief—Exxon Mobil Corp.: Appeal Is Planned of Decision in Louisiana Environment Case*, WALL ST. J., Apr. 4, 2005, at B3 (emphasis added):

Exxon Mobil Corporation said it plans to appeal a Louisiana appeals-court decision that held the oil giant liable for more than \$100 million in damages in an environmental case. The court reduced an earlier award Thursday, trimming punitive damages awarded by a jury to \$112 million from \$1 billion and leaving \$56 million in compensatory damages unchanged.

But Exxon Mobil of Irving, Texas, insisted punitive damages weren't warranted and said the compensatory award exceeded cleanup costs. The case involves land leased by former Jefferson Parish District Judge Joseph Grefer to Intracoastal Tubular Services Inc. a company contracted to clean and refurbish Exxon's pipes between the 1950s and 1992. *Judge Grefer argued the oil industry knew since the 1930s that its pipes were filled with residue containing significant amounts of radium, a carcinogen*, and Exxon said nothing in hopes of avoiding liability for cleanup costs.

environment. In addition, [insurance-defense lawyers argued that] intentional polluters are barred from insurance protection, which is designed to cover accidental calamities only.<sup>592</sup>

Perhaps the courtroom is not the best forum to determine whether insurers or polluters must bear the greater burden of decontaminating hazardous-waste sites. But this question has generated a considerable amount of litigation since CERCLA, the Superfund, and various states' pollution remediation statutes were enacted.<sup>593</sup> Significantly, state courts have decided most of the controversies.<sup>594</sup> Since the *Wall Street Journal* article appeared in 1989, the Fifth Circuit has decided only a few environmental impairment liability disputes between insurers and their corporate insureds.<sup>595</sup> However, during the 2010–2011 session, Fifth Circuit panels decided two quarrels over whether environmental liability insurers have a duty to pay pollution-remediation costs as well as damages for pollution-caused personal injuries.<sup>596</sup> Those opinions are discussed below.

*A. Federal Environmental Remediation Claim and Insurers' Duty to Indemnify*

**Substantive Question:** *Whether under Texas's laws, an environmental impairment liability insurer has a duty to indemnify the insured for paying the remediation costs that the EPA incurred after removing pollution from an industrial site.*

Although the legal issues and procedural history in *RSR Corp. v. International Insurance Co.* are somewhat intricate, the facts are not.<sup>597</sup>

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592. Amy Dockser, *Corporate Polluters Paying the Price—More Rulings Favor Insurers In Toxic Suits*, WALL ST. J., Aug. 1, 1989.

593. See generally ALA. CODE 1975 § 22-30E-1 (2009) (“Alabama Land Recycling and Economic Redevelopment Act”); ARK. CODE ANN. § 8-7-202 (West 2011) (“It is the purpose of this subchapter . . . to . . . enforce a hazardous waste program”); CAL. GOV. CODE § 53314.6 (West 2008) (setting up a fund for the cleanup of hazardous waste); COLO. REV. STAT. ANN. § 25-16-104.6 (2011) (establishing in the state treasury a hazardous substance response fund); CONN. GEN. STAT. ANN. § 22a-133k (West 2006) (“setting forth standards for the remediation of environmental pollution at hazardous waste sites”); LA. REV. STAT. ANN. § 30:2273 (2000) (“The purpose of this chapter is to encourage prompt notification to the department of any hazardous substance discharge”); MISS. CODE ANN. § 49-17-405 (2003) (providing funding for rehabilitation of contamination sites); TEX. WATER CODE ANN. § 7.031 (West 2008) (allowing commission to order corrective action for hazardous waste spills).

594. On September 18, 2011, the author accessed Westlaw's MIN-CS database and submitted the following query: SY(POLLUT! CONTAMINA! /P (DEFEND INDEMN!)). Covering the period between March 1969 and August 2011, four hundred (404) cases were generated.

595. On September 18, 2011, the author accessed Westlaw's CTA5 database and submitted the following query: SY(POLLUT! CONTAMINA! /P (DEFEND INDEMN!)). Covering the period between September 1983 and August 2011, twenty-four opinions were generated.

596. See *infra* Part IV.A.

597. See *RSR Corp. v. Int'l Ins. Co.*, 612 F.3d 851, 854-57 (5th Cir. July 2010) (Panel comprised of Circuit Judges Edith Brown Clement, the late William Lockhart Garwood, and Jerry Smith).

Essentially, RSR Corporation (RSR) is a recycling company.<sup>598</sup> Quemetco, Inc. (Quemetco) is RSR's subsidiary.<sup>599</sup> From 1972 until 1983, Quemetco operated a lead smelter on Harbor Island near Seattle, Washington.<sup>600</sup> During that period, Quemetco's operations generated a substantial amount of pollution on the island, which severely damaged the environment.<sup>601</sup> In December 1982, the EPA announced that it would put Harbor Island on its National Priorities List (NPL).<sup>602</sup> In 1986, the EPA determined that Quemetco was a potentially responsible party who caused the pollution.<sup>603</sup> And in May 2000, the EPA filed a CERCLA action against RSR.<sup>604</sup> The action sought reimbursements for expenditures that the EPA used to clean up Harbor Island.<sup>605</sup>

When the EPA commenced its remediation action, International Insurance Company (International) insured RSR and its subsidiaries—Quemetco, Quemetco Metals Limited, Inc., and Quemetco Realty, Inc.—under four environmental impairment liability insurance contracts.<sup>606</sup> International's predecessor-in-interest, North River Insurance Company, sold the insurance contracts to RSR in 1981.<sup>607</sup> Therefore, after learning about the EPA's lawsuit, International filed a declaratory judgment lawsuit against RSR (Northern District's First RSR Decision).<sup>608</sup> In the complaint, the insurer asked the District Court for the Northern District of Texas to declare that International had no duty to defend or indemnify RSR under the four environmental liability insurance policies.<sup>609</sup>

An initial jury trial was held to resolve certain coverage issues.<sup>610</sup> Other coverage and damages issues, however, were reserved for future resolution.<sup>611</sup>

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598. See *RSR Corp.: Company Description*, HOOVERS, [http://www.hoovers.com/company/RSR\\_Corporation/crcesi-1.html](http://www.hoovers.com/company/RSR_Corporation/crcesi-1.html) (last visited Mar. 6, 2012) (“Medieval alchemists tried to turn lead into gold. RSR’s operations are even more complex—the company turns batteries into lead and then into money. RSR represents the stateside operations of privately owned holding company Quexco, which also owns UK battery recycler Eco-Bat Technologies. RSR recycles scrapped lead-acid batteries and other lead-bearing materials into refined lead and calcium and antimonial lead alloys. The company also offers technology and product development services to the metals industry. It operates three plants in the US.”).

