Annual Survey of TEXAS Insurance Law 2022

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I. INTRODUCTION

This year the Texas Supreme Court declined to expand the duties owed by an insurer to its insured. In a case where an insured was killed taking pictures of a collision scene at the insurer's request, the court held the insurer had no duty to process the accident claim without requesting the insured take photographs or issue a safety warning to the insured.[1]

The Texas Supreme Court clarified when extrinsic evidence can be considered under an exception to the eight-corners rule.[2]

Several cases dealt with the discovery of information from hospitals on the negotiated rates the hospital charged private insurers and government payers. The courts in these cases are allowing this type of discovery holding the requests are relevant and not overbroad.[3]

And lastly, the courts continued to hear cases from businesses attempting to obtain coverage under their policies for COVID-related business shutdowns to no avail.[4]

II. FIRST PARTY INSURANCE POLICIES & PROVISIONS

A. Automobile

The issue in this auto policy dispute centers around the definition of "occupying." Appealing its denial of summary judgment, the insurer argued that the insured was not "occupying" the vehicle when she was leaning against it, pouring gas from a can into the car. Of note, the insured was an additional insured, not the named insured. "Occupying" the covered vehicle is not a condition of coverage for the named insured. The appellate court reversed the trial court's order granting summary judgment for the insurer and remanded as there was a genuine issue of material fact as to whether the insured was "occupying" the vehicle. *Hill v. Allstate Fire & Cas. Ins. Co.*, 652 S.W.3d 516 (Tex. App.—Houston [14th Dist.] July 28, 2022) (mem. op.).

In *Sentry Select Insurance Company v. Home State County Mutual Insurance Company v. Ortiz*, the opinion turns on the question of insurable interest in a recently purchased car. Sentry insured the seller of the car, and Home State insured the buyer. Shortly after purchase, the car insured by Home State was in the shop for repairs. The car in the accident was a loaner, while the insured car was in the shop. The Sentry policy contained a "step down" provision that it would pay only the minimum limits if other insurance was missing. Home State argued that it had no coverage since its insured, the buyer, had no control over the vehicle and hence no insurable interest.

The Fifth Circuit affirmed the trial court's granting Sentry's motion for summary judgment, holding that the loaner car was a "temporary substitute vehicle" under the Home State policy, therefore, an insured vehicle. Further, the buyer (insured

under the Home State policy) had an insurable interest in the car since she had made a down payment, procured insurance, and was under contract to purchase the car. Finally, the court denied Sentry's request for frivolous appeal sanctions, noting that Home State made a good faith, if unsuccessful, argument. No. 21-40371, 2022 WL 2800809 (5th Cir. July 18, 2022).

Under the terms of an automobile insurance policy, any family member not listed on the application was excluded from coverage. The policy excluded by name "Felicia Godoy." "Felicia Donias" was in a wreck and requested a defense from the insurer. The insurer declined after realizing that Felicia Godoy and Felicia Donias were the same person. After an adverse judgment, Felicia sued the insurer, alleging that the name change required a reformation of the policy which the insurer did not seek. The court's analysis was simple. The person in the wreck seeking coverage was the same person excluded in the policy. Therefore, the appellate court affirmed the trial court's judgment that the insurer did not owe automobile coverage to Felicia. Of note, the "named driver" policy at issue in this case is no longer permitted under Texas Insurance Code section 1952.353. *Donias v. Old Am. Cty. Mut. Fire Ins. Co., et al.*, 649 S.W.3d 789 (Tex. App.—El Paso June 14, 2022).

B. Homeowners

The insureds' home suffered damage after a hurricane, and they filed a claim with their insurer. The insurer denied the claim stating there were no visible signs of covered flood damage. Summary judgment was granted in favor of the insurer, and the insureds appealed. The Fifth Circuit affirmed the trial court's judgment and held the flood insurance policy obligated the insurer to cover only direct physical losses by or from a flood. The court noted "flood" was explicitly defined as, "[a] general and temporary condition of partial or complete inundation of two or more acres of normally dry land area or of two or more properties (one of which is your property) from: (a) overflow of inland or tidal waters (b) unusual and rapid accumulation of runoff of surface waters from any source, (c) mudflow." The Fifth Circuit stated the insureds' evidence failed to create a genuine fact issue about whether there was a flood as defined by the policy. *Shaw v. Am. Bankers Ins. Co. of Fl.*, No. 21-20455, 2022 WL 621694 (5th Cir. March 3, 2022) (per curiam).

