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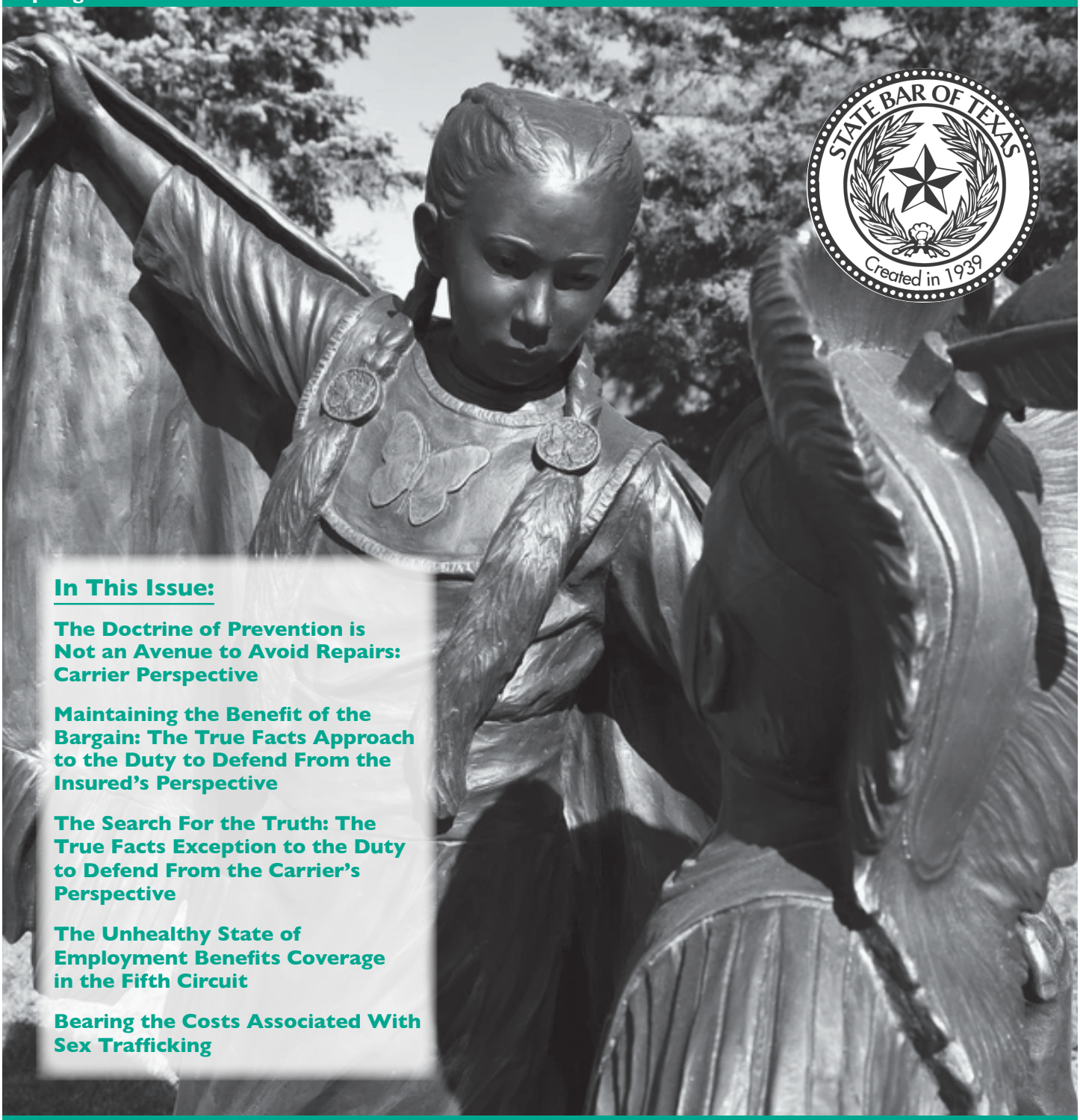

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The Journal of Texas Insurance Law is published by the Insurance Law Section of the State Bar of Texas. The purpose of the ***Journal*** is to provide Section members with current legal articles and analysis regarding recent developments in all aspects of Texas insurance law and convey news of Section activities and other events pertaining to this area of law.

Anyone interested in submitting a manuscript for publication should contact Jason C. McLaurin, Editor In Chief, at (713) 461-6500 or by email at jmclaurin@mdlawtex.com. Manuscripts for publication must be typed and double-spaced with endnotes. Replies to articles published in the ***Journal*** are welcome.

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MISSION STATEMENT

The Insurance Law Section serves to promote the understanding and development of Texas insurance law by providing high quality educational resources to the bench, bar, and public and by promoting collegiality among those with an interest in insurance law.

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COMMENTS

FROM THE EDITOR

By Jason C. McLaurin
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This issue of the Journal of Texas Insurance Law brings together a range of articles examining current legal questions relevant to both insurance coverage and procedure. The authors explore topics involving the duty to defend, ERISA standards of review, commercial liability for sex trafficking, and equitable doctrines affecting first-party property claims.

Shannon O'Malley's article addresses the Doctrine of Prevention in the context of commercial property insurance, focusing on the conditions under which insureds may seek recovery of replacement cost and code upgrade benefits. The piece discusses recent rulings interpreting whether delayed or partial payments from carriers excuse performance under policy terms, particularly in cases involving sophisticated parties and time-limited provisions.

Jeffrey Dahl provides an overview of ERISA litigation in the Fifth Circuit, with emphasis on how courts review factual determinations by plan fiduciaries under the "substantial evidence" standard. The article considers the practical implications of the deferential review applied to benefit denials and discusses recent commentary from the bench suggesting a potential reevaluation of this approach.

This edition also includes two articles offering different perspectives on the evolving debate over the use of extrinsic evidence in duty-to-defend disputes. Brian Waters, Darin Brooks, and Rees LeMay outline the rationale behind preserving the eight-corners rule, emphasizing its role in aligning the interests of insurers and insureds during litigation. Christopher "Kipper" Burke's article argues for broader consideration of extrinsic evidence when underlying litigation is unlikely to resolve key coverage facts, particularly in situations involving potential conflicts between insureds and their carriers.

In another developing area of coverage law, Christina Culver and Benjamin Ritz examine the legal and insurance implications of civil claims brought under anti-trafficking statutes such as the TVPA. Their article surveys the liability exposure of business entities and addresses procedural and substantive insurance issues, including justiciability, declaratory relief, and potential exclusions under commercial general liability policies.

We appreciate the contributions of all authors and editors who supported this edition. As always, the Journal remains committed to publishing content that is relevant to practitioners and continues to reflect developments in Texas insurance law.

Jason C. McLaurin
Editor In Chief

COMMENTS

FROM THE CHAIR

By Rebecca DiMasi, Chair

It has been my honor to serve as Chair of the Insurance Section this year. I have served on the governing Council of the Section for the past ten years, including four years as Editor of the Journal of Texas Insurance Law, and I have watched the Section grow and continually provide valuable information for insurance practitioners. From the "Right Off the Press" emails providing bi-weekly updates on recent insurance law cases to the Journal providing insightful analysis of interesting insurance issues, the publications put out by the Section endeavor to keep insurance lawyers up to date on the current hot topics. This year, we began offering free webinars to Section members and we continue to provide high level continuing legal education to young lawyers through our 101 program and to all practitioners through the Advanced Insurance Seminar held in June every year. We have also created a Comprehensive Overview of Texas Insurance Law CLE, available through the Section website, that provides instruction on key insurance law topics, such as general liability coverage, property coverage, and many others. It's a great resource to review these topics or to allow young lawyers to receive a solid foundation in the specific areas of insurance law. We also work to provide networking opportunities through happy hours in Dallas, Houston and Austin and through our Casino Night during the Seminar in San Antonio.

For anyone practicing or insurance law, I encourage you to take advantage of the Section's publications, CLE opportunities and networking events. I also encourage you to become involved in the Section at whatever level you are able, by applying to join our Young Lawyers Committee or the Council, or even just submitting ideas for webinars or seminar topics. We welcome submissions of articles for the Journal or shorter articles for publication on the Section website, which is in the process of being revamped. We also have sponsorship opportunities for firms or organizations that would like to become more visible to our members. But most importantly, we welcome Section members and non-Section members alike to attend our events and interact with other insurance lawyers. In the recent landscape of virtual CLE and Zoom meetings, the Section strives to offer opportunities for people to meet face to face and create relationships that will hopefully allow for easier dialogue when you deal with each other as opposing counsel or are looking for your next professional opportunity.

Please feel free to contact me to become more involved with the Section or with any ideas or questions at rebecca@shidlofskylaw.com.

Sincerely,

Rebecca DiMasi

Chair of the Insurance Section of the State Bar of Texas

By Shannon M. O'Malley

THE DOCTRINE OF PREVENTION IS NOT AN AVENUE TO AVOID REPAIRS: CARRIER PERSPECTIVE

Most insurance policies contain conditions precedent, which premise coverage on an insured's actions. "As a general rule, if a contract expressly conditions the duty to perform upon the occurrence of a specified event, the duty to perform does not arise until that condition occurs."[1] Conditions precedent include providing prompt notice of a loss, cooperating in an adjustment, and sitting for an examination under oath.

Some policies provide replacement cost value coverage (RCV) up front. But, most pay only the actual cash value (ACV) of property damage until the insured repairs or replaces the damage and provides evidence of repairs. This is another condition precedent: the policy conditions the insured's recovery of depreciation on actual repair or replacement of property. The same holds true for code upgrades. Most insurance policies condition recovery of code upgrade costs on the insured incurring those costs.

These seemingly basic premises are, invariably, never basic or simple in practice. When parties disagree on the amount of an insurance claim and the matter ends up in appraisal or litigation, replacement cost and code upgrade recovery are often key issues. This is especially the case when there is an appraisal award with both RCV and ACV, and there is no evidence the insured completed repairs. When the insurer pays the appraisal determination's ACV award, is the insured entitled to recover the remaining depreciation? And what happens when the insurance policy restricts recovery of RCV to a period of time—such as two years from the date of loss? If that period has expired, can the insured ever recover the RCV and code upgrade costs?

Courts in Texas have recognized that when both the insured and insurer are sophisticated parties, and the insurer has paid some portion of the ACV within the policy's timeframe, the insured's failure to make repairs bars recovery of additional depreciation. Recently, insureds have argued that the equitable Doctrine of Prevention, however, allows them to recover depreciation without conducting repairs or incurring code upgrade costs.[2] The Doctrine of Prevention is an *equitable* principle that should apply only to vary the terms of the parties' contract under three specific circumstances: (1) the insurer engaged in wrongful conduct; (2) the insured was actually prevented from meeting its condition; and (3) the insured can meet equitable principles.

1. What is the Doctrine of Prevention?

Most commercial property insurance policies require an insured to make repairs or incur code costs before recovering depreciation holdback or code costs for the claimed damage. Courts generally recognize that without those repairs, an insured is entitled to the ACV of the damaged property.

In recent years, however, insureds and their counsel have raised extra-contractual arguments to support claims for replacement and code costs when the insureds have not completed those repairs. One of the primary arguments is that the insureds were "prevented" from making repairs by the insurer's late payment, thereby relieving the insured from its duty to make repairs and incur code costs.[3] This argument is called the "Doctrine of Prevention."

The court in *Devonshire* was one of the first in Texas to discuss the Doctrine of Prevention in the context of commercial property insurance claims. And since *Devonshire*, numerous courts have used its analysis to address demands for replacement costs and code costs when repairs have not been completed, or even started.[4] Courts have found that the Doctrine of Prevention does not apply to commercial claims, especially when the insurer pays the ACV of the claim.[5] With these cases, courts granted summary judgment for insurers because, as a matter of law, the insured did not comply with the policy.[6]

Recently, though, some plaintiffs have used the Doctrine to avoid summary judgment by attempting to create a "fact issue" for jury consideration. And some courts have applied the Doctrine to accept this argument. Before giving the issue to a jury, however, and excusing the insured from meeting the terms of the policy, a court arguably should first require that the insured meet the high standard set out by the Fifth Circuit Court of Appeals.

2. The insured bears the burden of proof to show repairs have been completed.

As an initial matter, when a policy contains a valuation provision requiring repairs or replacement within a certain time frame, the insured typically bears the burden to show those repairs were completed. Recently, in *Kahlig Enterprises, Inc. v. Affiliated FM Insurance Company*,[7] the Fifth Circuit rejected the argument that the valuation provision, which describes how an insurer measures a loss, limits liability on

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which the insurer has the burden of proof at trial. The court recognized that the policy's structure applied an ACV measure if the insured did not repair, replace, or rebuild within two years from the date of loss. It found that the insured bears the burden to prove those repairs.

3. The insured must satisfy three elements to apply the Doctrine.

"No Texas court has employed the doctrine of prevention to vitiate an insured's contractual obligation to repair or replace damaged property before claiming payment for replacement costs."[8] Courts in Texas typically look to the Fifth Circuit's discussion in *Mendoza v. COMSAT Corporation*,[9] for the parameters of the Doctrine.

There, the Fifth Circuit first noted the general rule: "If a contract expressly conditions the duty to perform upon the occurrence of a specified event, the duty to perform does not arise until that condition occurs."[10] The court recognized that the Doctrine of Prevention is an exception to this rule. The Doctrine applies when a promisor ***wrongfully prevents*** a condition from occurring, thereby excusing that condition. Therefore, in *Mendoza*, the Fifth Circuit identified two essential elements the insured must satisfy to avoid a policy condition: (1) the promisor's conduct was wrongful; and (2) that conduct prevented performance.

a. Wrongful Conduct

Recent cases discussing the Doctrine of Prevention arguably overlook the key element of whether insurer's conduct was ***wrongful***. However, this was one of the primary issues addressed in *Mendoza*.