599. *RSR Corp.*, 612 F.3d at 854.

600. *Id.*

601. See *id.*

602. *Id.* “Placement of a site on the NPL indicates that the EPA plans to clean up a site and serves as notice to potentially responsible parties that the EPA may seek to recoup its remediation costs from them.” *Id.* at 854 n.1.

603. *Id.* at 854.

604. *Id.*

605. *Id.*

606. *Id.*

607. See *id.* at 854-55; see also *Int’l Ins. Co. v. RSR Corp.*, 426 F.3d 281, 285 (5th Cir. 2005) (“International Insurance Company is the successor-in-interest of North River Insurance Company . . . , which issued the [environment impairment liability] policy to RSR and other related entities in 1981. The [contracts] had a policy period of September 4, 1981 to November 4, 1982, with an extended reporting period until November 4, 1983.”).

608. *Int’l Ins. Co.*, 426 F.3d at 285.

609. *RSR Corp.*, 612 F.3d at 854.

610. *Id.*

611. See *id.*

At the conclusion of the initial trial, the Northern District of Texas entered a judgment for RSR.<sup>612</sup> The district court concluded that International had a duty to indemnify RSR for the Harbor Island remediation costs, barring costs that were excluded under the insurance contracts.<sup>613</sup> The Fifth Circuit affirmed the district court's judgment in the first *RSR* decision.<sup>614</sup> About two years later, International raised additional defenses, which had been reserved or were unavailable prior to the judgment in the Northern District's First *RSR* Decision.<sup>615</sup> Both parties filed motions for summary judgment.<sup>616</sup> The Northern District of Texas granted International's motion and dismissed RSR's claims.<sup>617</sup>

More specifically, the district court concluded that RSR could not recover from International, giving two reasons: (1) The "other insurance" clauses in International's environmental liability policies limited RSR's recovery to the amount of proceeds that the company had received under other liability insurers' settlement agreements; and (2) Texas's "one recovery" rule barred RSR's collecting money from International because RSR had been fully compensated for its Harbor Island liability under the other settlement

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612. *Id.* at 856. The following facts are relevant:

In August 2001, RSR and International tried certain coverage issues relating to the Harbor Island claim before a jury, while reserving unripe coverage and damages issues for future resolution. Issues relating to the West Dallas site were severed into a separate trial and were later settled. After the jury returned its verdict on the Harbor Island issues, the district court entered judgment for RSR, declaring that International was:

"contractually obligated to indemnify RSR for any remediation costs and expenses that RSR is or becomes obligated to pay to the United States Environmental Protection Agency ('EPA') with respect to the EPA's remediation activity at the Harbor Island site . . . to the extent such remediation costs and expenses are covered by [the] EIL Policies . . . and are not otherwise excluded by the terms of the policies . . ."

The district court also determined that the EPA had made a claim against RSR, that RSR had not waived its right to coverage with respect to the Harbor Island site, that RSR's Harbor Island lawsuit against International was not barred by the statute of limitations, and that RSR should take nothing on its common law bad faith and Texas Insurance Code claims against International.

*Id.*

613. *Int'l Ins. Co.*, 426 F.3d at 285-86.

614. *Id.* at 290.

615. *See RSR Corp.*, 612 F.3d at 854.

In March 2006, RSR moved to reopen the same federal district court case under 28 U.S.C. § 2202. Subsequently, International requested leave to amend its complaint to assert new coverage and damages defenses which had not been ripe at the time of the 2001 trial. In February 2007, the district court granted both motions. International then amended its complaint to assert new defenses, among them that Condition 8 of its policies, an "other insurance" clause, precluded coverage of RSR's Harbor Island claims because RSR had already been fully compensated for this liability through its settlements with the CGL insurers in the Harrison County state court case. . . . On July 12, 2007, the parties were realigned. RSR filed its original complaint on March 7, 2008, seeking approximately \$13.1 million as its allegedly remaining liabilities on the Harbor Island claims, and International filed its answer on April 3, 2008.

*Id.* at 856-57.

616. *Id.* at 854.

617. *Id.*

agreements (Northern District's Second RSR Decision).<sup>618</sup> RSR appealed the district court's adverse summary judgment ruling to the Fifth Circuit.<sup>619</sup>

On appeal, the late Circuit Judge Garwood wrote the opinion for the panel.<sup>620</sup> He began his analysis by carefully inspecting the various insurance contracts that International, its predecessor-in-interest, and other commercial-liability insurers sold to RSR.<sup>621</sup> Again, in 1981, the North River Insurance Company (North River) issued four environmental-liability policies to RSR.<sup>622</sup> Under each of those insurance contracts, North River promised to pay successive layers of coverage up to \$60 million.<sup>623</sup> There were multiple conditions, including this one: The per-claim limit was \$30 million.<sup>624</sup> Additionally, the environmental-liability policies covered RSR's operations at several locations, including the insured's facilities on Harbor Island.<sup>625</sup> In 1993, International became North River's successor-in-interest.<sup>626</sup>

Under the environment-liability policies, International promised to:

[I]ndemnify the Insured against all sums which the Insured shall be obligated to pay for compensatory but not punitive or exemplary damages by reason of the liability imposed upon the Insured by law on account of:—

- (a) Personal Injury, including death at any time resulting therefrom;
- (b) Property Damage;
- (c) Impairment or diminution of or other interference with any other environmental right or amenity protected by law;

. . . caused by Environmental Impairment in connection with the Business of the Insured . . . and in respect of which a claim has been made against or other due notice has been received by the Insured during the Policy Period.<sup>627</sup>

International liability insurance contracts defined "Environmental Impairment" in different ways:

- (a) the emission, discharge, dispersal, disposal, seepage, release or escape of any liquid, solid, gaseous or thermal irritant, contaminant or pollutant into or upon land, the atmosphere or any watercourse or body of water;
- (b) the generation of smell, noises, vibrations, light, electricity, radiation, changes in temperature or any other sensory phenomena but not fire or explosion arising out of or in the course of the Insured's operations, installations or premises. . . .<sup>628</sup>

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618. *Id.*

619. *Id.*

620. *See id.*

621. *See id.*

622. *Id.*

623. *Id.*

624. *Id.*

625. *Id.*

626. *Id.* at 854-55.

627. *Id.* at 855 (alteration and omissions in original).