In *Overstreet v. Allstate Vehicle and Property Insurance Company*, the Fifth Circuit certified three questions to the Texas Supreme Court to help further clarify the concurrent causation doctrine. The doctrine states when insured property is damaged by a combination of covered and uncovered causes, the insured must prove how much of the damage is solely attributable to the covered cause. In *Overstreet*, the insured argued that a hailstorm damaged his roof. His insurer argued the roof was damaged in a hailstorm prior to the policy period and by wear and tear. The district court granted summary judgment to the insurer because the insured did not prove what damages were solely attributable to the covered storm. The Fifth Circuit noted there are substantial gaps in the concurrent causation doctrine and that this case posed significant consequences for the Texas insurance market. The Fifth Circuit certified these three questions to the Texas Supreme Court:

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

34 F.4th 496 (5th Cir. 2022). The case was dismissed prior to the Texas Supreme Court answering these questions.

Another homeowner's case dealt with claims for damages following a hurricane. The policy excluded damage from flood waters. The covered roof damage was estimated by the insurer to be under the policy deductible, but the remaining flood damage was excluded so no payment was made. The insured homeowner sued, amending her claim before summary judgment to allege a different date of loss to avoid limitations. In the trial court, summary judgment was granted in favor of the insurer holding that the insured did not timely file suit and that flood and surface water damage were excluded from coverage. On appeal, the homeowner did not challenge the cause of loss – the excluded flood damage. The appellate court cites well-established case law and holds that where a sufficient, independent ground for summary judgment is not challenged, the summary judgment must be affirmed. *Sosa v. Auto Club Indem. Co.*, No. 01-21-00312-CV, 2022 WL 3722396 (Tex.App.— Houston [1st Dist.] September 1, 2022).

In *Overstreet v. Allstate Vehicle and Property Insurance Company*, the Fifth Circuit certified three questions to the Texas Supreme Court to help further clarify the concurrent causation doctrine.

C. Commercial Property

Following limitations placed on non-essential businesses during the COVID-19 pandemic, an insured restaurant tried to recover its losses through its commercial property insurer, which covered business interruption losses caused by "direct physical loss of or damage to property." The insurer determined the policy did not cover the claimed losses. The insured restaurant sued, and the district court granted judgment on the pleadings in favor of the insurer. The insured appealed.

The Fifth Circuit affirmed the lower court's ruling, holding the suspension of dine-in services during the COVID-19 pandemic was not a direct physical loss of or damage to property. Moreover, the restaurant extension endorsement that provided coverage for the suspension of operations at the premises due to civil authority had to result from the actual or alleged exposure of the premises to a contagious or infectious disease. The Fifth Circuit noted it was making an "*Erie* guess" as to how the Texas Supreme Court would decide the issue, as the Texas Supreme Court had not interpreted the policy language at issue or whether the relevant provisions cover business interruption losses due to

civil authority orders suspending nonessential businesses during the COVID-19 pandemic. The court noted the business income and extra expense provision only covered business interruption that is caused by loss or damage to the commercial property. While the insured argued the loss of use of its dining rooms for their intended purpose was a physical loss of use of the property, the Fifth Circuit disagreed, stating one could not read the policy to support that argument. A loss of *property* was required to recover, not the loss of *use* of property. Because the insured restaurant was not physically altered by the suspension of dine-in services and the civil authority orders were not caused by the insured restaurant's exposure to COVID-19, the Fifth Circuit affirmed the district court's ruling in favor of the insurer. *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, No. 21-50078, 2022 WL 43170 (5th Cir. Jan. 5, 2022).

An insured gift shop suffered a loss of revenue during the COVID-19 pandemic when limitations were placed by the government on the operations of nonessential businesses. The insured sought coverage from its insurer under its commercial property insurance policy which stated it covered losses "caused by direct physical loss of or damage to property at the described premises." The claim was denied, and the insured sued. The district court dismissed the claim stating the insured did not allege a direct physical loss of property, and the insured appealed arguing that "direct physical loss of property" could reasonably be interpreted to cover a "loss of use of property." The appellate court looked to its decision in *Terry Black's Barbecue, L.L.C. v. State Automobile Mutual Insurance Company,* No. 21-50078, 2022 WL 43170 (5th Cir. Jan. 5, 2022), when determining the insured had not alleged a covered loss of revenue due to the closing of its shop. The court held, "[w]hether a business is directed to cease one kind of service or all of its services, that order is not a tangible alteration or deprivation of property." Therefore, the appellate court affirmed the district court and stated nothing tangible happened to the insured's property and also held "physical loss of property" cannot reasonably be interpreted to mean loss of use. *Aggie Invs., L.L.C. v. Cont'l Cas. Co.*, No. 21-40382, 2022 WL 67333 (5th Cir. Jan. 26, 2022).