The *Mendoza* court looked to the Restatement of Contracts and recognized that "the prevention doctrine is subsumed under the duty of good faith and fair dealing."[11] That provision states:

> The obligor's duty [of performance] is not discharged if occurrence of the event (a) *is the result of a breach by the obligor of his duty of good faith and fair dealing*, or (b) could not have been prevented because of impracticability and continuance of the duty does not subject the obligor to a materially increased burden.[12]

The court held that the plaintiff must show that there is some wrongful conduct, as opposed to some less culpable fault, to apply the Doctrine of Prevention. The court rejected the plaintiff's argument that "a showing of bad faith is not required."13 Instead, the court noted that a plaintiff must first demonstrate that the defendant's actions were wrongful.

While insured plaintiffs often allege bad faith, courts can determine, as a matter of law, whether the insurer's conduct rises to the level of bad faith.[14] "An insurer violates its duty of good faith and fair dealing only when it has no reasonable basis for the denial or delay in payment of the insured's claim and the insurer knows or should have known of that fact."[15] Essentially, "[a]n insurer does not breach its duty of good faith merely by erroneously denying a claim[, and] evidence showing only a bona fide coverage dispute, by itself, does not demonstrate bad faith."[16]

Accordingly, the insured bears the burden to show the insurer's wrongful conduct — a standard it arguably may not be able to meet if there is a *bona fide* dispute between the parties. And, unless the insured can demonstrate this higher standard, the Doctrine of Prevention should not be applied.

b. Actual Prevention

In addition to showing wrongful conduct, the insured must also demonstrate that it was prevented from complying with the policy's conditions. This actual prevention is where courts such as *Devonshire*, *Kahlig*, and *Double Diamond* have rejected the insured's argument.

Specifically, policies typically condition payment for replacement cost and code upgrades on completion of the work.[17] As one court astutely reasoned, a time limit to make repairs does not depend on whether or when the insurer makes payment because the Policy requires the insured to make the repairs before being paid: "[The insurer] was not obligated to pay [the insured] upfront and so [the insurer's] desisting cannot have made it beyond [the insured's] control to replace the property within three years."[18] Essentially, an insurer's non-payment cannot affect the policy's time limit to make repairs because the replacement cost provision always requires the insured to make repairs before being paid.[19] This is even more likely to be held true in a commercial context, where both parties are considered sophisticated.[20]

Moreover, courts have recognized that when the insurer pays the ACV during adjustment, the insured cannot be "prevented."[21] At most, an insured could be delayed from making repairs, if the insurer failed to pay the owed ACV amount during adjustment. But, as discussed below, the insured's own conduct cannot contribute to delays, including failure to support the claim.

Accordingly, in addition to wrongful conduct, the insured must show that it was prevented from making repairs. But, because most policies require repairs to be made *before* payment for replacement cost or code upgrades are due, courts have rejected these arguments when the parties are sophisticated and ACV payments are made.

c. The Third Element: Clean Hands

"It is old hat that a court called upon to do equity should always consider whether the petitioning party has acted . . . with unclean hands."[22] While courts recognize that the Doc-

trine of Prevention requires wrongful conduct and prevention, this Doctrine is inherently equitable, which requires the party asserting the Doctrine to come with clean hands. Therefore, if the insured argues it was prevented from timely completing repairs, its own actions cannot have caused or substantially contributed to those delays.

The Fifth Circuit recently had an opportunity to address the Doctrine of Prevention in *Kahlig Enterprises, Inc.*[23] The court rejected the insured's "contention that any failure to timely repair is excused because [the insurer] was the source of delay."[24] In affirming the lower court's grant of summary judgment, the court relied on evidence in the record that showed the delays were attributable to the insured.

Other courts have similarly declined to apply the Doctrine of Prevention when the insured's conduct contributed to delays. For example, in another *Kahlig* matter, the court rejected the insured's argument that the insurer waived its right to enforce the policy's two-year limitation.[25] The court found it particularly important that the insured completed only minor repairs by the two-year deadline.[26] The court noted that under "the doctrine of equitable prevention, when a promisor wrongfully prevents a condition from occurring, that condition is excused. The doctrines of waiver and prevention are both equitable, *and thus require a party seeking recovery to come with clean hands*."[27]

Accordingly, when delays attributable to the insured prevent the condition from occurring, most courts should not apply the Doctrine of Prevention to alter the terms of the contract because the insured's own unclean hands preclude application of an equitable doctrine.

4. Conclusion

Insurers should stand fast by conditions in their policies, especially provisions that call on the insured to perform some act, such as completing repairs or incurring code upgrade costs. Courts typically require the insured to actually repair/replace or incur code costs before awarding those costs to the insured.

So how should this play out in the typical claims context? Insurers should promptly identify policy provisions that require the insured to make repairs within certain time frames before recovery of withheld depreciation or code costs. In the context of appraisal, the appraisers and umpire should be instructed to separately identify their awards for actual cash value, replacement cost, and code upgrades. And to the extent that the insured maintains that it made partial repairs, the insured should provide proof of the cost of those repairs to recover that portion of the depreciation holdback.

If the parties still have a dispute (or the dispute is already in litigation), then courts should not allow insureds to sidestep these conditions when the insured fails to undertake the repairs or upgrades. Courts can examine the facts of a case and determine, as a matter of law, whether the insured can meet the three elements necessary to assert the Doctrine of Prevention. If the insured cannot meet these elements, then the contract should be enforced as written.

1 *Mendoza v. COMSAT Corp.*, 201 F.3d 626, 631 (5th Cir. 2000).
2 For example, John Wood advocates for expanding the Doctrine of Prevention to excuse policyholders' non-performance of conditions precedent. John D. Wood, *Will "Green Upgrade" Coverage Bring Policyholders to Greener Pastures?*, J. of Tx. Ins. Law, Vol. 20, No. 1 (Spring/Summer 2023) (arguing the Doctrine of Prevention should be applied to sophisticated insureds and when payments of ACV are not enough to allow the insured to complete the required repairs).
3 *See e.g. Devonshire Real Est. & Asset Mgmt., LP v. Am. Ins. Co.*, No. 3:12-CV-2199-B, 2014 WL 4796967, at *7 (N.D. Tex. Sept. 26, 2014) (the insured "argues that the equitable 'doctrine of prevention' relieves it of the obligation to make repairs before receiving replacement costs, because [the insurer's] refusal to pay [the insured] the actual cash value of its second supplemental claim for damage…prevented [the insured] from completing the necessary repairs.").
4 *Lakeside FBBC, LP v. Everest Indem. Ins. Co.*, No. SA-17-CV-491-XR, 612 F. Supp. 3d 667, 677(W.D. Tex. 2020); Mem. Op. & Order at 9-13, *Double Diamond Del., Inc. v. Homeland Ins. Co.*, No. 3:17-cv-1403-X (N.D. Tex. July 20, 2020), ECF No.105; *Kahlig Auto Grp. v. Affiliated FM Ins. Co.*, No. 5:19-CV-1315-DAE, 2021 WL 5227093, at *8 (W.D. Tex. May 20, 2021).
5 *Id.*
6 *See e.g. Kahlig Enters., Inc. v. Affiliated FM Ins. Co.*, No. 23-50144, 2024 WL 1554067, at *2 (5th Cir. Apr. 10, 2024).
7 *Id.*
8 *Devonshire*, 2014 WL 4796967, at *7.
9 *Mendoza*, 201 F.3d at 631.
10 *Id.*
11 *Id.*
12 *Id.* (citing Restatement (Second) of Contracts § 230 (1979)).
13 *Id.*
14 *Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 213 (Tex. 1988) (recognizing that courts should use an objective standard to determine whether a reasonable insurer under similar circumstances would have delayed or denied payment of the claim).
15 *Tex. Windstorm Ins. Ass'n v. James*, No. 13-17-00401-CV, 2020 WL 5051577, at *17 (Tex. App.—Corpus Christi–Edinburg Aug. 20, 2020, pet. denied).
16 *Id.* at *17 (citing *Universe Life Ins. Co. v. Giles,* 950 S.W.2d 48, 67 (Tex. 1997)).
17 *Fitzhugh 25 Partners, L.P. v. KILN Syndicate KLN 501*, 261 S.W.3d 861, 863 (Tex. App.—Dallas 2008); *see also Mainali Corp. v. Covington Specialty Ins. Co.*, 872 F.3d 255, 257 (5th Cir. 2017) (finding the "appraisal panel issued an appraisal award of $387,925.49 as actual cash value and a replacement cost value of $449,349.61. The former was the relevant figure as [the insured]

did not repair or replace the property").
18 *Kahlig Auto Grp.*, 2021 WL 5227093, at *7 (quoting Mem. Op. & Order at 10, *Double Diamond Del., Inc. v. Homeland Ins. Co.*, No. 3:17-cv-1403-X (N.D. Tex. July 20, 2020), ECF No.105).
19 *Id.*
20 *Devonshire,* 2014 WL 4796967*,* at *7; *Lakeside FBBC*, 612 F. Supp. 3d at 678.
21 *Id.*
22 *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 794 (5th Cir. 1999).
23 *Kahlig Enters.*, 2024 WL 1554067, at *2.
24 *Id.*
25 *Kahlig Auto Grp.,* 2021 WL 5227093, at *8.
26 *Id.*
27 *Id.* (emphasis added) (cleaned up)

By: Brian Waters, Darin Brooks and Rees LeMay

MAINTAINING THE BENEFIT OF THE BARGAIN: THE TRUE FACTS APPROACH TO THE DUTY TO DEFEND FROM THE INSURED'S PERSPECTIVE

In Texas (and, generally, across the United States), an insurer's obligation to an insured facing a lawsuit has long been split into two separate tracks of analysis. At the threshold, the insurer's "duty to defend" its insured results from comparing the factual allegations in the pleadings to the plain language of the insurance policy. If the plaintiff's allegations, taken as true, state a potentially covered claim, then the insurer must defend the action. In Texas and some other jurisdictions, this analysis is known as the "eight-corners rule," referring to the four corners of the pleadings and the four corners of the policy. In contrast, the insurer's duty to indemnify the insured for damages under a final judgment or settlement agreement turns on the facts determined in the underlying litigation.

Critics of the eight-corners rule often point to the potential that it forces insurers to extend coverage for defense costs based solely on the plaintiff's factual allegations, which may be out of step with—or plainly contradicted by—the actual underlying facts. These critics observe that plaintiffs may misstate facts relevant to coverage for strategic reasons or simply out of error, and further that insured defendants may not be incentivized to seek out the true facts where the establishment of those facts could vitiate coverage for defense costs. As a solution, some critics propose a shift towards a "true facts" approach to the duty to defend, under which an insurer may present evidence contradicting the plaintiff's allegations to eliminate its defense obligation to the insured.

Currently, as many as 33 states allow some modicum of this "true facts" approach, although the approaches of these states vary widely. Some states allow extrinsic evidence only that weighs *in favor* of coverage, while other states allow extrinsic evidence only in the case of ambiguity. A few states, such as California, Arizona, and Michigan, fully allow the use of extrinsic evidence to determine the duty to defend. Indeed, Texas itself allows a narrow exception to the eight-corners rule, allowing parties to present evidence outside of the eight corners of the policy and the plaintiff's petition so long as there is a "gap" in the pleading such that coverage is not apparent, and 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."

This paper serves as a caution, from a policyholder's perspective, against adopting an unfettered "true facts" approach in Texas. Contrary to the concerns of its critics, and as we explain in greater detail below, the traditional eight-corners rule is consistent with the plain language of most liability policies and serves important public policy considerations that a "true facts" approach to the duty to defend could undermine. For instance, by hewing to the plaintiff's pleaded allegations and the plain language of the policy, the eight-corners rule ensures that coverage disputes surrounding the insurer's duty to defend remain straightforward questions of law, allowing for quick and efficient resolution of those disputes rather than distracting the insured and the insurer from focusing on the defense of the underlying lawsuit. And, perhaps most importantly, the eight-corners rule ensures to the greatest extent possible that the pecuniary interests of insurer and insured are aligned toward the common goal of defending the underlying lawsuit.

(1) A "true facts" approach undercuts plain policy language and the traditional understanding of the defense benefit as broader than the indemnity benefit.

It is foundational that the duty to defend is separate and distinct from the duty to indemnify. Traditionally, the duty to defend is construed more broadly than the duty to indemnify, and, consistent with that approach, policies routinely define the duty to defend more broadly than the duty to indemnify by their own terms. That is one of the benefits of the insured's bargain when purchasing a liability insurance policy and is factored into premium calculations. The ultimate goal is that the insured receive a defense for

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even frivolous claims the policy might cover. While parties are free to contract around this traditional framework by bargaining for a more restrictive duty to defend, both Texas common law and the standard language of most insurance policies reflect the traditional understanding for good reason—consumers in insurance markets contract for a defense and expect their insurer to defend them from lawsuits based on a liberal construction of the pleadings, even though an eventual judgment may or may not be covered.

A "true facts" approach to the duty to defend would quickly undermine that basic understanding. While it would stop short of completely erasing the distinction between the duty to defend and the duty to indemnify—as the presence of potentially covered claims would still presumptively invoke the duty to defend—it would nonetheless fundamentally alter the perception of the duty to defend as a broad and generously construed benefit. Perhaps more significantly, a "true facts" approach would contradict clear policy language promising a defense against "any suit" seeking covered damages which traditionally allows for a defense regardless of the truth, falsehood, or overall merits of the plaintiff's claims. The insurer's right to bargain for a more restrictive duty to defend is, of course, not under any doubt, having been acknowledged by the Texas Supreme Court. In light of that fact, there is no need to overrule longstanding common law to allow insurers a way out of the broad defense benefit that they write into their own policies and for which they calculate and receive premiums.

(2) A "true facts" approach would foster increased adversarial relationships between insurer and insured.