And the environmental policies' exclusion clauses excluded from coverage any liability for injuries or property damages resulting "from a 'sudden and accidental happening' or a 'fire or explosion.'"<sup>629</sup>

RSR also purchased several comprehensive general liability (CGL) insurance contracts, which covered RSR's operations on multiple sites, including those on Harbor Island.<sup>630</sup> Some of those CGL policies excluded coverage for an environmental claim unless the event was "sudden and accidental."<sup>631</sup> Other CGL policies excluded an environmental claim unless the event was a "hostile fire."<sup>632</sup> Still, other CGL insurance contracts covered environmental claims if those claims were "accidents and occurrences."<sup>633</sup> Thus, in 1993, RSR sued fifty-three of its CGL insurers "in the 71st District Court for the Judicial District of Harrison County, Texas" (Harrison County action).<sup>634</sup>

In the state action, RSR asserted that the CGL insurers had a contractual duty to cover the environmental cleanup costs as well as an obligation to pay third-party personal-injury claims that evolved from RSR's operations on Harbor Island and at twenty-five additional sites.<sup>635</sup> Furthermore, RSR argued that "accidental pollution" caused the third-party claims; therefore, the "sudden and accidental" requirement was satisfied under the CGL insurers' environmental-liability insurance contracts.<sup>636</sup> In the end, the Harrison County court adopted RSR's reading of the policies.<sup>637</sup> And, in the course of events, RSR and its CGL insurers entered into thirty-six settlement agreements.<sup>638</sup> RSR received an aggregate payment of \$76,006,501 from the CGL insurers.<sup>639</sup> RSR dismissed the rest of its CGL insurers from the Harrison County action.<sup>640</sup> The commercial polluter also dismissed International as a defendant in the state-court action.<sup>641</sup>

Returning to the federal-court action, International wanted the Northern District of Texas to declare: International has no duty to pay third-party pollution claims that originated from RSR's operations on Harbor Island or at

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628. *Id.* (omission in original).

629. *Id.*

630. *Id.*

631. *Id.*

632. *Id.*

633. *Id.*

634. *Id.*

635. *Id.*

636. *Id.* at 856.

637. *Id.*

638. *Id.*

639. *Id.*

640. *Id.*

641. *Id.* at 855. ("RSR also asserted claims against International in the Harrison County action for breach of the Environmental policies, violations of the Texas Insurance Code, and recovery of attorney's fees."). In the Harrison County action, RSR also asserted claims against International. *Id.* And, several CGL insurers sought contribution from International. *Id.* "Following the execution of the last of the settlements, RSR non-suited the Harrison County action." *Id.* at 856.

another site.<sup>642</sup> The district court granted International's request for summary relief for two reasons: (1) As a matter of law, the "other insurance" clause in International's policy barred RSR's recovery because the commercial polluter and its CGL insurers settled similar claims in the Harrison County action, and (2) Texas's "one satisfaction" rule bars double recovery for the same claims.<sup>643</sup>

To determine whether International's environmental-impairment-liability insurance contracts also covered similar claims in RSR and CGL insurers' settlement agreements, Judge Garwood carefully examined the condition clauses in International's multiple policies.<sup>644</sup> Each insurance contract contained the same "other insurance" provision.<sup>645</sup> It read:

This Policy shall not be called upon in *contribution* and no liability shall attach hereunder for any injury, loss, damage, costs or expenses recoverable under any *other insurance* insuring to the benefit of the Insured except as regards any excess over and above the amounts collectible under such other insurance; provided always that this clause shall not apply to any policy that is specifically arranged by the Insured to cover limits in excess of those stated in this Policy. Nothing herein shall be construed to make this Policy *subject to the terms, conditions and limitations of any other insurance*.<sup>646</sup>

Earlier, the district court concluded: (1) RSR's CGL policies were "other insurance"; (2) The CGL insurers paid the full amount of proceeds to cover RSR's Harbor-Island liabilities; (3) The "other insurance" clause precluded RSR's receiving any additional compensation under International's environmental-liability policies; and (4) RSR was judicially estopped from asserting the environmental and CGL policies were different because RSR had argued successfully in the Harrison County action that the CGL and environmental-liability insurance contracts covered the matching liabilities.<sup>647</sup>

On appeal, RSR argued that the district court erred by failing to embrace the following points: (1) a payment under a settlement agreement is not

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642. *Id.*

643. *Id.* at 856-57.

644. *See id.* at 858.

645. *See id.* at 855.

646. *Id.* at 858 n.4 (emphasis added).

Condition 8 is triggered where "any injury, loss, damage, costs or expenses [are] recoverable under any other insurance insuring to the benefit of the Insured." Thus, for Condition 8 to have been applicable in this case, (1) RSR must have had "other insurance" insuring to its benefit, and (2) RSR must have been able to recover under this other insurance for the same "injury, loss, damage, costs or expenses" it sought to recover from International.

*Id.* at 858.

647. *Id.*; *see also* Ergo Sci., Inc. v. Martin, 73 F.3d 595, 598 (5th Cir. 1996) (reaffirming that the judicial estoppel doctrine "prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding") (citing United States v. McCaskey, 9 F.3d 368, 378 (5th Cir. 1993)).

“insurance” and does not qualify as “other insurance”;<sup>648</sup> (2) assuming that the settlement payment was insurance, the condition clause only applies if International’s environmental-liability policies and the CGL insurers’ insurance contracts cover the same liabilities;<sup>649</sup> and (3) the environmental-impairment and CGL policies covered very different third-party liabilities.<sup>650</sup>

The central question for the *RSR* panel was whether recovery under the CGL policies precluded *RSR*’s recovery under the environmental policies.<sup>651</sup> And, writing for the panel, Judge Garwood concluded that the Northern District of Texas did not abuse its discretion.<sup>652</sup> The panel also concluded that International did not have to pay any additional reimbursements.<sup>653</sup> To reach that central conclusion, the Fifth Circuit panel found: (1) “*RSR* [never argued] that any of its pollution at Harbor Island was intentional;”<sup>654</sup> and (2) the conditions clause precluded *RSR*’s collecting additional payments.<sup>655</sup>

Regarding the applicability of the conditions clause, *RSR* argued that the district court erred by holding that a settlement payment could be “other insurance” within the meaning of the conditions clause.<sup>656</sup> But, the Fifth Circuit panel concluded that *RSR*’s argument was flaccid.<sup>657</sup> Therefore, the panel decided not to address whether the district court should have applied Texas’s “one satisfaction” rule to resolve this prong of the overriding dispute.<sup>658</sup>

648. *RSR Corp.*, 612 F.3d at 858-60.

649. *Id.* See generally *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, No. 82 Civ. 7327 (JSM), 1997 WL 251548, at \*1 (S.D.N.Y. May 13, 1997), *aff’d*, 241 F.3d 154 (2d Cir. 2001) (holding that “settlement agreements are not contracts of insurance”).

650. *RSR Corp.*, 612 F.3d at 858.