Another court followed the holding in *Terry Black's Barbecue*, 2022 WL 43170, related to a commercial insurance policy insuring a company that provided gift shop inventory to hospitals. The insured sought business interruption losses resulting from the COVID-19 pandemic arguing that the virus that causes COVID-19 physically damages property. The insurance policy covers, "accidental physical loss or accidental physical damage." The insurer moved to dismiss the suit asserting the insured failed to allege any direct physical loss or damage to property that would entitle coverage. The court agreed with the insurer and dismissed the lawsuit holding COVID-19 does not cause physical damage to property. *Lamacar, Inc. v. The Cincinnati Cas. Co.*, No. 3:21-CV-1396-S, 2022 WL 227162 (N.D. Tex. Jan. 26, 2022).

In *Bradford Realty Services, Inc. v. Hartford Fire Ins. Co.*, No. 21-11047, 2022 WL 1486779 (5th Cir. May 11, 2022), there was a property damage claim based on pooled rainwater on the roof of the insured premises. The issue in this case turned on the difference between "rain" and "water." The policy excluded rain as a covered hazard but covered water that backed up from a sewer or a drain. The court held that rainwater collecting on the roof fell within the rain exclusion, admitting that it was making an *Erie* guess since there was no "reservoir of precedent" to guide it. This is one of many plays on the word "water" the opinion indulges in, referring initially to water as "dihydrogen monoxide." The Fifth Circuit affirmed the district court's holding in favor of the insurer, agreeing that the rain exclusion applied while the backup drain coverage did not.

A commercial property was damaged in a hurricane by floodwater. The insurer paid the insured for the damage. The insured had also purchased a "deductible buyback policy," a type of policy that may cover all or part of the deductible required by the primary policy, as the underlying policy had a high deductible. The deductible buyback policy insurer argued its policy covered the specific perils of "Windstorm or Hail" that are "associated with a Named Storm," but not all the perils associated with a "Named Storm." The underlying policy was an all risks policy, but the buyback policy insurer argued that the language in its policy made it a "named perils" policy that did not include flooding. The district court ruled in favor of the insured on summary judgment, and the deductible buyback insurer appealed. The Fifth Circuit held that since the deductible buyback policy framed its coverage as applying to "specific perils," that were listed as windstorm or hail associated with a named storm, flooding was not covered under this policy. Therefore, the Fifth Circuit reversed the district court's grant of summary judgment in favor of the insured and rendered judgment in favor of the deductible buyback policy insurer. *Landmark Am. Ins. Co. v. SCD Mem'l Place II, L.L.C.*, No. 20-20389, 2022 WL 320316 (5th Cir. Feb. 3, 2022).

D. Other Policies

A smoked meat business insured its equipment from breakdown. Under the policy, vehicles were excluded from the definition of insured equipment. The equipment at issue was a storage trailer that was on the premises for excess storage. It was not attached to a towing vehicle at the time of its malfunction. The word "vehicle" was not a defined term in the policy. The Fifth Circuit affirmed the trial court's summary judgment for the insurer, holding that the malfunctioning equipment was a vehicle under the ordinary meaning of the word. The court noted that the smoked meat business did not offer authority for a different definition, hence, there was no ambiguity in the term. *Kiolbas-*

sa Provision Co., Inc. v. Travelers Prop. Cas. Co. of Am., No. 21-51033, 2022 WL 1800884 (5th Cir. June 2, 2022) (mem. op.).

III. FIRST PARTY THEORIES OF LIABILITY

A. Prompt Payment of Claims – Article 21.55

An insured sued his insurer for failing to timely pay personal injury protection (PIP) benefits. The parties agreed the $2,500.00 owed in benefits were paid prior to the lawsuit. The insurer argued this precluded statutory penalties. Insurer stated that ecause the benefits were paid before the lawsuit was filed, no statutory penalties were due. The trial court considered the issue in competing motions for summary judgment and ruled in favor of the insured. The appellate court agreed, holding the due date set by statute controlled, not the date of the lawsuit. The appellate court affirmed the award of a twelve percent penalty. Attorney's fees were agreed to by the parties before the appeal. *State Farm Mut. Ins. Co. v. Rumbaugh*, 642 S.W.3d 901 (Tex. App.—Texarkana 2022, pet. denied).