There can be little doubt that a "true facts" approach to the duty to defend would pit insurer against insured at a time when the two should be aligned in their common goal of defending against the underlying claims. Common sense dictates that stakeholders will seek to protect their own interests to the fullest extent allowed under law. If the law allows insurers to potentially avoid paying hundreds of thousands of dollars or more of defense costs by litigating the underlying facts in a coverage lawsuit, then many likely will take advantage of that option.

Already, when the insured is facing a lawsuit by a third party, it will often face an assault on two fronts—one from the third-party plaintiff and one from its own insurer. This assumes, of course, that the insured has the financial wherewithal to fight the insurer in the duty to defend dispute. A "true facts" approach will increase the frequency and scale of this scenario. This antagonistic relationship contravenes the protections the insured was promised and expected when it purchased the insurance policy. Simply put, a defense against the plaintiff's claims maximizes the insured's pecuniary interests, while an avenue to relieve itself of its duty to defend by engaging in fact-intensive litigation against its insured maximizes the insurer's pecuniary interests.

Of course, tension between the financial interests of insurer and insured exists at the heart of every insurance contract. But for the same reason, a liberally construed duty to defend serves sound public policy by protecting the alignment of insurer and insured in defending lawsuits against the insured. Under the eight-corners rule, when the plaintiff states a potentially covered claim on the face of its pleading, the insurer's best path toward minimizing its financial exposure is to focus on vigorously defending the underlying claims—a path that benefits both insurer and insured. Under a "true facts" approach, however, the insurer's surest path towards minimizing financial exposure will often be to seek out evidence vitiating its duty to defend, driving a wedge between its interests and those of its insured. This fundamental shift in incentives could foster animosity between insureds and their insurers, thereby fostering public mistrust in the insurance industry.

(3) Allowing insurers to intervene in underlying lawsuits, or file a separate but concurrent suit, to defeat coverage with unrestricted extrinsic evidence could lead to insurers introducing evidence harmful to the insured's defense of the underlying lawsuit.

Reiterating it here, Texas law already recognizes a carefully tailored iteration of the "true facts" approach, allowing insurers to present evidence outside of the eight corners of the policy and plaintiff's petition when there is a "gap" in the pleadings, and so long as 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."

Monroe's underlying facts show the critical importance of the Texas Supreme Court's narrow formulation of this test, particularly the first element requiring that extrinsic evidence not go to the merits of the underlying case. *Monroe* involved a dispute between two insurers, Monroe and BITCO, about which insurer had the duty to defend the defendant-insured in an underlying lawsuit alleging damage to the plaintiff's land caused by drilling of an irrigation well. Monroe issued the defendant a CGL policy spanning from October 2015 through October 2016, while BITCO issued a policy covering October 2013 through October 2015. Because the plaintiff's petition was silent as to precisely when the alleged

damage occurred, a fact critical to the determination of which insurer owed a defense, Monroe sought to introduce evidence establishing that the damage occurred in 2014, during BITCO's policy period. This evidence, of course, did not pass the test articulated by the Court as it overlapped with the merits—evidence of when the alleged damage occurred was necessarily also evidence that the alleged damage did, in fact, occur. In rejecting Monroe's arguments, the Court expressed concern about insurers undermining their insured's defense of the underlying claims:

> "a dispute as to *when* property damage occurs also implicates *whether* property damage occurred on that date, forcing the insured to confess damages at a particular date to invoke coverage, when its position may very well be that no damage was sustained at all… [t]his would undermine [the insured's] liability defense, which is best served by asserting there was no damage either in November or anytime thereafter."

Whether a loss occurred during a policy period is a frequent coverage issue, and evidence of when it occurred would seem to always be evidence that it did occur. But that is just one example. A "true facts" approach to the duty to defend would no doubt result in a host of other classes of coverage disputes that overlap with the merits of the underlying lawsuit.

For that reason, the policy concerns that underpin the eight-corners rule itself further support the *Monroe* court's cautious approach to considering extrinsic evidence. The *Monroe* test serves to protect, to the fullest extent possible, an alignment of interests between insurer and insured in defending the underlying lawsuit. A "true facts" approach allowing extrinsic evidence overlapping with merits-level questions would undercut that interest to the significant detriment of insurance consumers.

(4) Allowing the litigation of fact-intensive coverage issues at the outset of the underlying lawsuit would promote inefficiency and delay to the detriment of the insured and judicial system.

Even under the eight-corners rule, insurers in Texas still routinely bring declaratory judgment actions seeking a determination of their duty to defend before the resolution of the underlying lawsuit. *Monroe* itself involved such a request for declaratory relief. Setting aside extrinsic evidence the narrow *Monroe* exception allows, such suits involve a straightforward question of law: whether the plaintiff's pleadings on their face state a potentially covered claim under the terms of the policy. For that reason, these coverage disputes are generally susceptible to quick and efficient resolution on summary judgment, requiring very little, if any, fact discovery.

The traditional eight-corners rule therefore protects an additional public policy interest by facilitating the quick and efficient resolution of coverage disputes regarding the duty to defend, thereby allowing insurer and insured to fully focus on the defense of the underlying claims if there is a determination of coverage in the insured's favor, or otherwise allowing the insurer to quickly cease funding the defense if no duty to defend exists on the face of the pleadings.

In contrast, a broad "true facts" approach to the duty to defend likely would mire threshold coverage disputes in a swamp of fact discovery. Insurers seeking to vitiate their duty to defend would be incentivized to aggressively pursue coverage-determinative facts omitted from the plaintiff's pleading, a task which, in some cases, might surpass the complexity of the underlying litigation itself. For instance, an insurer seeking to introduce evidence of a plaintiff's employee status might require adverse depositions and extensive discovery of employment and related records, contested briefing on the subject, and potentially even a trial (something the present system very rarely requires). This would be true in cases with the simplest fact patterns, potentially creating situations where the insured might successfully defend the bulk or entirety of the underlying lawsuit before the duty to defend question is resolved. An insured in such a situation would (1) endure financial stress due to the need to pay out of pocket defending a threshold coverage issue, and (2) further be distracted from fully and vigorously defending the underlying lawsuit. For this reason, the eight-corners rule serves an important role in promoting the efficient progression of covered lawsuits without increasing tension between the insurer and the insured.

Conclusion

One might describe Texas's eight-corners rule as "the worst system of [determining the duty to defend], except for all the others that have been tried." It is true that the rule can create unfortunate consequences, such as when a plaintiff blatantly misstates the underlying facts, leaving the insurer powerless to correct the error. Peeling back the sheet on the eight-corners rule, however, reveals to an insured a generally well-functioning system that operates to mitigate the often tense relationship between insurer and insured. By adhering to the plain text of the allegations, the rule creates a quick, efficient, and low-cost measuring stick by which insurers and insureds can readily determine the duty to defend, allowing them to move forward with their interests aligned and their collective attention focused on defending the underlying claim.

1 Texas adopted this rule over 60 years ago. *See Heyden Newport Chem. Corp. v. S. Gen. Ins. Co.*, 387 S.W.2d 22, 24 (Tex. 1965).

2 *Pharr-San Juan-Alamo Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self Ins. Fund*, 642 S.W.3d 466, 471 (Tex. 2022).

3 *See Understanding an Insurer's Duty to Defend and the Four-Corners Rule*, https://mycoitracking.com/understanding-an-insurers-duty-to-defend-and-the-four-corners-rule/ (last visited Apr. 1, 2025).

4 *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, 640 S.W.3d 195, 203 (Tex. 2022).

5 *See Utica Nat'l Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004).

6 *See Trinity Universal Ins. Co. v. Cowan,* 945 S.W.2d 819, 821–22 (Tex. 1997) (explaining that in contrast to the duty to defend, whose existence is controlled by whether the pleaded factual allegations, liberally construed, potentially assert a covered claim, the existence of the duty to indemnify depends upon the true facts underlying a claim); *see also Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 83–84 (Tex. 1997) (holding pleadings alleging a drive-by shooting negated any possibility the insurer will ever have a duty to indemnify the insured from resulting personal injuries); *cf. D.R. Horton-Tex., Ltd. v. Markel Int's Ins. Co.*, 300 S.W.3d 740, 744 (Tex. 2009) (holding the absence of a duty to defend does not negate a duty to indemnify where evidentiary proof of the allegations in pleadings establishes coverage).

7 *See GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church,* 197 S.W.3d 305, 310 (Tex. 2006) (stating that the duty to defend under a CGL policy is often defined more broadly than the duty to indemnify).

8 *See Pendergest–Holt v. Certain Underwriters at Lloyd's of London,* 600 F.3d 562, 574 (5th Cir.2010); *see also* 14 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 200:5 (3d ed. 2009).

9 *See* General CG 00 01 Form § 1.1(a) (April 2022), https://rnc-pro.com/rnc-pro/pfm/200/270_0402.HTM#coverA.

10 *See GuideOne Elite Ins. Co.*, 197 S.W.3d at 308.

11 *See Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 60 (Tex. 1997) (Hecht, J., concurring) (acknowledging that insurer and insured's interests "should be" aligned in third-party cases when facing a "common opponent").

12 In fact, this assumption underpins entire academic disciplines. *See, e.g.*, Akhilesh Ganti, *Rational Choice Theory: What it is in Economics*, Investopedia (June 29, 2024), https://www.investopedia.com/terms/r/rational-choice-theory.asp.

13 *Monroe Guar. Ins. Co.,* 640 S.W.3d at 203.

14 *Id.* at 197.

15 *Id.*

16 *Id.* at 197–98.

17 *Id.* at 204 (emphasis in original).

18 Winston Churchill, Address at United Kingdom House of Commons (1947) ("It has been said that democracy is the worst system of government, except for all the others that have been tried.").

By Christopher "Kipper" Burke

THE SEARCH FOR THE TRUTH: THE TRUE FACTS EXCEPTION TO THE DUTY TO DEFEND FROM THE CARRIER'S PERSPECTIVE

Several hundred years ago, Lord Chief Justice Coke observed that "truth is the mother of justice."

Courts across the United States universally agree that litigation should be a search for the truth. Texas courts and the Fifth Circuit are no different. Even in cases where an insurance company is paying for the defense of its insured, the Supreme Court of Texas understands that the search for truth is paramount. In fact, the court stated that the profession needs to guard against giving prominence or substance to the "image that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth."

But what happens if neither the plaintiff nor the defendant pursue the truth? And, what if the refusal to seek the truth is because it would take the matter out of coverage under the defendant's insurance policy? Should an insurer be required to defend a case where neither party seeks the truth?

Under Texas law, insurance companies defending their insureds under a reservation of rights are limited in their options to ensure that the underlying lawsuit is a search for the truth. Texas courts should permit insurance companies the opportunity to establish the true facts when the underlying parties lack the incentive to do so. Rather than wait for a trial based on a fiction designed to benefit both the plaintiff and the insured defendant at the expense of the insurance company, Texas law should permit insurance companies to establish the coverage issue at the duty-to-defend stage when neither party in the underlying lawsuit has the incentive to litigate the true facts.

Gamesmanship is common in cases involving people injured while working. Injured workers who may be employees of the defendant under Texas law often allege that, at the time of the injury, they were (1) an independent contractor of the defendant; or (2) either an employee or independent contractor of the defendant. Alleging that the injured worker was an independent contractor is likely sufficient to trigger a duty to defend under standard commercial general liability or commercial auto policies. In this situation, or where the insurer's investigation determines that the plaintiff may be the insured's employee, the insurer accepts the defense while reserving the right to disclaim under the employee injury exclusion.

Whether the worker is an independent contractor or employee significantly affects the trial. If the worker is an employee, then the defendant loses all common law defenses like contributory negligence. If the worker is an independent contractor, then the defendant can submit the plaintiff's comparative fault to the jury.

If the availability of insurance coverage was not an issue, the plaintiff would almost certainly argue that he or she is an employee to maximize the employer's liability. However, because this would trigger the employee injury exclusion, plaintiffs often ignore the worker's status and proceed to trial as if the injured employe were an independent contractor. The defendant, even knowing that the worker is an employee, lacks incentive to prove it. The parties submit the case to the fact finder with negligence questions as to the plaintiff and defendant, as well as the comparative liability question. They do so despite the fact that whether the injured worker was an employee or an independent contractor affects liability and the availability of insurance coverage.

Under the current guidance from the Supreme Court of Texas, the insurance company has no viable option to address this fiction until a final judgment is entered. Because it is defending under a reservation of rights where a true conflict between it and the insured exists, the insurance company lacks the ability to control the defense. The insurance company has no means to ensure that the true facts are tried, as neither underlying party has the incentive to argue the truth—that the worker was an employee.

Texas courts have long held that the insurer's duty to defend is analyzed under the eight-corners rule. The rule is well established: the duty to defend is determined by comparing the factual "allegations of the complainant . . . in the light of the policy provisions without reference to the truth or falsity of such allegations and without reference to what the parties know or believe the true facts to be, or without reference to a legal determination thereof."

The duty to indemnify, however, is determined by the actual facts established in the underlying litigation. Texas courts treat the duty to indemnify separately from the duty to defend. And, Texas law provides that "a claim based on a contract that provides indemnification from liability does not accrue until the indemnitee's liability becomes fixed

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and certain." Thus, if an insurer has a duty to defend, any attempt to determine the duty to indemnify prior to a final judgment in the underlying action is deemed "premature."

1. Courts should adopt a true-facts exception to the duty to indemnify when trier of fact will not decide the coverage issue in the underlying case.

A true-facts exception, permitted where the underlying litigation will not establish coverage-determinative facts, is the only mechanism by which justice can be efficiently achieved for all the parties. While this approach may, at first blush, appear to violate well-established Texas law, it reflects the rationale behind virtually all of the Supreme Court of Texas opinions on the issue. Each of these opinions is addressed below.

a. *GuideOne*

In *GuideOne*, the Supreme Court of Texas declined to adopt a "true facts" exception to the eight-corners rule in a suit involving sexual assault. The insurer argued that it knew the allegations could not be true because the individual defendant was not an employee of the church during at the time of the alleged assaults. The Court held that if an insurer "knows [the] allegations to be untrue, **its duty is to establish such facts in defense of its insured, rather than as an adversary in a declaratory judgment action.**" The Court determined that public policy did not support a "true-facts exception" because "the record before us [did] not suggest collusion or the existence of a pervasive problem in Texas with fraudulent allegations designed solely to create a duty to defend." *Id*.