651. See *id.* at 859.

652. See *id.* at 860-61 (“We decline to find an abuse of discretion in the district court’s holding . . . . Because *RSR*’s original interpretation of the CGL and Environmental policies allowed accidental pollution to be covered under both policies, and because the only pollution alleged to have occurred at Harbor Island was accidental, we hold that the district court did not abuse its discretion by holding that *RSR* was estopped from arguing that the CGL and Environmental policies covered different liabilities.”).

653. See *id.* at 861-63.

654. *Id.* at 860.

This is not surprising, since intentional pollution at Harbor Island would likely be excluded from the Environmental policies under Exclusion 4 (“Liability for Environmental Impairment, arising out of the Insured’s noncompliance with any valid and applicable statute, regulation or written instruction relating to Environmental Impairment issued by competent authority . . . .”) or Exclusion 13 (“Liability arising from the deliberate and intentional dumping or disposal of toxic or radioactive substances in the open sea.”). An admission by *RSR* that its pollution at Harbor Island was intentional also might have led to new difficulties with the EPA.

*Id.* at 860 n.5 (omission in original).

655. See *id.* at 858-59.

656. *Id.* at 858.

657. See *id.* at 859 (“By its plain language, the triggering of Condition 8 requires only (1) the existence of ‘other insurance’ insuring to *RSR*’s benefit and (2) overlapping coverage between that other insurance and International’s Environmental policies. The means by which actual recovery might be achieved under the other insurance in question, whether by settlement agreement or by judgment, is irrelevant to Condition 8’s applicability. The existence of other insurance that covers the same liability as the Environmental policies is what triggers the condition, whether or not recovery under this other insurance is actually sought.”).

658. *Id.* at 857.



Why? Put simply, the *RSR* panel embraced the district court's conclusion: "International's 'other insurance' clause deprived RSR of any right to recover more than it had already obtained from its settlements with the CGL insurers."<sup>659</sup>

Finally, "RSR clearly alleged in state court that its CGL policies covered all accidental pollution, whether . . . it was sudden [or otherwise]."<sup>660</sup> To be sure, that position in the Harrison County action contradicted RSR's position before the Northern District of Texas.<sup>661</sup> Thus, in light of RSR's inconsistent positions, the Northern District of Texas applied the doctrine of judicial estoppel.<sup>662</sup> In the end, the district court declared that RSR was judicially estopped from asserting this point: RSR's CGL and environmental-impairment-liability insurance contracts cover different liabilities.<sup>663</sup> On appeal, RSR argued that the district court's application of judicial estoppel was an abuse of discretion.<sup>664</sup> Judge Garwood and other members on the panel disagreed.<sup>665</sup>

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659. *Id.* "Therefore, we hold that the district court did not err in finding that Condition 8 barred all recovery on the Environmental policies. For the foregoing reasons, we affirm the take-nothing judgment of the district court." *Id.* at 863.

660. *Id.* at 860 ("The Environmental policies have nothing to do with whether or not the pollution in question can be characterized as 'routine.' Their exclusions are triggered only where pollution occurred in a manner that was both sudden and accidental. Thus, the Environmental policies covered pollution that was accidental, but not sudden." (citation omitted)). "[U]nder Texas law, the [sudden and accidental] clause contains a temporal element in addition to the requirement of being unforeseen or unexpected. The sudden and accidental requirement unambiguously exclude[s] coverage for all pollution that is not released quickly as well as unexpectedly and unintentionally." *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 554 (5th Cir. 2004) (alterations in original) (quoting *Guar. Nat'l Ins. Co. v. Vic Mfg. Co.*, 143 F.3d 192, 193-94 (5th Cir. 1998)).

661. *See RSR Corp.*, 612 F.3d at 860 ("[I]n the Harrison County action, RSR took a very different position. There, RSR argued that the CGL policies' exception for 'sudden and accidental' occurrences could be satisfied by an occurrence that was not sudden, so long as it was accidental. RSR argued that the CGL policies covered 'all forms of emissions causing pollution liabilities, *except* for those resulting from intentional pollution.' It urged the Harrison County district court to hold that the CGL policies covered 'all damages from unexpected and unintended releases, discharges, dispersals, and/or escapes of pollution.' In a letter ruling dated March 19, 2003, the Harrison County district court granted RSR's request and held that 'the sudden and accidental exception provides coverage for all unexpected and unintended pollution.'").

662. *See id.* at 859 ("The doctrine of judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." (quoting *Ergo Sci., Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996))); *see also* *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 395-96 (5th Cir. 2003) (declaring that two elements must be satisfied before a party can be judicially estopped from asserting a position: "First, it must be shown that 'the position of the party to be estopped is clearly inconsistent with its previous one; and [second,] that party must have convinced the court to accept that previous position.'" (alteration in original) (quoting *Ahrens v. Perot Sys. Corp.*, 205 F.3d 831, 833 (5th Cir. 2000))).

663. *RSR Corp.*, 612 F.3d at 859.

664. *Id.*

665. *See id.* at 859-60.

*B. Third-Party Victims' Property-Pollution Claims Against Insureds and Liability Insurers' Duty to Indemnify*

**Substantive Question:** *Whether under Texas's laws, a comprehensive general liability insurer has a duty to indemnify the insured after the insured polluted third-party victims' property and persons and settled the victims' class action.*

In *DPC Industries, Inc. v. American International Specialty Lines Insurance Co.*, the general conflict between a different CGL insurer and a commercial polluter evolved over whether the insurer had a duty to cover third-party victims' injuries.<sup>666</sup> But more narrowly, the disagreement was over whether several liability insurance contracts covered both the parent company's and its subsidiaries' activities.<sup>667</sup> Before reviewing the third-party victims' underlying claims, however, consider the complex organizational structure among all of the allegedly insured business entities.<sup>668</sup>

DX Holding Company, Inc. (DX Holding) "manufactures and distributes water treatment chemicals and chemical products. [It offers] chlorine, caustic soda, sulfur dioxide, anhydrous ammonia, sodium hypochlorite (bleach), and water treatment chemicals. The company was founded in 1946 and is based in Houston, Texas."<sup>669</sup> DPC Industries, Inc. (Industries) is a subsidiary of DX Holding.<sup>670</sup> DPC Enterprises and DPC Enterprises, L.P. (collectively Enterprises) are general partners.<sup>671</sup> But, DPC Enterprises, Inc. is also a subsidiary of Industries.<sup>672</sup> In the opinion, DX Holding and its subsidiaries are jointly referred to as the DX entities or DX subsidiaries.<sup>673</sup>

Enterprises owns and operates a chlorine repackaging facility in Festus, Missouri.<sup>674</sup> And, "Industries provides technical support and training for the Festus facility."<sup>675</sup> On August 14, 2002, chlorine gas was released from the Festus facility.<sup>676</sup> Consequently, numerous third parties filed pollution-related claims for bodily injury and property damage.<sup>677</sup> The complainants filed lawsuits against Enterprises and DX Holding's other subsidiaries.<sup>678</sup> In

666. See *DPC Indus., Inc. v. Am. Int'l Specialty Lines Ins. Co.*, 615 F.3d 609, 612 (5th Cir. Aug. 2010) (Panel comprised of Circuit Judges W. Eugene Davis, Catharina Haynes, and Jerry Smith).