B. Negligence and Breach of the Duty of Good Faith and Fair Dealing

This case reached the appellate courts as a permissive interlocutory appeal under Section 51.014 of the Texas Civil Practices and Remedies Code.

The insured was in a one-car wreck. The insured's husband showed up at the scene and started taking pictures. The insured testified that her insurance carrier requested the photographs, and she passed this request to her husband. While taking the pictures, he was struck by another vehicle and killed.

In her wrongful death and survivor action, the insured argued that the carrier "owed the motorist and her husband a duty to process a single-vehicle accident claim without requesting that the insured take photographs or to issue a safety warning along with any such request." The court held there was no such duty.

In affirming the trial court's summary judgment for the insurer, and reversing the appellate court, the Texas Supreme Court held that to recognize a duty several factors are considered. Citing *Greater Houston Transportation Co. v. Phillips*, 801 S.W.2d 523 (Tex. 1990), the Court said:

> To determine whether a duty exists and what its parameters are, we apply what are commonly called the "Phillips" factors. This inquiry requires us to "weigh the risk, foreseeability, and likelihood of injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant." In making this assessment, we also consider "whether one party would generally have superior knowledge of the risk or a right to control the actor who caused the harm." Here, the relevant risk of harm is a car running over a pedestrian standing adjacent to a roadway taking pictures of an accident scene.

The court also rejected a duty based on good faith and fair dealing in this context, noting a special relationship between insurer and insured was not applicable to the conduct complained of in this case. Finally, the court rejected the insured's argument for liability under a negligent undertaking theory, noting that the insurer's instructions were not "necessary to protect the insureds or their property from harm." The trial court denied the insurer's motion for summary judgment on the insured's uninsured motorist claim, but that issue was not before the Texas Supreme Court, and no comment was made on it. *Elephant Ins. Co. v. Kenyon*, 644 S.W.3d 137 (Tex. 2022).

IV. AGENTS, AGENCY, AND VICARIOUS LIABILITY

A. Individual Lability of Agents, \Adjusters, and Others

This next case centers around the duties owed by an insurance agent to its customers. The insureds sought better and cheaper coverage through the insurance agent. They requested flood insurance as part of their purchase. The agent repeatedly asked for their existing flood insurance which they did not have and could not produce. Eventually, the policy was issued with "flood extension" coverage but not primary flood coverage.

A hurricane later flooded the insureds' home. When the insureds found out they had no flood insurance, they sued the agent. The jury found that the agent was not negligent, but the insureds were. Both parties acknowledged that an agent has two duties under the common law: (1) to use reasonable diligence in procuring the coverage their customer requests and (2) to inform their customer if they are unable to do so. The insureds argued at trial and on appeal for expanded duties to include: (1) a duty to keep their customer "fully informed so they could remain safely insured at all times, (2) a duty to know what they tell their customer is true, and (3) that the customer is entitled to rely upon its instruction being carried out."

The court analyzed existing precedent and concluded that no such duties exist in the context of this case. The court also noted that no Texas Deceptive Trade Practices-Consumer Protection Act or Texas Insurance Code causes of action were alleged. Finally, the court agreed with the trial court's submission of a comparative negligence question. *Garcia v. Hartwig Moss Ins. Agency, Ltd.*, No. 01-20-00420-CV, 2022 WL 1250564 (Tex. App.—Houston [1st Dist.] April 28, 2022) (mem. op.).

V. THIRD PARTY INSURANCE POLICIES & PROVISIONS

A. Homeowners Lability Insurance

This case is an appeal from a summary judgment in favor of the insurer on a declaratory judgment action. Two roommates were renting a house from Gonzales, the named insured under the policy. One roommate's dog bit the other roommate, so the injured roommate sued and took a default judgment against the roommate with the dog. The injured roommate later added the insurer and others associated with the insurer to the lawsuit seeking a declaratory judgment on its duty to defend the lawsuit, arguing that by implication the carrier had a duty to defend the roommate with the dog. Critical to the court's holding, the injured party never sued Gonzales, the named insured. The appellate court agreed with the trial court that the court lacked jurisdiction to hear the case. A plaintiff has standing to sue the liability carrier only after establishing the insured's liability by judgment or agreement, not by implication. There was simply no showing that the named insured was liable to the injured party, nor that the roommate with the dog was an insured under the policy. *Medrano v. Tafoya, et al.*, No. 04-21-00096-CV, 2022 WL 3638233 (Tex. App.—San Antonio Aug. 24, 2022).