The Court explained:

> Moreover, were we to recognize the exception urged here, we would by necessity conflate the insurer's defense and indemnity duties without regard for the policy's express terms. . . .
>
> The policy thus defined the duty to defend more broadly than the duty to indemnify. This is often the case in this type of liability policy and is, in fact, the circumstances assumed to exist under the eight-corners rule. Because the respective duties differ in scope, they are invoked under different circumstances. A plaintiff's factual allegations that potentially support a covered claim is all that is needed to invoke the insured's duty to defend, whereas, the facts actually established in the underlying suit control the duty to indemnify.

The *GuideOne* decision is premised on the fact that the coverage issue will be resolved in the underlying lawsuit. But, in the injured-worker scenario, the true facts will not be litigated in the underlying case, leaving coverage unresolved. Thus, the Court's premise for rejecting a true-facts exception is lacking where the facts will not be established in the underlying lawsuit.

b. *Avalos*

In *Loya Insurance Company v. Avalos*, the Court adopted an insurer's right use a true-facts exception to the eight-corners rule. In *Avalos*, the insurance company sold an automobile liability policy to Guevara. Guevara's husband, Flores, was explicitly excluded from the policy's coverage. While moving Guevara's car, Flores collided with another car carrying Avalos and Hurtado. Avalos, Hurtado, Guevara, and Flores agreed to tell both the responding police officer and the insurer that Guevara was driving the car, rather than Flores.

Avalos and Hurtado sued Guevara for damages. Guevara sought coverage from her insurer, which retained defense counsel. Guevara disclosed the lie to her attorney and identified Flores as the driver. The attorney reported this information to the insurer. The insurer withdrew the defense and denied coverage for the accident. Avalos and Hurtado obtained summary judgment, and the trial court entered a judgment against Guevara for $450,343.34.

Guevara assigned her rights against the insurer to Avalos and Hurtado, who sued the insurer for payment of the judgment. The trial court entered summary judgment in favor of the insurer, finding there was no factual issue that Flores, the excluded driver, was driving the at fault vehicle. The appellate court reversed, relying on the longstanding eight-corners rule, stating that "as logically contrary as it may seem," the insurer owed a duty to defend.

The Supreme Court of Texas reversed. The Court found no dispute that the parties agreed to lie in order to trigger insurance coverage. Finding this sufficient evidence of collusive fraud, which the Court identified as a key distinction justifying departure from the eight-corners rule, the Court concluded, "an insurer owes no duty to defend when there is conclusive evidence that groundless, false, or fraudulent claims against the insured have been *manipulated by the insured's own hands* in order to secure a defense and coverage where they would not otherwise exist."

In the injured-worker scenario, the insured does not affirmatively manipulate the claim into coverage. Thus, *Avalos* is not controlling. But, *Avalos*' statement that there was no factual dispute regarding who was driving is, in application, a "true facts" exception to the eight-corners rule. Because the Supreme Court of Texas would not allow a fiction to trigger the insurer's obligation, it found that the insurer could rely on the true facts to establish that it had no duty to defend the insured. While collusion is one reason to apply such a true-facts exception, other reasons also support the exception. That a case will proceed to judgment based upon a fictional set of facts should, alone, be sufficient. Thus, when the underlying lawsuit will not establish the facts necessary to determine coverage, the insurer should be able to negate the duty to defend by looking to the true facts.

Monroe Guaranty

Of course, the above approach directly conflicts with the Supreme Court of Texas' most recent opinion regarding extrinsic evidence in determining the duty to defend. In *Monroe Guaranty Insurance Company v. BITCO General Insurance Corporation*, the Court determine whether two insurance companies owed a duty to defend a suit where the insured defendant drilled an irrigation well that damaged the plaintiff's land. The Court considered whether Texas law permits consideration of stipulated extrinsic evidence to determine the duty to defend when the plaintiff's pleading is silent about a potentially dispositive coverage fact. The plaintiff's pleading was silent on when any "property damage" may have occurred within the meaning of the commercial general liability policies.

The Court determined that extrinsic evidence could be considered only "if 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." The Court ultimately decided that the stipulated extrinsic evidence did not satisfy the newly-articulated standard; *when* the property damage occurred overlapped with the merits of liability because that issue necessarily implicates *whether* property damage occurred. In other words, the insured would be forced to confess damage at a particular date to invoke coverage, when its position may be that no damage occurred at all.

Turning to the injured-worker scenario, suppose the plaintiff alleges that the worker is an independent contractor, which contradicts the true fact that the worker is an employee. Extrinsic evidence would not be permitted under *Monroe* because it violates the second prong of the test. Importantly, however, the *Monroe* standard does not address a scenario where the true facts are not litigated in the underlying lawsuit. The *Monroe* decision was based on the premise that the underlying parties would eventually litigate the true facts. In the injured-worker scenario, that will not occur.

The Texas Supreme Court previously observed that the "varied circumstances under which . . . consideration of extrinsic evidence may arise are beyond imagination." Thus, an insurer should be permitted to consider extrinsic evidence regarding the duty to defend when the underlying litigation will not establish coverage dispositive facts.

2. Such an exception is based on sound public policy.

The search for truth is sound public policy. In discussing a case involving an insurer's refusal to defend, the Texas Supreme Court stated "[t]he defendant's insurer is often the plaintiff's only real source of recovery, but without the insurer's involvement in the lawsuit the likelihood of a fully adversarial trial diminishes substantially." In the injured-worker example, however, the *presence* of insurance increases the likelihood that the case will not be litigated based upon the true facts. The presence or absence of insurance should not impact the search for truth.

A "true-facts" exception is also supported by sound public policy because it promotes an efficient resolution of the disputed issues. Under the current Texas law, the parties must participate in lengthy litigation in the underlying lawsuit, where they submit the case to the fact finder based upon incomplete facts regarding the insured's employment status. Then, they must litigate the true facts in the subsequent coverage action involving the insurance company. This scheme of double litigation is inefficient.

In *Great Am. Ins. Co. v. Hamel*, the insurer declined to defend based on an erroneous interpretation of the trigger of coverage. The Court examined whether the underlying trial was "adversarial," which depended on the insured defendant's incentive, or lack or incentive, to defend. The Court concluded that, because the underlying judgment was not the result of a fully adversarial trial, the "judgment that followed was not enforceable or admissible as evidence in the subsequent [coverage lawsuit]." And, the parties to the coverage action would be able to "litigate any disputed underlying issues with the benefit of full adversity."

Under *Hamel's* reasoning, the failure to address the worker's status results in a non-adversarial trial as it relates to the insurance company. Because neither the plaintiff nor the defendant have an incentive to raise the issue, the judgment should not be "enforceable or admissible" in the coverage action. The logical end result is that the judgment is meaningless in every case where (1) whether the worker was an employee or an independent contractor is not submitted to the fact finder; and (2) the carrier defends under a reservation of rights on the employee injury exclusion. In this scenario, the insurance company has paid to defend its insured in a lawsuit that could never be used to collect under the policy. And the parties will be forced to litigate all the "disputed underlying issues" in the coverage action. Essentially, the parties will be required to retry the entire underlying case.

A true-facts exception would cause no harm to the plaintiff or the defendant. If the plaintiff is an employee, he or she can pursue the defendant under that theory and obtain a judgment against that defendant. The defendant could defend the suit and make settlement decisions. If the true facts establish that the plaintiff is an independent contractor, the insurer will provide a defense to the insured without reservation on that issue, have the right and duty to defend, and have the exclusive right to settle the lawsuit. That is exactly what the defendant purchased from the insurance company.

A true-facts exception would also help the parties more efficiently seek a negotiated resolution, as it would clarify the rights and responsibilities of all parties. The parties will have

fewer issues that impact the decisions on whether to settle or not. It would alleviate uncertainty for all the parties.

Such a rule supports the Supreme Court of Texas' pronouncement that the duty to indemnify is separate from the duty to defend. When insurers are forced to defend uncovered claims, the duty to defend has an undue impact on the duty to indemnify. Insurance companies, like other businesses, make decisions based upon financial implications. The costs to defend a lawsuit—whether frivolous or not covered—are often considered when deciding how much to pay to settle a claim. When there is no duty to indemnify, the duty to defend swallows the duty to indemnify analysis. And, particularly where the insured controls of the defense, the insurer's decision to use the duty to defend as the primary driver of its duty to indemnify is amplified.

3. The Texas Rules of Professional Conduct may not protect the integrity of the courts in this scenario.

Opponents of a "true-facts" exception, may argue that the State Bar's ethical rules prevent the plaintiff's counsel from knowingly pleading the plaintiff's employment status incorrectly. However, the Texas Rules of Professional Conduct are not so limiting in this scenario. Rule 3.01 states that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous. A filing or assertion is frivolous if it is made primarily for the purpose of harassing or maliciously injuring a person. A filing or contention is frivolous if it contains knowingly false statements of fact. It is not frivolous, however, merely because the facts have not been first substantiated fully or because the lawyer expects to develop vital evidence only by discovery. Neither is it frivolous even though the lawyer believes that the client's position ultimately may not prevail.

Many workers, even those who qualify as employees under the common law definition, are reported as 1099 contractors to the IRS or paid in cash. Because they are not paid as employees that receive a W-2, an attorney can, without any additional investigation, argue that their client *might* be an independent contractor without violating Rule 3.01. Thus, Rule 3.01 may not prevent an attorney from making such an allegation.

An analysis of an attorney's ethical obligations to the court fares no differently. Under Rule 3.03(a) of the Texas Rules of Professional Conduct, "a lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; . . . or (5) offer or use evidence that the lawyer knows to be false." Because the defendant will not argue that the worker was an employee or an independent contractor, the plaintiff never need offer any evidence of the worker's status at the time of the injury. Thus, Rule 3.03 does not ensure the true facts are presented either.

4. Insurers should be permitted to intervene or file a separate declaratory judgment action.

While the Supreme Court of Texas considered an extrinsic-evidence exception sound public policy, the question of how an insurer may establish the extrinsic facts remains. Normally, an insurer files a declaratory judgment action to raise a coverage issue. And, while that should still be a viable approach, the insurer should also have the option to intervene in the underlying lawsuit to promote judicial efficiency.

Intervention would permit the trial court to resolve the issue, just as it would if the underlying matter were tried on the true facts. The court could also question counsel for both the plaintiff and the defendant about the true facts to ensure that the litigation is not solely a search for money rather than the truth. The trial court is in the best position to ensure the integrity of the process.

Texas Rule of Civil Procedure 60 states that "any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party." Rule 60 authorizes a party with a justiciable interest in a pending lawsuit to intervene in the suit as a matter of right, subject to a trial court's finding of "sufficient cause" to strike the intervention. Under Rule 60, a person or entity has a justiciable interest "if the intervenor could have brought the same action, or any part thereof, in his own name, or, if the action had been brought against him, he would be able to defeat recovery, or some part thereof." Intervention by an insurer does not fit into this definition of a justiciable interest on its face.

Both the Supreme Court of Texas and the Fifth Circuit, however, have permitted insurers to intervene even where the insurer lacked such a justiciable interest. In both cases, the insured attempted to abandon a substantive issue on appeal. The Supreme Court of Texas permitted an insurer to intervene on appeal when the insured abandoned a defense in order to resolve uninsured claims. The Court ruled that the insurer had a right to intervene because "our procedural rules favor the resolution of cases based upon substantive principles." The Fifth Circuit also permitted an insurer to intervene when the insured attempted to abandon its appeal because the victims agreed to not execute on the insured's property in exchange for an assignment of rights against the insurer. In both of those cases, the insured would not argue the true facts of the case.

The reasoning of Rule 60 supports the right of an insurer to intervene to raise the true facts that neither underlying party will. Intervention is necessary to promote the orderly administration of justice and avoid a sham trial. As the only party with an incentive to promote the truth, the insurer has a justiciable interest in the outcome. In addition, allowing an insurer to intervene would promote the resolution of the case based upon substantive issues at an early stage.

Courts in other jurisdictions routinely permit insurers to resolve coverage issues early in the underlying litigation. For example, in Florida, insurers may litigate duty-to-defend and -indemnify issues prior to the resolution of the underlying case. The Florida Supreme Court has noted the substantial policy factors that favor resolving coverage issues early. In discussing whether a declaratory judgment action would be appropriate, the Court stated:

> We conclude that it is illogical and unfair to not allow insureds and insurers to have a determination as to whether coverage exists on the basis of the facts underlying a claim against an insurance policy. Why should an insured be placed in a position of having to have a substantial judgment against the insured without knowing whether there is coverage from a policy? Why should an insurer be placed in a position of either paying what it believes to be an uncovered claim or being in jeopardy of a bad faith judgment for failure to pay a claim? These are precisely the issues recognized by this Court in other contexts that are intended to come within the purpose of the declaratory judgment statute's "relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations."

Wisconsin also permits an insurer to litigate the insurance coverage issues prior to resolution of the underlying case. Wisconsin identifies four judicially-preferred procedures:

1. Defend under a reservation of rights;
2. Defend under a reservation of rights but seek a declaratory judgment on coverage;
3. Enter into a nonwaiver agreement under which the insurer defends the insured but the insured acknowledges that the insurer has the right to contest coverage;
4. File a motion with the circuit court requesting a bifurcated trial on coverage and liability and a stay of the proceedings on liability until coverage is determined.

Intervention under Rule 60 would ensure that the underlying case is, in fact, a search for the truth. Timely addressing the duty to defend and the duty to indemnify, whether by intervention or a declaratory judgment action, will promote efficiency. It would be the most effective method to guard against giving prominence or substance to the "image that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth."