667. See *id.* at 611, 614-15.

668. See *id.* at 611; *infra* notes 669-72 and accompanying notes.

669. *Company Overview of DX Holding Company, Inc.*, BLOOMBERG, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=4253469> (last visited Mar. 3, 2012).

670. *DPC Indus.*, 615 F.3d at 611.

671. *Id.*

672. *Id.*

673. *Id.*

674. *Id.* at 612.

675. *Id.*

676. *Id.*

677. *Id.*

678. *Id.*

addition, a Missouri state court certified a class-action lawsuit after unsettled third-party claims were consolidated as *Adams v. DPC Enterprises*.<sup>679</sup> Furthermore, “Goodwin Brothers Construction Company filed a separate lawsuit against Enterprises, Industries and Jason Wisdom, manager of the Festus facility.”<sup>680</sup> “The *Goodwin* suit specifically named Industries as a defendant.”<sup>681</sup>

American International Specialty Lines Insurance Co. (AISLIC) insured DX Holding under two CGL insurance contracts—primary and umbrella policies.<sup>682</sup> Under the CGL primary policy, AISLIC’s limit of liability was \$1 million per occurrence.<sup>683</sup> More specifically, under the primary policy’s Coverage A provision, AISLIC agreed to pay general damages “for bodily injury and property damage,” and, under Coverage D, the insurer promised to reimburse DX Holding for pollution-related expenditures.<sup>684</sup> AISLIC’s aggregate liability under the CGL primary policy, however, was just \$2 million.<sup>685</sup> On the other hand, the CGL umbrella policy provided a second layer of coverage.<sup>686</sup> Under the umbrella, the policy limits for Coverages A and D were \$10 million and \$4 million, respectively.<sup>687</sup>

Although DX Holding is the named insured under the two insurance contracts, DX Service Company’s agent, Jack Holcomb, reported the accident to AISLIC.<sup>688</sup> And, Holcomb informed AISLIC that DX Holding wanted the insurer to make reimbursements under the terms of Coverage A, rather than Coverage D.<sup>689</sup> In an August 26, 2002 letter and subject to a reservation of rights, AISLIC accepted coverage for the claims under Coverage D, the smaller policy limit.<sup>690</sup> And “[t]he only insured referenced in the August 26 letter [was] DX Holding—the parent of Industries and Enterprises.”<sup>691</sup> To complicate the matter, on August 27, 2002, DX Holding responded.<sup>692</sup> In the August 27th

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679. *Id.*

680. *Id.*

681. *Id.*

682. *Id.* at 611.

683. *See id.*

684. *Id.*

685. *Id.*

686. *Id.*

687. *Id.*

688. *See id.* at 612.

689. *Id.* (“Starting in October 2005, Holcomb of DX Service Company began efforts to obtain coverage under Coverage A and thereby obtain the benefit of the higher liability policy limit for subsidiaries of DX Holding who were not owners of the Festus facility. Numerous letters were sent to and responses received from AISLIC. Holcomb notified AISLIC that the claims asserted against DX entities which did not own and operate the Festus plant, including Industries, were entitled to the benefit of coverage A in the policy. Mr. Holcomb noted that those entities do not own and operate the Festus facility and that the allegations involved claims of negligent training, supervision and maintenance of the facility.”).

690. *Id.*

691. *Id.*

692. *Id.*

letter, however, DX Holding only mentioned DPC Enterprises, L.P. and that subsidiary's activities.<sup>693</sup>

Ultimately, on behalf of the DX entities, AISLIC settled multiple third-party claims and actions.<sup>694</sup> Every settlement agreement contained a release for all DX entities, including Industries.<sup>695</sup> AISLIC also settled the *Goodwin* lawsuit, paying \$450,000.<sup>696</sup> In fact, AISLIC obtained releases for all defendants, including Industries.<sup>697</sup> In addition, AISLIC covered the defense costs for all the DX entities, including Industries.<sup>698</sup> AISLIC, however, did not settle the *Adams* suit against DX entities, including Industries.<sup>699</sup> And after exhausting the policy limit under Coverage D-2, AISLIC withdrew its defense.<sup>700</sup> Using their funds, Industries and its affiliates settled the *Adams* suit for \$9,400,000.<sup>701</sup>

Citing the pollution exclusion clause in the insurance contract, AISLIC refused to pay any proceeds under Coverage A of the general liability policy.<sup>702</sup> In response, Industries, rather than DX Holding, filed a breach of contract action against AISLIC in a Texas state court.<sup>703</sup> Industries sought reimbursement to cover its settlement costs, a "\$6 million differential between the policy limits of Coverage A and the policy limits of Coverage D [under] the umbrella policy."<sup>704</sup> Again, under Coverage A, AISLIC's limit of liability was \$10,000,000, and the CGL insurer's limit of exposure for pollution damage was only \$4,000,000 under Coverage D.<sup>705</sup> Quite simply, Industries wanted to secure as much insurance compensation as possible under Coverage A.<sup>706</sup>

AISLIC timely removed the case to the United States District Court for the Southern District of Texas.<sup>707</sup> And shortly thereafter, the CGL insurer filed a motion for summary judgment, claiming that several exclusion provisions precluded Industries's receiving any insurance remuneration under Coverage A.<sup>708</sup> Industries filed a cross-motion for summary judgment.<sup>709</sup> The district court granted AISLIC's motion for summary relief, finding primarily that (1) AISLIC satisfied its contractual obligation under Coverage D-2, and (2) an

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693. *Id.*

694. *Id.*

695. *Id.*

696. *Id.*

697. *Id.*

698. *Id.*

699. *Id.*

700. *Id.*

701. *Id.*

702. *See id.*

703. *See id.* at 612-13.

704. *Id.* at 613.

705. *Id.* at 611.

706. *Id.*

707. *See id.* at 610, 613.

708. *Id.* at 613.