A plaintiff has standing to sue the liability carrier only after establishing the insured's liability by judgment or agreement, not by implication.

B. Commercial General Liability Insurance

Tragically, a three-year-old child was left in a bus by a school employee and died of heat exhaustion. The commercial general liability policy contained an exclusion for claims arising from the use of a motor vehicle. The insured argued that this exclusion did not apply to the physical abuse form that was part of the liability policy. The court read the form's language, that "[c]overage is subject to this coverage form *and* the exclusions, conditions and other terms of this policy" as applying the automobile exclusion to this portion of the coverage. Of note, the insured did not challenge whether the injuries arose from the use of an automobile. The court noted the general rule that all portions of the policy are read together with each portion given meaning to avoid rendering any portion inoperative. The Fifth Circuit affirmed the district court's ruling to apply the exclusion and deny coverage. *Scottsdale Ins. Co. v. Discovering Me Acad., L.L.C.*, No. 21-20595, 2022 WL 3040663 (5th Cir. August 2, 2022).

C. Construction Liability Insurance

A worker was injured falling from a ladder while working for N. F. Painting, the named insured under the insurance policy. N. F. Painting was doing contract work for a homebuilding company at the time. The homebuilding company was an additional insured under the insurance policy. The policy had a standard exclusion for claims made by employees. Consequently, counsel for N. F. Painting did not believe there was coverage and did not demand a defense or indemnity from the insurer. The homebuilding company did demand a defense, and the insurer provided one. Subsequently, the injured worker amended his petition alleging independent contractor status. N. F. Painting did not send the amended petition to the insurer nor did it demand a defense under the amended pleading. After an agreed judgment, the injured worker sued the insurer as a third party beneficiary. In affirming summary judgment for the insurer, the Fifth Circuit held that under *Nat'l Union Fire Insurance Company of Pittsburgh, PA v. Crocker*, 246 S.W.3d 603, 608 (Tex. 2008), coverage was never triggered because no claim for a defense was made. The court shot down all the arguments of indirect notice, holding that the demand for a defense must come from the insured, not other sources. The court also noted that prejudice to the insurer is not required when notice is simply lacking. Late notice requires prejudice – no notice does not. *Moreno v. Sentinel Ins. Co., Ltd.*, 35 F. 4th 965 (5th Cir. 2022) (mem. op.).

VI. DUTIES OF LIABILITY INSURERS

A. Duty to Defend

A property owner sued an insured for breach of contract and negligence seeking damages resulting from drilling operations on his property. The pleading alleged damage in different ways but was silent as to when any of the alleged damage occurred. The insured demanded a defense from an insurer it had from 2013-2015 and an insurer it had from 2015-2016. The first insurer defended under a reservation of rights. The second insurer refused to defend arguing that any property damage occurred before its policy period began. The two insurers stipulated that the insured's drill bit stuck in the bore hole during drilling around November 2014. Both parties sought summary judgment on the issue of whether the second insurer owed a duty to defend. The district court held it could not consider the extrinsic evidence of when the drill bit stuck, and applied the eight-corners rule to conclude that the second insurer owed a duty to defend because the property damage could have occurred anytime between 2014-2016. The second insurer appealed, and the Fifth Circuit certified two questions to the Texas Supreme Court:

> (1) Is the exception to the eight-corners rule articulated in *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523 (5th Cir. 2004), permissible under Texas law? and,
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> (2) When applying such an exception, may a court consider extrinsic evidence of the date of an occurrence when (1) it is initially impossible to discern whether a duty to defend potentially exists from the eight-corners of the policy and pleadings alone; (2) the date goes solely to the issue of coverage and does not overlap with the merits of liability; and (3) the date does not engage the truth or falsity of any facts alleged in the third party pleadings?