1 Sir Edward Coke, *The Second Part of the Institutes of the Laws of England* 524 (1642).

2 *See Hickman v. Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 91 L.Ed. 451 (1947) (decrying rule that would make litigation "more of a battle of deception than a search for truth"); *Chicago, B. & Q. R. Co. v. Dey*, 38 F. 656, 661 (C.C.S.D. Iowa 1889) ("we . . . are simply searching after the truth."); *Watts v. Newport*, 149 Fla. 181, 187, 6 So. 2d 829 (1941) ("the search for truth . . . is the only purpose of a lawsuit."); *Greyhound Corp. v. Superior Court of Merced Cnty.*, 56 Cal. 2d 355, 376-77, 15 Cal. Rptr. 90, 364 P.2d 266 (1961) (quoting Professor David W. Louisell, "* * * a law suit should be an intensive search for the truth, not a game to be determined in outcome by considerations of tactics and surprise."); *State v. Stump*, 119 N.W.2d 210, 218 (Iowa 1963) (. . . "a lawsuit whether it be civil or criminal is essentially a search for the truth."); *State ex rel. Evertson v. Cornett*, 1964 OK 83, ¶ 34, 391 P.2d 277 (". . . the trial of a lawsuit is essentially a search for the truth and not a mere sporting proposition or game."); *Fitzgerald v. Westland Marine Corp.*, 369 F.2d 499, 500 (2d Cir. 1966) (quoting Justice Warren, "a law suit is a search for the truth and the tools are provided for finding out the facts before the curtain goes up on trial."); *Groff v. State Indus. Acc. Comm'n.*, 246 Or. 557, 565, 426 P.2d 738 (1967) ("Litigation is deeply involved in the search for truth."); *Anderson v. Florence*, 288 Minn. 351, 356, 181 N.W.2d 873 (1970) (quoting Professor David W. Louisell, "a lawsuit should be an intensive search for the truth, not a game to be determined in outcome by considerations of tactics and surprise."); *Ark. State Highway Comm'n. v. Phillips*, 252 Ark. 206, 209, 478 S.W.2d 27 (1972) ("[t]he trial of any lawsuit, fundamentally, should be a search for truth."); *State v. Merski*, 437 A.2d 710, 715 (N.H. 1981) ("the litigation process which is, after all, a search for the truth." (quoting McNamara, *The Hierarchy of Evidentiary Privilege in New Hampshire*, 20 N.H.B.J. 1, 27 (1978))); *Cates v. Wilson*, 321 N.C. 1, 18, 361 S.E.2d 734 (1987) (Mitchel, J., concurring) ("[a] lawsuit is not a parlor game; it is a solemn search for truth conducted by a court of law."); *Shoney's, Inc. v. Lewis*, 875 S.W.2d 514, 517 (Ky. 1994) (Leibson, J., dissenting) ("lawsuit is a search for the truth.").

3 *See State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 708 (Tex. 1996); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. App. —San Antonio 1994, writ ref'd); *Walker v. Packer*, 827 S.W.2d 833, 857 (Tex. 1992); (Doggett, J., dissenting); *Elbaor v. Smith*, 845 S.W.2d 240, 252 (Tex. 1992) (Doggett, J., dissenting).

4 *See Sims v. ANR*, 77 F.3d 846, 849 (5th Cir. 1996); *Hall v. Freese*, 735 F.2d 956, 961-62 (5th Cir. 1984).

5 *Gandy*, 925 S.W.2d at 708 (Tex. 1996); *Loya Ins. Co. v. Avalos*, 610 S.W.3d 878 (Tex. 2020).

6 *Gandy*, 925 S.W.2d at 708 (internal citation omitted).

7 While by no means is this issue unique to Texas, the fact that an employer may opt out of providing worker's compensation coverage for injuries to employees results in this issue arising

more frequently in Texas than in other states that legislate compulsory worker's compensation coverage.

8 Both the ISO Commercial General Liability Coverage Form and the and the ISO Commercial Auto Coverage Form exclude "bodily injury" to "employees" of the "insured" arising out of and in the course of (1) employment by the "insured", or (2) performing the duties related to the conduct of the "insured's" business.

9 *See* Tex. Lab. Code § 406.033 (abolishing defenses of contributory negligence, assumption of the risk, and negligence of a fellow employee);*see also Schneider Elec. USA, Inc. v. Ramirez*, 657 S.W.3d 157, 161 (Tex. App.—El Paso 2022, no pet.) (noting § 406.33 abolishes certain common law defenses for defendants who do not purchase worker's compensation insurance).

10 *See* Tex. Civ. Prac. & Rem. Code § 33.001, *et. seq.*

11 *See Northern County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685, 689 (Tex. 2004) (declaring that a conflict of interest will prevent an insurer from conducting the defense when the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends); *see also State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 627 (Tex. 1998) (stating insurer has right to control the defense unless there is a conflict of interest).

12 *Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co.*, 387 S.W.2d 22, 24 (Tex. 1965).

13 *Heyden Newport Chem. Corp.*, 387 S.W.2d at 25; *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821 (Tex. 1997); *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 744 (Tex. 2009); *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 656 (Tex. 2009).

14 *Cowan*, 945 S.W.2d at 821-22.

15 *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 134 (Tex. 2010) (citations omitted).

16 *See Hartrick v. Great Am. Lloyds Ins. Co.*, 62 S.W.3d 270, 275 (Tex. App. – Houston [1st Dist.] 2001, no pet.).

17 While this article addresses the employee/independent contractor scenario, such an exception would also be warranted in any matter where the coverage fact will not be decided by the trier of fact in the underlying lawsuit.

18 *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 310-11 (Tex. 2006).

19 *Id.* at 311 (emphasis added).

20 *Id.* at 310 (internal citations omitted).

21 The Texas Supreme Court's rationale in *GuideOne* fails to account for the fact that the insurer loses the right to control the defense where there is a true conflict of interest. In *GuideOne*, it just so happens that the coverage fact and the liability fact were the same: the insurer and the insured would both argue the individual worker-defendant was not an employee of the church at the time any assaults occurred. As a result, there was no conflict between the insured and the insurer.

22 610 S.W.3d 878 (Tex. 2020).

23 *Id.* at 882 (emphasis added).

24 640 S.W.3d 195 (Tex. 2022).

25 *Id.* at 202.

26 While the two insurers may have intended to stipulate to the coverage issue, they did not do so. The parties' stipulation only mentioned when the drill bit became stuck. The stipulation stated:

> While 5D Drilling and Pump Service, Inc. fka Davenport Drilling and Pump Service, Inc. ("5D") was performing its contract to drill a commercial irrigation water well for David Jones dba J & B Farms of Texas, during drilling, the drill bit stuck in the bore hole (the "Incident"). The date of the Incident was in or around November 2014.

Appellant's Brief On The Merits, Tab G, *Monroe Guar. Ins. Co.*, 640 S.W.3d 195 (No. 21-0232). They did not stipulate to the two coverage issues: (1) when any "property damage" occurred, or (2) when the insured became aware of when any "property damage" occurred. *See id.* at 46 (describing coverage issues).

27 *Id.* at 204.

28 *Richards v. State Farm Lloyds*, 597 S.W.3d 492, 500 (Tex. 2020).

29 *Great Am. Ins. Co. v. Hamel*, 525 S.W.3d 655, 669 (Tex. 2017).

30 This is effectively the approach the Texas Supreme Court addressed in *Hamel*, 525 S.W.3d at 658-59, where an insurer does not defend. The *Hamel* Court noted that the scope of *Gandy* was unclear, and the Court remanded to re-litigate the damages case. *See Hamel*, 525 S.W.3d at 670 & n.12 (remanding to re-litigate the underlying action as well as the coverage issues).

31 525 S.W.3d at 658-59.

32 *Id.* at 666–67.

33 *Id.* at 671.

34 *Id.*

35 *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821-22.

36 Tex. Disciplinary Rules Prof'l Conduct R. 3.01 cmt. 2, *reprinted in* Tex. Gov't Code, tit. 2, subtit. G app. A (State Bar Rules art. X, § 9).

37 *Id.* cmt. 3.

38 *Id.*

39 *Id.*

40 *See, e.g., Nghiem v. Sajib*, 567 S.W.3d 718, 721 n.14 (Tex. 2019) (citing *In re Union Carbide Corp.*, 273 S.W.3d 152, 154 (Tex. 2008) (*per curiam*) (orig. proceeding)).

41 *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990).

42 *See In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718, 720

(Tex. 2006).

43 *Id*. at 728.

44 *See Ross v. Marshall*, 426 F.3d 745 (5th Cir. 2005).

45 *See Higgins v. State Farm Fire & Cas. Co.*, 894 So. 2d 5, 15 (Fla. 2004).

46 *See id*.

47 *Id.* (citing *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*, 680 So.2d 400, 404 (Fla.1996)).

48 *See Choinsky v. Emp'rs Ins. Co.*, 390 Wis. 2d 209, 225, 938 N.W.2d 548 (Wis. 2020).

49 *Id*.

50 *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 708 (Tex. 1996) (internal citation omitted).

By Jeffrey E. Dahl

THE UNHEALTHY STATE OF EMPLOYMENT BENEFITS COVERAGE IN THE FIFTH CIRCUIT

Introduction: The Low End of Reasonable is Enough

Pension and welfare benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA) require a plan fiduciary to review any denied benefit claim. This is a statutory requirement. The plan must act solely in the interest of participants and beneficiaries, with the exclusive purpose of providing benefits to plan participants and their beneficiaries and defraying reasonable administrative expenses. The plan fiduciary is also required by statute to act with care, skill, prudence, and diligence and follow the terms of the plan, so long as the plan does not violate the requirements of ERISA.

Most ERISA plans grant discretion to the fiduciary conducting the final review. The Fifth Circuit Court of Appeals has confirmed that, when the plan document grants such discretion within a plan fiduciary's denial of a claim for benefits will be affirmed unless the fiduciary's interpretation is contrary to the plan's plain language or there is not substantial evidence in the administrative record (the claim file compiled during the claims and fiduciary review process) to support the denial. Plan interpretation is a legal question. Fifth Circuit precedent often, although not always, requires a two-step process in evaluating whether the fiduciary's interpretation is an abuse of discretion. A case in which the fiduciary denies the claim based upon the assertion that the submitted evidence does not sufficiently support the claim is a factual review case. Factual review cases are the focus of this article.

In the Fifth Circuit, a court's review of an "ERISA benefits determination is essentially analogous to a review of an administrative agency decision." The group insurer, third-party administrator, or employer-appointed committee that reviews the denied benefit claim is treated as an administrative agency. If a fiduciary's denial is challenged in federal court, the ERISA benefits case is "a review proceeding, not an evidentiary proceeding." Hence the claim file that is compiled is transformed into an "administrative record" after suit is filed.

Review of administrative agency decisions is usually a review of whether substantial evidence within the administrative record supports the decision. Most ERISA benefit cases litigated in courts of the Fifth Circuit are decided on summary judgment, meaning that most factual review cases are reviewed for abuse of discretion. The following are common iterations of the controlling standard of review:

Under an abuse of discretion standard, if the plan fiduciary's decision is supported by substantial evidence, it must prevail. Even if an ERISA plaintiff supports his or her claim with substantial evidence, or even with a preponderance of the evidence, he or she will not prevail for that reason. Rather, it is the fiduciary's decision that must be supported by substantial evidence, and, if it is, the administrator's decision must prevail. Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. A decision is arbitrary only if made without a rational connection between the known facts and the decision or between the found facts and the evidence. The review of the fiduciary's decision need not be particularly complex or technical; it need only assure that the administrator's decision falls somewhere on the continuum of reasonableness, even if on the low end.

This daunting standard of review results in many ERISA benefit claimants giving up after a fiduciary's denial. It also makes it difficult to find a lawyer.

Justice Oldham's Concurring Opinion in Michael J.P.

The Fifth Circuit case Michael J P v. Blue Cross Blue Shield of Texas et al., involved an ERISA claim for reimbursement for in-patient psychiatric treatment. Blue Cross paid for some of the treatment but determined that continued inpatient treatment was not medically necessary. The Fifth Circuit upheld the denial of benefits, applying the "the continuum of reasonableness" standard that is challenging for an aggrieved claimant to overcome in a "substantial evidence" dispute. But Justice Oldham's concurring opinion in Michael JP makes the following observation:

The substantial-evidence standard of review we apply comes from half-century old cases about pension plans under the Labor Management Relations Act. And we've continued to apply this same standard even after the Supreme Court told us it lacked a sound justification. The second puzzling thing about our standard of review is how it compares to substantial-evidence review in administrative law cases. Even

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though our ERISA standard of review uses the same name, it is notably more deferential than ordinary substantial-evidence review. These two features make me wonder whether our current standard for reviewing benefit denials under ERISA is justifiable . . . . Our ERISA cases purport to review a plan administrator's decision for 'substantial evidence.' But ERISA's substantial evidence is radically different from substantial evidence elsewhere in law.

Justice Oldham emphasized that the seminal substantial evidence case, Universal Camera Corporation v. NLRB, overturned a Second Circuit decision upholding a National Labor Relations Board decision based on substantial evidence. The Supreme Court held that the Second Circuit used too narrow a lens to determine what constituted substantial evidence. The Second Circuit focused on whether substantial evidence supported the Board's decision, but it did not consider the weight of the countervailing evidence. The Court vacated the decision and remanded the case to the Second Circuit, requiring the court to conduct a more holistic review of the administrative record.

The Universal Camera case established the requirement that courts, when considering whether substantial evidence supports an administrative agency decision, should give serious consideration to the record as a whole, "taking into account contradictory evidence or evidence from which conflicting inferences could be drawn."