709. *Id.*

exclusion clause precluded the subsidiary's collecting any additional insurance proceeds under Coverage A.<sup>710</sup> Industries appealed.<sup>711</sup>

Circuit Judge Davis wrote the *DPC Industries* opinion.<sup>712</sup> And, on appeal, the general question was whether AISLIC's favorable summary judgment award was warranted.<sup>713</sup> More narrowly, the question was whether AISLIC had a contractual duty to pay additional funds under the CGL policy's Coverage A provision.<sup>714</sup> But, at the outset, Judge Davis and the panel observed that the litigants did not specifically address an important point: The Coverage D-2—a pollution coverage clause—applied only when chlorine was released and produced injuries and damages.<sup>715</sup> “Coverage D-2 states: ‘We will pay those sums that the insured becomes legally obligated to pay as loss because of claims in the coverage territory for bodily injury, property damage or clean-up costs beyond the boundaries of the insured property [within the specified time frame of the policy.]’”<sup>716</sup>

Of course, the language in Coverage D-2 is significant for an important reason. According to Industries, the complaints in the underlying *Adams* and *Goodwin* lawsuits alleged that Industries and other DX entities negligently maintained the Festus facility and negligently trained and supervised employees in the facility.<sup>717</sup> Furthermore, Industries was responsible for providing technical support and training various personnel in the Festus facility.<sup>718</sup> Therefore, the *DPC Industries* panel concluded as follows: Coverage D-2 rather than Coverage A governed whether AISLIC had a contractual duty to pay additional funds to cover the third-party complainants' negligence-based pollution claims and the pollution-remediation costs.<sup>719</sup>

But, Industries insisted that it did not own or operate the Festus plant; therefore, the polluter argued that the court should not employ the language in the Coverage D-2 clause to resolve the dispute.<sup>720</sup> In addition, Industries cited the language in an endorsement to the CGL policy to buttress its argument.<sup>721</sup> The endorsement read: “It is agreed that the following location(s) are insured property(ies) under Coverage D—Pollution Legal Liability, subject to all Policy terms, conditions and exclusions and shall be deemed listed in Item 6 of the Declarations.”<sup>722</sup> On the endorsement, the Festus facility was listed as an

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710. *Id.*

711. *Id.*

712. *See id.* at 610.

713. *See id.* at 613.

714. *See id.*

715. *Id.*

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

717. *Id.*

718. *See id.*

719. *Id.*

720. *Id.*

721. *See id.*

722. *Id.* (alterations in original) (“Item 6 is on the first page of the policy and titled ‘Insured Property: Coverage D Pollution Legal Liability.’”).

“owned or operated” location.<sup>723</sup> But the Fifth Circuit panel embraced the district court’s analysis of this issue and concluded: The policy and its endorsement did not contain any language that required a specific entity to own or operate an insured property before the entity could obtain insurance compensation for personal injuries or damages emanating from the insured facility.<sup>724</sup>

The *DPC Industries* panel also reviewed two other relevant insurance provisions.<sup>725</sup> One was entitled “Separation of Insureds.” It read: “Except with respect to the Limits of Insurance, and any rights or duties specifically assigned to the first Named Insured, this insurance applies: (a) As if each named Insured were the only Named Insured; and (b) Separately to each insured against whom claim is made or suit is brought.”<sup>726</sup>

The policy also contained a “covered by other coverages exclusion” or an “exclusion u” clause.<sup>727</sup> That clause outlined the exclusions under Coverage A.<sup>728</sup> It stated that Coverage A did not apply to:

Any claim or part thereof which may be alleged as covered under this Coverage of this Policy, *if we have accepted coverage or coverage* has been held to apply for such claims or part thereof under *any other Coverage in this Policy*. This exclusion does not apply to any claim for medical expenses under Coverage C caused by bodily injury which is covered under Coverage A.<sup>729</sup>

But a similar exclusion clause limited AISLIC’s exposure under coverage provisions D-1 and D-2.<sup>730</sup> It stated that Coverage D did “not apply to claims or loss: a. Which may be alleged as covered in whole or in part under this Coverage of this Policy, *if we have accepted coverage* or if coverage has been held to apply for such claim under *any other Coverage of this Policy*.”<sup>731</sup>

Like the district court, the Fifth Circuit panel concluded: (1) The exclusion clauses were designed to prevent insurance coverage stacking, and (2) They were inserted to communicate clearly that Coverage A general liability clause and Coverage D-2 pollution-related clause “are mutually exclusive for each insured.”<sup>732</sup> But, on appeal, Industries argued that exclusion u did not apply to the facts in the case because (1) Industries never sought “any other coverage [under] the policy”; and (2) AISLIC, presumably, never accepted another

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723. *Id.*

724. *Id.* at 611, 613. “Endorsement No. 2 to the policy adds a Broad Form Named Insured definition which includes as a named insured any subsidiary or subsidiary thereof of the named insured.” *Id.* at 611.

725. *See id.* at 611.

726. *Id.*

727. *Id.*

728. *Id.*

729. *Id.* (emphasis added).

730. *Id.*

731. *Id.* at 611 n.1 (emphasis added).

732. *Id.* at 611-12.

pollution-related claim under any other coverage provision in the policy.<sup>733</sup> Certainly, AISLIC defended Industries subject to a reservation of rights.<sup>734</sup> Still, Industries insisted that the legal defense was not an “acceptance of coverage.”<sup>735</sup> Furthermore, as discussed above, AISLIC settled multiple third-party claims and actions on behalf of Enterprises.<sup>736</sup> Yet, Industries argued relentlessly that the settlements did not constitute an “acceptance of coverage.”<sup>737</sup>

To resolve one prong of the controversy, the panel focused carefully on certain words and phrases that appeared in the exclusion u clause.<sup>738</sup> The pertinent language stated that the insured would not receive any additional insurance compensation under Coverage A after AISLIC accepts a claim and pays insurance proceeds under “any other coverage [provision in] the policy.”<sup>739</sup> Writing for the *DPC Industries* panel, Judge Davis declared that the clause plainly gave AISLIC a contractual right to cover Industries’ liabilities under Coverage D rather than under Coverage A.<sup>740</sup>

On appeal, however, Industries stressed that AISLIC settled the third-party claims and actions on behalf of Enterprises rather than on behalf of Industries.<sup>741</sup> And Judge Davis forthrightly acknowledged that the facts were blurred respecting whether some or all of the DX entities were covered under AISLIC’s CGL insurance contract.<sup>742</sup> Still, Judge Davis embraced AISLIC’s argument and the district court’s ruling: AISLIC satisfied its obligations because the liability insurer defended Industries against the third parties’ chlorine pollution, personal injury, and property damage claims.<sup>743</sup> To reach that conclusion, Judge Davis applied a rule of the panel and observed: Under a “typical comprehensive general liability policy[,] . . . defense costs are excluded

733. *Id.* at 613-14 (“Industries [insisted] that it only sought coverage under Coverage A and [that] well-settled Texas law gives the insured the right to choose the applicable coverage.”).