In answer to the first certified question, the Texas Supreme Court held the eight-corners rule remains the initial inquiry to be used to determine whether a duty to defend exists, stating:

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

In answer to the second certified question, the Texas Supreme Court held under the standard adopted in this opinion, a court may consider extrinsic evidence of the date of an occurrence but only if it goes solely to the issue of coverage and does not overlap with the merits of liability. The court held in this case, where there is continuing damage, evidence of the date of property damage overlaps with the merits of liability, and therefore, cannot be considered. *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, No. 21-0232, 2022 WL 413940 (Tex. Feb. 11, 2022).

An insured school obtained a new roof membrane system that was guaranteed to be watertight for 20 years. However, four years after the roof was installed, it began to leak. The roof manufacturer attempted to repair it a few times, but the roof continued to leak. A roof expert hired by the insured said a new roof was required. The insured sued the roof manufacturer and installing contractor. The roof manufacturer submitted a claim to its commercial liability insurer. For the policy to apply, the property damage must have been caused by an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Two relevant exclusions were the "your product/your work exclusion" and the "contractual liability exclusion." The insurer denied coverage, including its duty to defend the insured, and the insured filed suit against its insurer asking for declaratory relief that the insurer provide a defense, and also asserted claims for breach of contract, violations of the Texas Insurance Code, and attorney's fees. The insurer filed a counterclaim for declaratory relief that it had no duty to defend or indemnify the insured. Both parties moved for summary judgment, and the district court granted the insurer's motion for summary judgment finding that while the complaint in the underlying lawsuit did allege property damage that was caused by an "occurrence" the alleged damage fit within the your product/your work exclusion. The insured appealed.

The Fifth Circuit held the underlying complaint did contain allegations of damage to the property other than the roof membrane. Therefore, the your product/your work exclusion did not apply, and the court held there was a duty to defend based on those allegations. The underlying complaint alleged there was "water damage in the ceiling tiles throughout the [school] after a rain storm" and the insured roofing manufacturer recommended the school contact a contractor to address the damage and leak. Therefore, the Fifth Circuit held there was a duty to defend and reversed the district court's ruling, rendering declaratory judgment in favor of the insured, requiring the insurer to defend the insured in the underlying lawsuit. *Siplast, Inc. v. Emp'rs Mut. Cas. Co.*, 23 F.4th 486 (5th Cir. 2022).

The Fifth Circuit held there was a duty to defend and reversed the district court's ruling, rendering declaratory judgment in favor of the insured, requiring the insurer to defend the insured in the underlying lawsuit.

VII. DAMAGES & OTHER ELEMENTS OF RECOVERY

A. Statutory Penalties and Additional Damages

An insured sued his insurer after the insurer failed to timely pay personal injury protection (PIP) benefits owed to the insured's son who was injured in a car accident. The claim was timely submitted, and the insurer did not dispute the claim. However, the insurer paid the benefits several days late. The insured sued the insurer for the twelve percent penalty, interest, and attorney's fees owed under Texas Insurance Code section 1952.157(b). In a summary judgment motion, the insurer argued that the twelve percent statutory penalty could be awarded only in a suit to recover benefits, and that because the PIP benefits were paid before suit was filed, the statutory penalty could not be recovered. The trial court disagreed, entering judgment in favor of the insured to recover the statutory penalty, interest, and all court costs. The insured appealed, contending that, "an order from [a] court requiring the insurer to pay policy benefits that it has previously failed to pay is a precondition to the imposition of the statutory penalty." The appellate court found that a lawsuit to recover PIP benefits is not a prerequisite to the statutory penalties described in Texas Insurance Code section 1952.157(b). The court stated, "[s]imply put, an insurer's obligation to pay benefits is not triggered by the lawsuit, it is triggered by the statutory deadline." Therefore, the appellate court affirmed the trial court's judgment in favor of the insured. *State Farm Mut. Auto. Ins. Co. v. Rumbaugh*, 642 S.W.3d 901 (Tex. App.—Texarkana 2022, pet. denied).

B. Attorney's Fees

Following a jury verdict in favor of the insured in an uninsured/underinsured motorist case, the insured requested attorney's fees under the Declaratory Judgment Act. The insurer objected to the insured's entitlement to attorney's fees as well as the evidence of attorney's fees since the insured had not disclosed an expert on the subject. The insurer claimed that the award of attorney's fees was not equitable under the facts of the case. While this case was pending, the Texas Supreme Court affirmed *Allstate Insurance Company v. Irwin*, 627 S.W.3d 263 (Tex. 2021) determining the insurer's first argument against it. The court allowed additional time for the insurer to produce rebuttal evidence on attorney's fees, which it failed to do. Therefore, the appellate court held that it was not an abuse of discretion to award equitable attorney's fees in the case. *Allstate Fire & Cas. Co. v. Howell—Herring*, No. 02-20-00175-CV, 2022 WL 1183336 (Tex. App.—Ft. Worth Apr. 21, 2022).