In Michael J.P., Justice Oldham continued:

Our approach in ERISA cases significantly diverges from this conception of substantial-evidence review. We routinely affirm plan administrator decisions without the holistic review that Universal Camera contemplates . . . we approve plan administrator decisions as long as they "fall somewhere on a continuum of reasonableness–even if on the low end." In practice, any plan administrator in any case will point to some quantum of evidence which arguably puts their decision on at least the "low end" of a reasonableness spectrum. So, in almost every case, we quickly approve the administrator's decision as supported by substantial evidence, without "taking into account contradictory evidence or evidence from which conflicting inferences could be drawn."

Justice Oldham concludes as follows:

It appears that we've wandered far astray. The Supreme Court warned us not to use LMRA principles to review ERISA claims. We did so anyway. And then we adopted a flavor of substantial-evidence review that bears little resemblance to one we'd use in an administrative-law case. All of this makes it particularly difficult for ERISA beneficiaries to vindicate their rights under the cause of action created by Congress. And it does so with no apparent support in law, logic, or history.

Justice Oldham's view is correct and should be adopted by the Fifth Circuit.

The Limited Impact of Ariana in Review of Non-Discretionary Benefit Plan Decisions

A few years before Michael J.P., the Fifth Circuit overruled 25 years of ERISA precedent. The court held that when the benefit plan at issues makes no grant of discretion, courts conduct a de novo factual review. The Ariana decision overruled a 1991 Fifth Circuit case, titled Pierre v. Conn. Gen. Life Ins. Co. In Pierre, the Fifth Circuit held that factual determination for ERISA plan cases should be reviewed for abuse of discretion rather than the de novo standard of review required by the Supreme Court's decision in Firestone Tire & Rubber Company v. Bruch when the underlying plan had no grant of discretion. According to Pierre, ERISA cases that turned on a court's factual review should always be reviewed for abuse of discretion.

In Ariana, the Fifth Circuit acknowledged that Pierre conflicted with the decisions of most other U.S. federal circuit courts, which review both plan interpretation cases and factual review cases under a de novo standard. The Fifth Circuit noted that other circuit court decisions that expressly reject Pierre often share Firestone's observation that "reading ERISA to provide a default standard of deference would undermine congressional intent as it 'would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted.'"

However, the practical impact of overturning Pierre is limited, as most ERISA plans continue to include discretionary clauses. The Ariana decision does not apply to cases involving plans with a discretionary clause.

The Texas Insurance Code Prohibits Discretionary Clauses in Texas Insurance Policies for Life and Health Coverages

A discussion of the highly deferential "substantial evidence" review standard is incomplete without mentioning that, since 2011, the Texas Insurance Code prohibits discretionary clauses in life and health coverage policies. If the employee benefits are funded through an insurance policy interpreted under Texas law, the prohibition on discretionary clauses applies. The reason for the statute and the accompanying regulations, 28 TAC §§3.1201-1203, was given by the Texas Insurance Commissioner prior to enactment:

Discretionary clauses are unjust, encourage misrepresentation, and are deceptive because they mislead consumers regarding the terms of coverage. For example, a consumer

could reasonably believe that if they are disabled, they will be entitled to benefits under the policy and will be able to receive a full hearing to enforce such rights in court. Instead, a discretionary clause permits a carrier to deny disability income benefits even if the insured or enrollee is disabled, provided that the process leading to the denial was not arbitrary and capricious.

For many Texas claimants with fully insured life or health benefits, the concerns described by the Commissioner continue to resonate. Courts review cases assuming that the fiduciary made a reasonable decision. As noted by the Commissioner, this allows a fiduciary who is granted discretion to deny a claim even when a preponderance of the evidence supports coverage. As Justice Oldham notes "in practice, any plan administrator in any case will point to some quantum of evidence which arguably puts their decision on at least the 'low end' of a reasonableness spectrum."

Is The Texas Statute Outlawing Discretionary Clauses Preempted by ERISA?

The Fifth Circuit has yet to rule on whether the Texas statute and regulations are preempted by ERISA. There have been some decisions at the district court level that found no preemption, the most notable being a 2016 opinion from the Northern District of Texas in which the court conducted a detailed analysis and concluded that the Texas statute barring discretionary clauses was not preempted by ERISA.

Although it did not decide whether the Texas statute was preempted because Humana stipulated to a de novo review of the benefit denial, the Fifth Circuit pointed out in Ariana that most federal circuit courts deciding the issue have found that state bans on discretionary clauses are not preempted by ERISA.

If the Fifth Circuit holds that the Texas law is not preempted, then employees and beneficiaries who have life and health coverage underwritten by group insurance policies governed by Texas law will receive de novo review at the courthouse. They can avoid the heavy burden of having to prove that there is no reasonable evidence within the administrative record to support the fiduciary's denial of benefits.

However, because the anti-discretionary statute applies only to certain insurance policies, claims brought under other ERISA benefit plans, such as retirement or severance benefit claims, courts will still review denied claims under the highly deferential substantial-evidence standard. Also, any benefits paid from self-funded plans or plans underwritten by policies interpreted under state law lacking an anti-discretionary statute will receive a highly deferential review. Short-term disability benefits, for instance, become important for anyone who unexpectedly becomes unable to work due to injury or illness. But they are usually self-funded (funded by the employer), so the prohibition on discretionary clauses also would not apply to the typical STD claim.

Conclusion: The Fifth Circuit Has Wandered Far Astray From Supreme Court Precedent and the Intent of Congress

As noted by Justice Oldham, the Fifth Circuit has not followed Supreme Court precedent regarding substantial evidence reviews of administrative law decisions when considering ERISA benefit cases. Universal Camera requires a holistic review of the record, "taking into account contradictory evidence or evidence from which conflicting inferences court be drawn." Instead, the focus is on a quick and efficient review of the administrative record for some reasonable evidence to support the fiduciary's denial.

Further, the Fifth Circuit deviates from the Congressional intent in passing ERISA. By its name we know the intent: to protect and secure retirement income for employees. But ERISA was written broadly. Its scope was not only to protect worker's retirement benefits but to protect all benefits offered by employers in the private sector. It is so stated by Congress in the introduction to ERISA's statutory scheme:

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts."

In this author's view, the purpose of ERISA is thwarted by the judiciary's frequent deference to a fiduciary's denial of benefits; that is, the acceptance of any decision that lies on a "continuum of reasonableness," even on the low end. The application of such great deference to a fiduciary's decision is a step backward rather than a step toward the goal of protecting an employee's right to benefits. In many cases today, the employee remains better off if ERISA is inapplicable because the beneficiary can bring a simple breach of contract claim in which the preponderance of the evidence will be the standard of review.

In ERISA benefit cases, a careful federal court review of the fiduciary's decision is especially important because, unlike administrative law decisions, which is the comparative model, the decision is not conducted by an independent body such as the Social Security Administration or the Securities and Exchange Commission. Instead, courts review of a de-

cision by someone who may not know that they are statutorily required to act as the claimant's fiduciary. Generally, the fiduciary is someone who is employed by the same entity that conducted the original review, often an insurance carrier liable for payment.

As Justice Oldham points out, the review of an ERISA factual determination case when there is deference granted to the fiduciary is much less searching than a review of an agency decision. As noted by the Supreme Court in Firestone, (the case holding that de novo review is the default standard in ERISA benefit cases and that is emphasized in Ariana, "reading ERISA to provide a default standard of deference would undermine congressional intent as it 'would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted.'"

Less protection for employees and their beneficiaries is the current unhealthy state of benefits coverage in the Fifth Circuit. ERISA and this highly deferential standard of review is used as a shield by those required to pay benefits. It's a shield against a breach of contract action that could have been brought before ERISA was enacted. When considering ERISA benefit claims that turn on factual determinations, it is time that the Fifth Circuit align itself with Supreme Court precedent and the purpose of ERISA to require a holistic review of the record when considering a fiduciary's decision to deny plan benefits.

1 29 U.S.C. § 1133(2).
2 29 U.S.C. § 1104(a)(1)(A).
3 29 U.S.C. § 1104(a)(1)(B) & (D).
4 *Encompass Off. Sols., Inc. v. La. Health Serv. & Indem. Co.*, 919 F. 3d 266, 282 (5th Cir. 2019).
5 *Crosby v. La Health Serv. & Indem. Co.*, 647 F.3d 258, 264 (5th Cir. 2011).
6 *Crosby*, 647 F.3d at 264 (quoting *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 875 (7th Cir. 1997)).
7 *Corry v. Liberty Life Assurance Co. of Bos.*, 499 F.3d 389, 397 (5th Cir. 2007) (emphasis added). This is a typical recitation of Fifth Circuit precedent in a defendant's motion for summary judgment. *See, e.g.*, *Holland v. Int'l Paper Co. Ret. Plan,* 576 F.3d 240, 246–47 (5th Cir. 2009).
8 Finding a lawyer to help navigate the straits or challenge the decision in court presents a difficult problem from an economic perspective. Most claimants don't have the money to pay an hourly fee, even at a reduced rate, and some claims, such as health care claims, are usually about obtaining a certain treatment for the participant or his or her beneficiary, which does not lend itself to a contingent fee agreement.
9 No. 20-30361, 2021 WL 4314316, at *1 (5th Cir. 2021).
10 *Id.* at *8–9.
11 340 U.S. 474 (1951).
12 *Id.* at 487, 490.
13 *Michael J.P.*, No. 20-30361, 2021 WL 4314316, at *10 (cleaned up) (quoting *Universal Camera*, 340 U.S. at 487).
14 *Id.* at *10.
15 *Ariana M. v. Humana Health Plan of Texas, Inc.,* 884 F.3d 246, 247 (5th Cir. 2018) (en banc).
16 *Id.*
17 *Id.* at 256 ("We overrule *Pierre* and now hold that *Firestone's* default *de novo* standard applies when the denial is based on a factual determination.").
18 *Pierre v. Conn. General Life Ins. Co.*, 932 F.2d 1552 (5th Cir. 1991), *overruled by Ariana M. v. Humana Health Plan of Texas, Inc.,* 884 F.3d 246 (5th Cir. 2018) (en banc).
19 *Ariana M.,* 884 F.3d at 263 (5th Cir. 2018) (en banc) (Jolly, dissenting).
20 *Id.* at 252 (*quoting* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113–14 (1989)).
21 Tex. Ins. Code Ann. § 1701.062(b).
22 Tex. Dep't Ins., *Subch. M Discretionary Clauses*, at 5, Order No. 10-1035. (Dec. 3, 2010) (citations omitted).
23 *Curtis v. Metropolitan Life Ins. Co.*, No. 3:15-CV-2328-B, 2016 WL 2346739, at *10 (N.D. Tex. May 4, 2016) ("Here, the Texas laws all specifically prohibit discretionary clauses... Thus, the Court concludes that the Texas laws prohibiting discretionary clauses affect the benefits an insured has access to…therefore, ERISA does not preempt them…").
24 *Ariana*, 884 F.3d at 250 n. 2.
25 *See, e.g.,* Mem. Adopting Rpt. & Rec. at 8, *Allen v. Sherman Operating Co.*, No. 4:20-cv-290-SDJ, 2021 WL 5710566 at *3 (E.D. Tex. Dec. 2, 2021), ECF No. 72, (holding that the Texas anti-discretionary statute did not apply because the ERISA injury benefit plan from which the plaintiff sought benefits was self-funded).
26 340 U.S. at 487, 490.
27 29 U.S.C. § 1001(b) (emphasis added).
28 *Ariana,* 884 F.3d at 252.

By Christina A. Culver & Benjamin Ritz

BEARING THE COSTS ASSOCIATED WITH SEX TRAFFICKING

I. Introduction

Over the last two decades, society has increasingly focused on human trafficking issues, particularly, sex trafficking. In response, governments have passed laws establishing statutory liability for overt actors who participate in sex trafficking activities, like pimps or recruiters, and also for secondary actors, such as business and property owners that know, or reasonably should know, of the benefits they derive from sex trafficking. When sex trafficking victims sue secondary actors under these statutes, the defendants often seek coverage under their commercial liability policies. This article outlines the potential civil liability these secondary actors may face and discusses related issues concerning commercial insurers' duty to defend and indemnify them.

II. Legal Liability of Commercial Entities for Trafficking

To understand the insurance issues that are implicated by trafficking liability, it is important to understand the scope of the potential liability insureds may face.

A. Statutory Liability — The Trafficking Victims Protection Act

The primary statute imposing such liability is the Trafficking Victims Protection Act ("TVPA"). The TVPA as originally passed by Congress in 2000 established only criminal liability for sex trafficking. However, in 2003, Congress amended the TVPA to give victims of sex trafficking a civil right of action for victims of trafficking to seek and recover damages: A "victim of a violation of section 1589, 1590, or 1591 may bring a civil action against the perpetrator to recover damages and reasonable attorney fees."

The TVPA defines sex trafficking as the "recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act." Sex trafficking is "severe" when the "commercial sex act is induced by force, fraud, or coercion." Section 1591 imposes criminal liability for sex trafficking children or trafficking any person by force, fraud, or coercion, to engage in a commercial sex act. Section 1591(a) provides: "Whoever knowingly (1) recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or (2) benefits from participation in a venture which has engaged in an act, with knowledge or reckless disregard, shall be punished."

In 2008, Congress expanded the victim's right of action in Section 1595 against those who benefited from the trafficking venture, specifically "whoever knowingly benefits, . . . financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter." Several states have also enacted similar criminal or civil liability statutes.

As a result, trafficking victims have filed cases across the country, usually against hotels, rest stops or similar businesses, for alleged facilitation and participation in trafficking ventures. The victims typically allege that the hotel brand, businessowners, and employees knew, or reasonably should have known, that the victims were being trafficked, but they did nothing to prevent or impede the trafficking of victims at their establishments and financially benefitted from the trafficking operations.