734. *Id.* at 614.

735. *Id.*

736. *Id.*

737. *Id.*

738. *See id.*

739. *Id.*

740. *Id.*

741. *Id.*

742. *Id.* at 614-15 (“[N]either side did a good job early on to clarify what entities were requesting coverage or what entities were being defended or indemnified by AISLIC. After the accident was reported by Holcomb, who is listed as representing DX Service Company, AISLIC responded and referred to the insured as DX Holding Company. Neither Industries nor Enterprises, the actual owner of the facility, was mentioned. This pattern continued even when events in the *Adams* litigation and claims in the *Goodwin* case led Holcomb to request coverage under Coverage A in October 2005. In that letter Holcomb did not mention the individual entities requesting coverage under Coverage A by name, referring only to ‘numerous other entities’ who were ‘additional named insureds.’ Industries was not mentioned by name until January 2006.”).

743. *Id.* at 615 (“AISLIC argues that payment of defense costs means that it ‘accepted coverage . . . for such claims’ because the policy defines the term ‘claim’ as a demand alleging liability for a ‘loss under Coverage D-1 or D-2.’ Further[more] under the policy, ‘Loss, as used in Coverages D-2 and D-2, means . . . [c]osts, charges and expenses incurred in the defense, investigation or adjustment of claims’ . . . . Thus payment of defense costs is payment of a claim under the terms of the policy.”).

from the calculation of the policy limits”; however, “Coverage D was an eroding policy under which defense costs ‘count’ against and ‘erode’ the policy limits.”<sup>744</sup>

In the end, the panel concluded that the Southern District of Texas did not err.<sup>745</sup> The lower court correctly found that (1) “AISLIC accepted coverage of Industries under Coverage D-2 of the policy”,<sup>746</sup> and (2) “Industries was precluded from coverage under any other provision of the policy because of the anti-stacking provision in exclusion u.”<sup>747</sup> Therefore, the Fifth Circuit affirmed the district court’s judgment and added the following:

Having contracted for and paid a premium based upon both a lower total limit for Coverage D and an eroding policy, the insured cannot now rewrite the policy. “[I]f the insured wanted a policy that had an unlimited defense obligation, rather than an eroding one, it should have contracted for such a policy.”<sup>748</sup>

#### V. SUMMARY—CONCLUSION

To repeat an earlier observation, Fifth Circuit panels decided a wide variety of substantive questions involving insurance law from July 1, 2010, to June 30, 2011. Generally, the panels’ opinions satisfactorily addressed litigants’ concerns. And for the most part, the panels carefully researched the laws of Louisiana, Mississippi, and Texas to reach thoughtful and reasonable conclusions.

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<sup>744.</sup> *Id.* at 615 n.3 (citing *N. Am. Specialty Ins. Co. v. Royal Surplus Lines Ins. Co.*, 541 F.3d 552, 559 (5th Cir. 2008)) (“In many liability policies, the policy limits refer only to the indemnity obligation . . . , and the obligation to defend a liability suit is not capped by the policy limits. In an eroding policy . . . the insurer’s payments to defense counsel to defend the liability suit count against policy limits.” (omissions in original) (quoting *N. Am. Specialty Ins.*, 541 F.3d at 559)).

<sup>745.</sup> *Id.* at 615.

<sup>746.</sup> *Id.* (“[W]e need not decide whether providing a defense under a reservation of rights under an eroding policy is equivalent to ‘accepting coverage’ to trigger exclusion u., because the record contains uncontradicted evidence that AISLIC provided indemnity coverage to Industries. Industries was named as a defendant in the *Goodwin* case as early as April 2004. The record contains a Settlement Agreement and Release of Claims, dated September 2006, to which Industries is a released party. AISLIC paid \$450,000 for this settlement. Industries argues that because the payments to claimants under this agreement were made by Enterprises and reimbursement from AISLIC went to Enterprises, this does not constitute acceptance of coverage of Industries as a separate entity. Industries cites no case law for this proposition. Qualification for ‘acceptance of coverage’ does not depend on whether or how the settlement was apportioned between Enterprises and Industries and the other named defendants covered by the Settlement Agreement. Industries was a named defendant in the case and a released party to the Settlement Agreement obtained as a result of the insurer’s payment. Industries clearly benefitted from the releases obtained in that agreement.”).

<sup>747.</sup> *Id.*

<sup>748.</sup> *Id.* at 615-16 n.4 (citation omitted) (citing *N. Am. Specialty Ins. Co. v. Royal Surplus Lines Ins. Co.*, 541 F.3d 552, 559 (5th Cir. 2008)) (“In many liability policies, the policy limits refer only to the indemnity obligation . . . , and the obligation to defend a liability suit is not capped by the policy limits. In an eroding policy . . . the insurer’s payments to defense counsel to defend the liability suit count against policy limits.” (omissions in original) (quoting *N. Am. Specialty Ins.*, 541 F.3d at 559)).



Still, a few opinions were not well-reasoned. And the following observation might be a plausible explanation. Barring just a few controversies, the overwhelming majority of insurers and insureds filed declaratory judgment actions in federal district courts. Presumably, the litigants wanted *full-blown declaratory judgment* trials to avoid *full-blown breach-of-contract or bad-faith trials*.<sup>749</sup> On the other hand, it is arguable that insureds and insurers truly do not want district judges to conduct *full-blown, declaratory judgment hearings*.

What is the evidence? In the Fifth Circuit and elsewhere, insurance-law litigants have a feverish habit of filing unremittingly large numbers of summary judgment motions in declaratory judgment trials.<sup>750</sup> Certainly, that practice requires district courts to spend an inordinate amount of time combing through and writing about large numbers of arguably unnecessary facts. Given courts' limited judicial resources and time, many judges award summary relief without interpreting the meaning of controversial words and phrases in insurance contracts.<sup>751</sup> To be sure, fairly often the practice continues on appeal.<sup>752</sup> Fifth Circuit panels conduct de novo reviews of summary judgment evidence.<sup>753</sup> And in the end, the panels either affirm or reverse the district courts' summary judgment rulings. But, all-too-many panels forget or refuse to interpret the meaning of the convoluted words and phrases in the insurance contracts.<sup>754</sup> And that failure leads to highly questionable and poorly reasoned opinions, like a few of the 2010–2011 insurance-law decisions.<sup>755</sup>

Again, a declaratory judgment trial is an action in equity.<sup>756</sup> As a consequence, federal judges have a considerable amount of discretion to

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749. Cf. *Harborside Refrigerated Servs., Inc. v. Vogel*, 959 F.2d 368, 373 (2d Cir. 1992) (“A common purpose behind both declaratory judgment availability and the doctrine of res judicata is litigation reduction and the conservation of judicial resources. Declaratory relief enables federal courts to clarify the legal relationships of parties before they have been disturbed thereby tending towards avoidance of full-blown litigation.”).