VIII. DEFENSES & COUNTERCLAIMS

A. Limitations

This case arises from a claim on a surety bond under the Miller Act. The US Army Corps of Engineers hired a company for a dredging project on the Texas coast. The Miller Act requires that a surety bond be in place, which the company obtained. The company doing the dredging project hired Diamond Services to repair a vessel it had chartered for the project. However, the company refused to pay Diamond who then submitted a claim to the insurer on the surety bond.

The Miller Act requires an action under the bond to be commenced within one year and a day from the last date labor was performed. This action was brought four days after that deadline. Diamond argued that estoppel tolled the limitations. The insurer sent a letter requesting additional information on the claim from Diamond. However, Diamond failed to plead the letter was a representation it reasonably relied on in deciding not to bring suit within the statutory limitation. The court noted that no allegations were made that the insurance company relied on representations that would justify estoppel. Therefore, the Fifth Circuit affirmed the district court's ruling in favor of the insurer dismissing the claim. The court held that reliance on the letter from the insurer in delaying filing suit was unreasonable and equitable estoppel could not rescue the claim. *Diamond Servs. Corp. v. Travelers Cas. & Surety Co. of Am.,* No. 22-40240, 2022 WL 4990416 (5th Cir. Oct. 3, 2022).

IX. PRACTICE & PROCEDURE

A. Jurisdiction

After a tornado struck several properties owned by an insured, the insured filed a lawsuit in state court against its insurer and its adjusters assigned to the claim. The adjusters were Texas citizens. The insurer accepted liability for the adjusters pursuant to Texas Insurance Code section 542A.006(a), and entered into a Rule 11 Agreement which stated the insured would effectuate the involuntary dismissal of the adjusters and in exchange, the insurer agreed not to remove the case to federal court. The insured then added several additional insurers, and non-suited the first insurer it sued. One of the new insurers attempted to remove the case to federal court stating there was diversity and more in controversy than $75,000. The new insurer argued the action became removable due to the insured's settlement and express release of its claims against the non-diverse insurer and adjusters. The insured argued the insurer could not rely on the diversity created by the involuntary removal of in-state adjusters, especially when counsel for the first insurer acknowledged dismissal of the adjusters would not affect removability of the matter. The court agreed with the insured, holding the settlement and non-suit of the first insurer did not make this action removable, and even if it did, the new insurer failed to show that the requirements for establishing diversity jurisdiction were satisfied. Additionally, the court held the insured's settlement agreement with the first insurer nor the notice of nonsuit were an "other paper" that made this action removable under 28 U.S.C. section 1446(c). Therefore, the insured's motion to remand the case to state court was granted. *Macey Prop. Mgmt. v. Starr Surplus Lines Ins. Co.*, No. H-21-3943, 2022 WL 540948 (S.D. Tex. Feb. 23, 2022) (mem. op.).

An insured sued the insurance carrier and the non-diverse agent. The court held that the allegations against the agent were insufficient to sustain an independent cause of action against the agent. Therefore, the insured's motion to remand was denied. Specifically, the court noted that claims for policy benefits and delay of payment were duties owed by the insurer, not the agent. The allegations against the agent were not specific enough to describe a cause of action independent of the carrier. *Go Green Botanicals, Inc. v. Drexler Ins. Serv., L.L.C. and Tri-State Ins. Co. of Minn.*, No. 5:22-CV-373-XR, 2022 WL 2286961 (W.D. Tex. June 23, 2022) (mem. op.).