1. Scienter Requirements for TVPA Liability

While an organization may be liable under Section 1595 when it knowingly benefits from a venture where it should have known the venture engaged in trafficking, courts disagree as to whether such liability is predicated on criminal liability. From a recent survey of 21 cases submitted to the Judicial Panel for Multidistrict Litigation, the U.S. District Courts for the Southern District of Ohio and the Western District of Washington held that Section 1595's civil liability is distinct from Section 1591's criminal liability. The Northern District of Georgia and the Southern District of New York, however, require a criminal violation under Section 1591 before the civil liability is triggered. In many of the cases, the defendants filed motions to dismiss with mixed results. Either way, when evaluating claims under Section 1595, courts consider the entire body of allegations. This article summarizes one case on either side of this split as examples of the difference in application.

a. *M.A. v. Wyndham*

In *M.A. v. Wyndham Hotels & Resorts, Inc.*, the plaintiff, M.A., alleged that she was sex trafficked at Days Inn by Wyndham, Comfort Inn, and Crowne Plaza locations in

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Columbus, Ohio. M.A. alleged signs of trafficking, including that her trafficker paid in cash for rooms near exits for long stays; the rooms contained used condoms and other paraphernalia; M.A. had bruising and would not make eye contact; her cries for help were ignored by hotel staff; and one online review indicated that the guest was solicited for drugs and prostitutes.

Alleging liability under TVPA Section 1595(a), M.A. pleaded that Wyndham (1) received a knowing benefit; (2) knew or should have known of a trafficking venture; and (3) participated in a trafficking venture. Wyndham filed a motion to dismiss.

The District Court for the Southern District of Ohio held that, as to a "knowing benefit," payment for booking or reserving rooms constitutes a sufficient financial benefit. As to the "knew or should have known" element, the court held that M.A.'s allegations were sufficient for "should have known negligence," but not enough to show actual knowledge. To decide the "knew or should have known element," the court provided two examples. On one end is *Ricchio v. McLean*, where the victim alleged the hotel owner witnessed the victim's abuse by the sex trafficker, and the hotel owner and trafficker "high-fived" each other. At the other end is *Lawson v. Rubin*, where the victim alleged only one visit by the police and one by an ambulance to a condominium unit in more than six years. The court held that M.A. alleged a review sufficient to put the hotel on notice to train their staff to prevent sex trafficking, as well as signs that "should have alerted staff."

For the third element "participation in a venture," the court held that M.A.'s allegations established a "pattern of conduct" indicating that the trafficker and hotel had a "tacit agreement." To arrive at the definition of "participating in a venture," the court distinguished between the criminal Section 1591 and civil Section 1595. While Section 1591(e)(4) defines the phrase "participating in a venture" as "knowingly assisting, supporting, or facilitating a violation of subsection (a)(1)," that definition was explicitly limited to section 1591. Section 1595 does not define "participation in a venture." Using common practices of statutory construction to give meaning to every statutory word, the court concluded that applying the criminal definition to Section 1595 would void the "should have known" language, rendering it meaningless. By applying the "should have known" language, the court held that M.A. alleged a sufficient continuous relationship and denied the defendants' motion to dismiss because M.A. pleaded an agency relationship sufficient to hold the hotels liable.

b. *Red Roof Inn* Cases

The District Court for the Northern District of Georgia took the opposite view of the "participation in a venture" element and granted several defendants' motions to dismiss claims under Section 1595. In a series of *Does 1–4 v. Red Roof Inns, Inc.* cases, the court defined "knowledge" for that element as "knowledge as to 'assisting, supporting or facilitating' trafficking." The court imposed the definition of "participation in a venture" in Section 1591(e)(4) to Section 1595. In making this determination, the court relied on a similar definition established in *Nobel v. Weinstein* from the Southern District of New York. Both the Georgia and New York courts found that association alone could not establish liability but required some level of knowledge and participation in the sex trafficking act. Accordingly, the Georgia District Court dismissed the victims' claims for failure to plead a sufficient knowledge element. The plaintiffs appealed the court's decision.

B. Common Law and Civil Law Liability

In addition to statutory liability, premises owners face common law liability for injuries on their premises, such as those that can occur in connection with trafficking. The scope of such liability under Texas and Louisiana law is summarized here for context.

1. Texas Law

In Texas a premises-liability plaintiff must prove "a duty owed to the plaintiff, breach of the duty, and damages proximately caused by the breach." Generally, there is no duty to protect another person from the criminal acts of a third party. A property owner, however, has "a duty to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee." Texas uses two tests to determine the presence of a duty: (1) the foreseeability of similar incidents; and (2) the foreseeability of immediately preceding conduct.

To determine the foreseeability of similar incidents, "Texas courts first narrow the relevant criminal history to be included in the foreseeability analysis," by evidence of "'specific previous crimes on or near the premises.'" "The courts then compare that narrowed criminal history with the crime in question based on the five *Timberwalk* factors: proximity, publicity, recency, frequency, and similarity." Or, in other words, the court considers: whether any criminal conduct occurred at or near the property; how recently the criminal conduct occurred; how often crime has occurred; how similar the previous crime was to the alleged crime; and

what publicity was given to the instances to indicate what the landlord should have known about them. The property owners, however, bear no duty to regularly inspect criminal records to determine the risk of crime in the area. The general idea is that past criminal history will put the hotel on notice.

In *Timberwalk Apartments, Partners, Inc., v. Tammie Rene Cain*, a tenant sued an apartment owner for negligently failing to prevent a sexual assault. The evidence established that there had been no violent crimes in the complex for the preceding ten years (similarity, recency, and frequency); only one sexual assault occurred within one-mile radius in the previous year (similarity, proximity, and frequency); and the remaining six assault-type crimes in neighboring complexes were not publicized or brought to the landlord's attention (similarity and publicity). The Supreme Court of Texas held that the sexual assault was not foreseeable.

In *Trammel Crow Central Texas, Ltd. v. Gutierrez*, the Supreme Court of Texas analyzed the similarity factor in more detail by comparing a murder with armed robberies, while also narrowing the proximity factor to the immediate premises. *Trammel* involved a murder at the Quarry Market, a shopping mall. In narrowing the relevant criminal history to be included in its foreseeability analysis, the court noted that only violent crimes would signal a future murder:

> In the two years prior to Luis's death, 227 crimes were reported at the Quarry Market. Of these reported crimes, 203 were property and property-related crimes—mostly thefts, but also a handful of burglaries, auto thefts, and incidents of vandalism. Fourteen "other crimes" occurred—thirteen simple assaults and one incident of weapon possession. The remaining ten crimes, all robberies, were classified as violent crimes—a category that also includes murder, manslaughter, rape, and aggravated assault.
>
> Although criminal conduct is difficult to compartmentalize, some lines can be drawn. For instance, we have held that reports of vandalism, theft, and neighborhood disturbances are not enough to make a stabbing death foreseeable. Similarly, although the repeated occurrences of theft, vandalism, and simple assaults at the Quarry Market signal that future property crimes are possible, they do not suggest the likelihood of murder. Accordingly, like the court of appeals, we limit our review to the ten instances of violent crime that took place at the Quarry Market during the two years prior to Luis's death.

The court then applied the five *Timberwalk* factors. As to proximity and publicity, ten other violent crimes occurred at the market, and the property manager knew about the crimes at the time of Luis's death. As to recency and frequency, the court noted that the market had a relatively low rate of violent crime. The chances of a San Antonio resident suffering a violent crime in general was one in 44,760, and the market's expert calculated the odds of suffering a violent crime at the market during the two years prior to Luis's death at one in 1,637,630. As to similarity, the robberies were distinct from the murder because the robbers demanded property, rarely with a weapon, and if an attack happened, it occurred after the robbery. In the attack on Luis in *Trammel*, the assailant missed one shot before firing four shots at Luis's back, and all from a long distance, before taking his wallet. The *Trammel* attack was more like murder than an armed robbery. Thus, the court held that the prior robberies would not have put the property manager on notice that it had a duty to prevent the attack.

In *Jai Jalaram Lodging Group, L.L.C. d/b/a Comfort Inn v. Rhonda E. Leribeus*, a guest sued a motel for injuries sustained in an armed robbery, kidnapping, and aggravated assault originating from the Comfort Inn's parking lot. In the prior year, the following incidents occurred at the Comfort Inn: (1) "someone jumping on the hood of a car"; (2) "theft of property from the motel rooms"; and (3) "theft of money from the register." The parties debated whether the proximity should extend to a one-mile radius, but even then, none of the violent crimes were of the same variety. Applying the *Timberwalk* proximity and recency factors, evidence showed that no violent crimes occurred at the Comfort Inn and none had been reported at the neighboring motels for two years. Further, applying the similarity and frequency factors, the property crimes were neither sufficiently frequent nor of the kind to facilitate violent crimes. Also, as to publicity, there was no evidence that criminal activity within a one-mile radius, per police reports, was widely publicized. The El Paso appellate court found that the armed robbery, kidnapping, and aggravated assault were not foreseeable because of insufficient evidence of similar crimes in the area. Accordingly, the court reversed the trial court's judgment and rendered a take-nothing judgment in favor of the motel.

Texas courts have also considered, after applying the *Timberwalk* factors, whether it was reasonably foreseeable that the injured party would be the victim of the crime alleged. In *Mellon Mortgage Co. v. Angela North Holder*, an on-duty police officer stopped a woman before sexually assaulting her in a nearby parking garage. Applying the *Timberwalk* factors, one would find that a sexual assault might occur. The Supreme Court of Texas found that roughly one violent crime, including rape and murder, occurred every four days at the garage. The Court held, however, that the parking

garage owner could not anticipate that a policeman would lead a woman from several blocks away to sexually assault her in the garage at three in the morning. The garage owner could not anticipate the crime. The court, therefore. held that the garage owner owed no duty to Holder.

As an alternative to the *Timberwalk* factors, the Supreme Court of Texas set out an even more straightforward test known as the foreseeability of immediately preceding conduct test, which it applied in the context of behavior that led to a bar fight. In *Del Lago Partners, Inc. v. Smith*, a bar patron sued a property owner for injuries stemming from a brawl inside the bar. The Court found that the "nature and character of the premises" (a bar) can make criminal activity (a drunken bar fight) foreseeable. Alternatively, the Court found that the conduct immediately preceding the crime (repeated confrontations between patrons about ninety minutes before the brawl) allowed the owner to anticipate criminal conduct.

Other cases applying the *Timberwalk* factors include *Flanagan v. RBD San Antonio L.P.*, 04-16-00761-CV, 2017 WL 5615567, at *1 (Tex. App.—San Antonio Nov. 22, 2017, pet. denied) (affirming the hotel's summary judgment where one vehicular burglary in two years was insufficient to satisfy the recency and frequency factors, and one patron driving his truck into another was not similar to a sexual assault inside a hotel"); *Armstrong v. La Quinta Inns, Inc.*, CIV 99-531 BB/LFG, 2000 WL 36739803, at *1–2 (D.N.M. June 13, 2000) (granting 50(a) judgment as a matter of law where sexually assault victim's only evidence was the theft of three to four televisions and personal belongings), *aff'd*, 12 Fed. Appx. 879 (10th Cir. 2001); and, *Fitzgerald v. Patel*, 03-99-00755-CV, 2000 WL 547017, at *1–2 (Tex. App.—Austin May 4, 2000, no pet.) (affirming summary judgment that the hotel had no duty to a woman who was accidently shot in the head by a guest where the evidence showed only property crimes, like robbery, at a rate of every 2.2 years and one stabbing that did not result in death).

In summary, Texas considers the foreseeability of prior criminal instances (proximity, publicity, recency, frequency, and similarity), whether the victim is a foreseeable victim of such crimes, and whether the property owner had immediate notice that an incident was imminent, such as angry drunks starting a bar fight.

III. Insurance Coverage for Trafficking Liability

Trafficking cases present various coverage issues depending on the type of liability policy, from common general liability policies to more specialized policies such as professional liability and directors and officers liability. They also present procedural issues with respect to obtaining a declaration or otherwise resolving coverage. However, there are few published opinions on coverage for trafficking liability cases. This section of the article outlines these issues and the scant published decisions addressing them under CGL policies.

A. Procedural Issues

1. Justiciable Controversy

A justiciable controversy is required for a court to decide coverage issues. In *Canopius Capital Two Ltd. v. Jeanne Estates Apartments, Inc.* the defendants in a trafficking case did not seek coverage from the insurers, and the court held there was no justiciable dispute. That case concerned the property and business of Tony Alamo Christian Ministries, which forced minors to become "spiritual wives" before subjecting them to frequent sexual, physical, and psychological abuse. At least one of the underlying complaints alleged trafficking liability under Section 1595. The U.S. District Court for the Western District of Arkansas denied the insurer's summary judgment for lack of a justiciable controversy. First, none of the defendant insureds made a direct request to the insurer for defense or indemnification. Second, in one of the underlying suits, the plaintiff settled or nonsuited any remaining claims, removing any justiciable controversy for the court to decide. Third, some of the defendant insureds from another underlying suit opposed the summary judgment by citing a duty to defend and indemnify against the judgment. The defendant claimants, however, stipulated that they had not, and did not, seek insurance proceeds in the collection of these adverse judgments. So, again, there was no justiciable controversy.

2. Intervention

In *M.A. v. Wyndham Hotels & Resorts, Inc.*, the U.S. District Court for the Southern District of Ohio denied the insurer's late motions to intervene because the insurer had no more than a contingent interest in the underlying action. Erie Insurance Exchange sought to intervene under Federal Rule of Civil Procedure 24 to protect its rights in two sex trafficking cases against hotels Erie insured. Erie argued that it should be permitted to intervene because the defendants sought both defense and indemnity under the policy and potential coverage for some of plaintiffs' claims. The court denied Erie's intervention as a right under Rule 24(a) because Erie's coverage interest was contingent on the underlying action, Erie's right to bring a future declaratory judgment would not be impaired if it did not intervene, and the existing parties were sufficient to decide the underlying case.