750. Cf. *Gregory v. Chrysler Corp.*, 181 F.3d 101, No. 97-4442, 1999 WL 282685, at \*6 (6th Cir. Apr. 28, 1999) (unpublished op.) (“The harder case, such as here, requires the district court to undertake a careful reading of the circumstantial evidence of record, construing that evidence, when the employer moves for summary judgment, in the light most favorable to the non-moving plaintiff employee. Admittedly, this review is not an easy undertaking, given the great many summary judgment motions on which the district courts are asked to rule, with their ever-increasing and overburdened civil dockets.” (citation omitted)).

751. See Hon. Randall H. Warner, *All Mixed Up About Contract: When Is Contract Interpretation a Legal Question and When Is It a Fact Question?*, 5 VA. L. & BUS. REV. 81, 117-18 (2010).

752. See *id.* at 116-18.

753. See, e.g., *Shotek v. Tenneco Resins, Inc.* 953 F.2d 909, 912 (5th Cir. 1992).

754. See, e.g., *Canal v. Coleman*, 625 F.3d 244, 247-50 (5th Cir. Nov. 2010) (considering only the contract's meaning).

755. See *supra* Part III.A.

756. See *Septum, Inc. v. Keller*, 614 F.2d 456, 463 (5th Cir. 1980) (“Although the procedural distinction between actions at law and actions at equity has disappeared in Federal District Courts, . . . suits for injunctions and for declaratory relief, both traditionally brought as equitable actions are still governed by established substantive principles of equity. The most basic principle of equity is the discretion of the Court. Historically, equitable remedies were granted only in cases where an action at law would not provide adequate relief. The remedy granted by a Court sitting in equity was based on its ‘sense of need and justice’. . . . Plaintiffs in equity often sought declaratory judgments along with injunctions in order to obtain a formal declaration of their rights with respect to an existing conflict or one that was fairly certain to arise in the

fashion sound declarations of rights and obligations.<sup>757</sup> Surely, a de novo review of summary judgment evidence originating in a declaratory judgment trial does not or should not preclude a Fifth Circuit panel “sitting in equity” from also consistently and thoughtfully applying settled principles of insurance law.<sup>758</sup>

The supreme courts of Louisiana, Mississippi, and Texas have adopted five doctrines to interpret insurance contracts: the adhesion doctrine,<sup>759</sup> the doctrine of plain meaning,<sup>760</sup> traditional rules of contract construction and interpretation,<sup>761</sup> the doctrine of ambiguity,<sup>762</sup> and the doctrine of reasonable expectations.<sup>763</sup> For sure, in the aggregate, the quality and predictability of all

future.” (citations omitted).

757. *Id.*

758. *See id.*

759. *See, e.g.,* *Duncan v. Kan. City S. Ry. Co.*, 747 So. 2d 656, 674 (La. Ct. App. 3d Cir. 1999) (observing that “[i]t is well settled that . . . insurance policies are generally contracts of adhesion”); *Lewis v. Allstate Ins. Co.*, 730 So. 2d 65, 72 (Miss. 1998) (concluding that “[i]nsurance policies are contracts of adhesion and as such ambiguities are to be construed liberally in favor of the insured and against the insurer”); *Arnold v. Nat’l Cnty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) (concluding without deciding definitively that insurance contracts are adhesion contracts because they “arise[] out of the parties’ unequal bargaining power” and they “allow unscrupulous insurers to take advantage of their insureds’ misfortunes” during the bargaining process).

760. *See, e.g.,* *La. Ins. Guar. Ass’n v. Interstate Fire & Cas. Co.*, 630 So. 2d 759, 763 (La. 1994) (holding that the parties’ intent must “be determined in accordance with the general, ordinary, plain and popular meaning of the words used in the policy”); *Blackledge v. Omega Ins. Co.*, 740 So. 2d 295, 298 (Miss. 1999) (holding that courts must give terms used in insurance policies their ordinary and popular definition); *Transport Ins. Co. v. Standard Oil Co.*, 337 S.W.2d 284, 288 (Tex. 1960) (reiterating that courts must give words appearing in insurance contracts their plain meaning when there is no ambiguity).

761. *See, e.g.,* *Ledbetter v. Concord Gen. Corp.*, 665 So. 2d 1166, 1169 (La. 1996) (holding that “[a]n insurance policy is an agreement between the parties and should be interpreted by using ordinary contract principles”); *Sessoms v. Allstate Ins. Co.*, 634 So. 2d 516, 519 (Miss. 1993) (embracing the position that “insurance policies which are clear and unambiguous are to be enforced according to their terms as written [like all other contracts]”); *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998) (reiterating that insurance contracts are subject to the same rules of construction as other contracts).

762. *See, e.g.,* *Succession of Fannaly v. Lafayette Ins. Co.*, 805 So. 2d 1134, 1138 (La. 2002) (repeating that “ambiguous contractual provision[s] are construed against the insurer who furnished the contract’s text and in favor of the insured”); *Nationwide Mut. Ins. Co. v. Garriga*, 636 So. 2d 658, 662 (Miss. 1994) (embracing “the general rule that [ambiguous] provisions of an insurance contract are construed strongly against the [insurance company]”); *Nat’l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991) (reaffirming that ambiguous language in an insurance contract must be construed in favor of the insured).

763. *See, e.g.,* *La. Ins. Guar. Ass’n*, 630 So. 2d at 764 (holding that a court should construe an insurance contract “to fulfill the reasonable expectations of the parties in the light of the customs and usages of the industry”); *Brown v. Blue Cross & Blue Shield of Miss., Inc.*, 427 So. 2d 139, 141 n.2 (Miss. 1983) (adopting the principle that “[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations”); *Kulubis v. Tex. Farm Bureau Underwriters Ins. Co.*, 706 S.W.2d 953, 955 (Tex. 1986) (permitting an innocent victim whose property had been destroyed to collect under an insurance contract for “loss reasonably expected to be covered”). *But see* *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 145 n.8 (Tex. 1994) (observing that Texas law does not recognize the doctrine of reasonable expectation as a basis to disregard unambiguous policy provisions).

Fifth Circuit insurance-law opinions can improve enormously. And very likely, that will occur, if the panels' de novo reviews of summary judgment evidence, which evolve in declaratory judgment trials, contain the following ingredients: (1) a careful examination of probative facts; (2) the consistent application of insurance-law doctrines to interpret the meaning of highly unintelligible words and phrases in insurance contracts; and (3) formal declarations of insurers' and insureds' respective contractual rights and obligations.

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