B. Discovery

A discovery dispute arose out of a lawsuit where the injured party sought treatment at a hospital that did not bill his insurer but considered him a private pay patient. The defendant who hit the injured party sought information from the hospital through discovery on the negotiated rates the hospital charged private insurers and government payers for the services provided, but the hospital filed a motion for protective order and motion to quash, which the trial court granted. The defendant sought mandamus at the appellate court, which was granted. The appellate court cited to prior cases that held, "[e]vidence of a medical provider's negotiated rates for private insurers and public payers is relevant, though not dispositive, when considering the reasonableness of its chargemaster rates." (citing to *In re Exxon Mobil Corp.*, 635 S.W.3d 631, 633 (Tex. 2021) (orig. proceeding) (per curiam); *see also K&L Auto Crushers, LLC,* 627 S.W.3d 239, 248 (Tex. 2021) (orig. proceeding); *In re North Cypress Med. Ctr. Operating Co., Ltd.*, 559 S.W.3d 128 (Tex. 2018)). The discovery sought was similar to those allowed in the previous cited cases, asking for contracts where the hospital was a party with other insurance companies, an annual cost report required to provide to Medicare, and the Medicare and insurance company reimbursement rates for services provided to this plaintiff. The appellate court held these requests were relevant and not overbroad, and also held the information could not be withheld because it is publicly available or trade secret information. Therefore, the appellate court directed the trial court to vacate its motion for protective order and motion to quash, and to craft an order that protects the interests at stake and imposes reasonable conditions to comply with the subpoena. *In re Teran*, No. 04-21-00436-CV, 2022 WL 849764 (Tex. App.—San Antonio March 23, 2022, no pet.) (mem. op.).

People injured in a car accident sought medical treatment but did not bill their health insurance for the care. The injured party filed a lawsuit against the party who hit them to recover their past medical expenses. The defendants filed a motion to compel regarding the third-party medical providers for the fee schedules in effect for the procedures provided to the injured party. The court granted the motion to compel holding that the Texas Supreme Court recently clarified that medical providers' negotiated rates and fee schedules with private insurers and public-entity payors are relevant and discoverable in personal-injury litigation on the issue of the reasonableness of plaintiff's claimed damages. (citing to *In re K&L Auto Crushers, L.L.C.*, 627 S.W.3d 239, 258 (Tex. 2021)). Therefore, the court found that defendants were entitled to the fee schedule and reimbursement rates for the year of the injured party's treatment with the insurers who insured the injured party at the time the hospital performed the surgeries. *Acuna v. Covenant Trans., Inc., et al.*, No. SA-20-CV-01102-XR, 2022 WL 95241 (W.D. Tex. Jan. 10, 2022).

In this case mandamus was sought after the trial court ordered the corporate representative's deposition in an underinsured motorist case. Following last year's Texas Supreme Court opinion in *In re USAA General Indemnity Company*, 624 S.W.3d 782 (Tex. 2021) (orig. proceeding), the appellate court held it was an abuse of discretion for the trial court to order the deposition. Using a proportionality analysis, the court held, after reviewing the discovery documents produced in the case, the deposition would provide "little, if any, additional benefit in relation to the cost." *In re Home State Cty. Mut. Ins. Co. d/b/a Safeco & Sabour*, No. 05-21-00873-CV, 2022 WL 1467984 (Tex.

App.—Dallas May 10, 2022).

This next case closely mirrors *In re Home County Mutual Insurance Company* out of the Dallas Court of Appeals. Again, the insured sought the corporate representative's deposition in an underinsured motorist case, and again the trial court allowed the deposition. The Tyler Court of Appeals came to the opposite conclusion of the Dallas appellate court, and denied mandamus. The Tyler Court of Appeals reviewed previous case law on the issue, but did not cite *In re USAA General Indem. Co. In re Cent. Mut. Ins. Co.*, No. 12-22-00237-CV, 2022 WL 4394561 (Tex. App.—Tyler Sept. 22, 2022).

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1 *Elephant Ins. Co. v. Kenyon*, 644 S.W.3d 137 (Tex. 2022).

2 *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, No. 21-0232, 2022 WL 413940 (Tex. Feb. 11, 2022).

3 *See In re Teran*, No. 04-21-00436-CV, 2022 WL 849764 (Tex. App.—San Antonio March 23, 2022, no pet.) (mem. op.); *Acuna v. Covenant Transp., Inc., et al.*, No. SA-20-CV-01102-XR, 2022 WL 95241 (W.D.Tex. Jan. 10, 2022).

4 *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, No. 21-50078, 2022 WL 43170 (5th Cir. Jan. 5, 2022); *Aggie Invs., L.L.C. v. Con't Cas. Co.*, No. 21-40382, 2022 WL 67333 (5th Cir. Jan. 26, 2022); *Lamacar, Inc. v. The Cincinnati Cas. Co.*, No. 3:21-CV-1396-S, 2022 WL 227162 (N.D. Tex. Jan. 26, 2022).