In the same case, the court also considered Erie's permissive intervention under Rule 24(b). Erie argued that its time-

ly motion shared a common question of law or fact with the main action and, as such, intervention would not cause undue delay or prejudice. Erie asserted that its legal obligations rested on the same factual record of the parties. But, as the court explained, this contingent interest focuses on the policy language, which is "wholly separate from the [sex trafficking] claims in the main action." The court also found prejudice because it would force the plaintiff to fight a coverage dispute in which it did not yet have an interest. And the court found Erie's motions untimely because they were filed without explanation several months after another insurer's earlier intervention attempts. The court denied permissive intervention.

In *Lisa Ricchio v. Bijal, Inc. d/b/a Shangri-La Motel*, the U.S. District Court for the District of Massachusetts permitted intervention by the insurer. Two months after the underlying complaint was filed, Peerless Indemnity Insurance attempted to intervene but was denied. Peerless then filed a separate declaratory judgment action, asserting jurisdiction under 28 U.S.C. § 1367, which was stayed. The court stayed the action, but after the court lifted the stay, it granted Peerless's motion to intervene in the sex trafficking action because it was concerned that it would have no jurisdiction under Section 1367 in the declaration judgment action.

3. Declaratory Judgment Actions

Declaratory judgment actions can provide the insurer with a coverage determination sooner, which courts prefer. For example, Atain Specialty Insurance Company recently filed a declaratory judgment action against Varahi Hotel, LLC and Jane Doe 1 concerning the *Red Roof Inn* cases. Atain seeks a declaration that it has no duty to defend or indemnify Varahi against Jane Doe 1's claims under several policy terms, including a physical abuse exclusion. While the final outcome of some declaratory judgment coverage actions may be protracted depending upon the current state of the underlying lawsuit, such cases can be a tool to discover coverage facts early in the action.

B. Coverage Issues Under CGL Policies

CGL insurance policies generally provide primary liability insurance coverage under two major coverage sections. One section, "Coverage A" includes coverage for "bodily injury" and "property damage" *i.e.*, coverage against claims made for injury to persons, including death, and physical damage to, or loss of use of, tangible property. "Coverage B" includes coverage for "personal and "advertising injury," which is generally an enumerated list of torts such as invasion of privacy, slander and libel, as well as false arrest, detention and imprisonment.

1. Personal and Advertising Injury Exclusions

While trafficking claims often result in bodily injury Coverage B may also be implicated, especially in cases where the claim is excluded under Coverage A.

In the *Ricchio* hotel case, Ricchio alleged that she was kidnapped and taken to a Massachusetts hotel where she was held captive, raped, and abused. Ricchio asserted that the insured hotel knew of the abuse and intentionally assisted with the sex trafficking to profit from it. In turn, Peerless sought summary judgment declaring that it had no duty to defend the insured hotel under either Coverage A or B.

The court found that there was no coverage under Coverage A because under an exclusion for "bodily injury arising out of personal . . . injury." The policy defined "personal . . . injury" to include, among other things, "injury, including consequential 'bodily injury,' arising out of . . . false . . . imprisonment." Ricchio argued for a narrow interpretation of "arising out of" that mirrored "but for" causation, because a separate asbestos exclusion in the policy used broader language. Rejecting Ricchio's argument, the court held that the exclusions dealt with different topics. The court further explained that Ricchio did not explain how injuries could arise only out of her trafficking without her imprisonment. Accordingly, the court held that because Ricchio's injuries arose out of her false imprisonment, they were excluded coverage under Coverage A of the CGL policy.

However, the court found that the insurer did have a duty to defend the hotel under Coverage B of the insured's policy, which covered "personal and advertising injury" caused by an offense arising out of the insured's business. The court had already found that the plaintiff's claims arose out of her false imprisonment, which was covered under Coverage B, and rejected the insurer's argument that her injury arose out of the statutory violation alone. The court also rejected the insurer's argument that the plaintiff's injury did not arise out of the hotel company's business because the company is not "in the business of human trafficking" on the grounds that the renting of the room was part of the insured's business.

2. Criminal Acts Exclusions

Ricchio also raised another common issue in coverage for trafficking cases under CGL policies — criminal acts exclusions. Coverage B contained a "Criminal Acts" exclusion for personal injuries "arising out of a criminal act committed by or at the direction of the insured." Peerless argued that the hotel criminally violated the TVPA to cause Ricchio's injuries, which in turn triggered the exclusion.

The court ruled, however, that Ricchio's complaint was reasonably susceptible to an interpretation that there was coverage under Coverage B. The court interpreted the TVPA to permit civil recovery even absent proof of intentional criminal conduct. While Ricchio's claims were focused on intentional conduct, the broad requirements of the duty to defend allowed the complaint to be "reasonably susceptible" to an interpretation of only civil negligence. Thus, the Criminal Acts exclusion did not apply.

Bodily injury coverage under CGL policies is also typically subject to an exclusion for bodily injury or property damage "expected or intended from the standpoint of the insured." Depending on the allegations in a trafficking complaint, insurers may also argue that this exclusion applies because injury from trafficking is always expected. Given the availability of "should have known" scienter requirements in the TVPA, however, the analysis of the *Ricchio* court may apply to this exclusion as well.

3. Assault & Battery Exclusions

In *Nautilus Insurance Co. v. Motel Management Services, Inc.*, the U.S. District Court for the Eastern District of Pennsylvania held that the insurer had no duty to defend or indemnify the insured because the alleged sex trafficking claims were barred by an assault or battery exclusion to the CGL policy. Nautilus sought a declaration on its duty to defend and indemnify its insured, Motel Management Services, Inc., a motel in Pennsylvania. At the motel, a girl was allegedly "held at gunpoint and threatened to engage in sex acts" in violation of several Pennsylvania kidnapping and rape statutes.

The minor brought claims alleging that the motel knowingly permitted the traffickers' activities, failed to intervene or report the activities, and profited from the rented rooms where the sex acts occurred. She brought her claims for negligence and intentional infliction of emotional distress, including a state trafficking law similar to the TVPA. The motel sought coverage under its CGL policy.

The court held that the minor's claims were excluded under the policy's exclusion for bodily injury that resulted from any "[a]ctual or alleged assault or battery," regardless of the "culpability or intent of any person." The exclusion also expressly included any act or omission relating to the assault, battery, or prevention of assault or battery, including "adequate security," and "emotional distress" arising out of the assault or battery. Thus, the court reasoned that the definition of assault and battery were broad enough to encompass a negligent insured that did not prevent the assault or battery.

On appeal, the Court of Appeals for the Third Circuit affirmed the district court's decision, agreeing that coverage was barred by the Assault or Battery exclusion because the policy excluded claims "arising out of" an assault or battery. Because the assault and battery were the "but for" causes of the minor's injuries — she was ordered at gunpoint to have sex — they arose out of the assault and battery. Other courts have upheld similar exclusions.

4. Abuse & Molestation Exclusions

Some CGL policies include provisions that specifically relate to sexual abuse or molestation, which can impact coverage relating to trafficking claims.

For example, in *Millers Capital Insurance Co. v. Anil Vasant*, the U.S. District Court for the District of Maryland held that the insurer had a duty to defend because the sex trafficking claims were not barred by an abuse and molestation exclusion in the CGL policy. In the underlying suit, Jane Doe plaintiffs had been held at one hotel before the traffickers transported them to the insured's Econo Lodge. There they were forced to perform sex acts and pose for provocative pictures that were posted on a website advertising sex. The Jane Doe plaintiffs alleged claims of negligence (premises liability), negligent training, retention and supervision, and *respondeat superior*.

An Abuse or Molestation exclusion modified the standard CGL coverage form by adding an exclusion to Coverage A and Coverage B. Specifically, it excluded injuries arising from "[t]he actual or threatened abuse or molestation **by anyone** of any person while **in the care, custody or control** of any insured." While the court interpreted the acting language "by anyone" broadly, it interpreted "care custody, and control" as a function of "watching, guarding, or overseeing." In other words, for a hotel to keep an invitee safe, the hotel must be on notice that the invitee is on the premises. The court explained that a hotel cannot care for or guard a guest when it has no knowledge or indication the guest is on its premises.

Examining the record, the court held that there was no evidence that the hotel was ever aware that the victims were on its premises. The record showed that no Econo Lodge staff saw the Jane Does, nor did housekeeping come to the rooms; the clients came in at night; the Jane Does did not go to the hotel common areas or office; and "Jane Does #1 and #3 testified that they were not abused or molested while at the Econo Lodge, but they were falsely imprisoned at the hotel." Being unaware of the victims, the hotel did not have the victims under its care, custody, or control. Accordingly, the court granted summary judgment for the insureds,

requiring Millers Capital to defend and reimburse defense costs already expended.

But, if such "care, custody, and control" language is not present, then an abuse or molestation exclusion may negate coverage. In *Piligra v. America's Best Value Inn*, a Louisiana appellate court affirmed a trial court's holding that the CGL policy's sexual abuse or molestation exclusion applied. Piligra had lost consciousness by consuming alcohol at a nightclub within the hotel. An employee escorted her to a room, leaving her with an unknown male who allegedly raped her. Piligra alleged negligence to an innkeeper standard of care.

The *Piligra* hotel's sexual abuse or molestation exclusion excluded bodily injury for "[t]he actual or threatened abuse or molestation . . . culminating in any sexual act." It also excluded negligent hiring or supervision of an employee. The court explained that molestation implied "a degree of unwanted touching." Piligra's allegations of rape, *i.e.* nonconsensual sex, supported the trial court's finding that the sexual molestation exclusion applied. The absence of control language preserved the exclusion.

Other policies may include express coverage for abuse or molestation claims. For example, the Fifth Circuit interpreted a policy with an endorsement providing: "[I]t is hereby understood and agreed that Bodily Injury and Property Damage includes any act, which may be considered sexual in nature and could be classified as an Abuse, Harassment, Molestation, Corporal Punishment or an Invasion of an individual's right of Privacy or control over their physical and/or mental properties by or at the direction of an Insured . . ." Errors and omissions policies may also provide some coverage, depending upon language and factual context.

1 Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, div. A, 114 Stat. 1464 (2000).
2 Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108–193, 117 Stat. 2875 (2003) (cleaned up).
3 22 U.S.C. § 7102(12).
4 22 U.S.C. § 7102(11).
5 18 U.S.C. § 1591(a) (cleaned up).
6 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, 122 Stat. 5044 (2008); 18 U.S.C. § 1595(a).
7 *See A.B. v. Marriott Int'l, Inc.*, 455 F. Supp. 3d 171, 174, 182–88 (E.D. Pa. 2020) (collecting and discussing trends in sex trafficking cases); *see also Florida Abolitionist v. Backpage.com LLC*, No. 6:17-cv-218-Orl-28TBS, 2018 WL 1587477, at *1 (M.D. Fla. Mar. 31, 2018) (involving sex trafficking conducted through the website Backpage.com).
8 *In re Hotel Indus. Sex Trafficking Litig.*, 433 F. Supp. 3d 1353, 1356 (J.P.M.L. 2020) (collecting cases from Georgia, Massachusetts, Michigan, Hampshire, New York, Ohio, Oregon, Pennsylvania, Texas, Virginia, and Washington).
9 *A.B.*, 455 F. Supp. 3d at 183–86.
10 *See id.* 186–88.
11 *See, e.g.*, *id.* at 182–83 & nn.64–65 (collecting cases); *H.M. v. Red Lion Hotels Corp.*, No. 19-4859 (N.D. Ga.) (plaintiff filed a notice of voluntary dismissal without prejudice of all defendants without ruling on pending motion to dismiss; case closed); *H.G. v. Marriott Int'l, Inc.*, No. 19-13622 (E.D. Mich.) (motions granted); *K.B. v. Inter-Continental Hotels Corp.*, No. 19-1213 (D.N.H.) (granted in part and denied in part); *S.J. v. Choice Hotels Int'l, Inc.*, 473 F. Supp. 3d 147 (E.D.N.Y 2000) (motions granted in part and denied in part); *A.C. v. Red Roof Inns, Inc.*, No. 19-4965 (S.D. Ohio) (motions denied); *C.T. v. Red Roof Inns, Inc.*, No. 19-5384 (S.D. Ohio) (denied as moot); *B. v. Hilton Worldwide Holdings, Inc.*, No. 19-1992 (D. Or.) (granted in part and denied in part); *A.D. v. Wyndham Hotels & Resorts, Inc.*, No. 19-120 (E.D. Va.) (motion denied); *L.W. v. Hilton Worldwide Holdings, Inc.*, No. 19-4171 (S.D. Tex.) (motion denied without opinion with plaintiff voluntarily dismissing hotel).
12 *See Ricchio v. McLean*, 853 F.3d 553, 557 (1st Cir. 2017) (Souter, J., sitting by designation) (reversing the district court's grant of summary judgment to the defendant hotel owner where the kidnapper and hotel manager's high-fives while speaking about "getting this thing going again" was not ambiguous "in light of the allegations of the [hotel manager's] complaisance in response to the several alleged exhibitions of [the kidnapper's] coercive and brutal behavior to a physically deteriorating [victim], who pleaded for help").
13 *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959, 962 (S.D. Ohio 2019).
14 *Id.*
15 *Id.* at 964, 967.
16 *Id.* at 965.
17 *Id.* at 968.
18 *Id.* at 966 (citing *Ricchio v. McLean*, 853 F.3d 553 (1st Cir. 2017); *Lawson v. Rubin*, No. 17-cv-6404 (BMC), 2018 WL 2012869 (E.D.N.Y. Apr. 29, 2018)).
19 *Id.* at 968.
20 *Id.* at 970.
21 *Id.* at 969.
22 *See id.* at 970.
23 *Id.* at 969.
24 *Id.* at 970–72.
25 *Doe 1 v. Red Roof Inns, Inc.*, No. 1:19-cv-03840-WMR, 2020 WL 1872335, at *3 (N.D. Ga. Apr. 13, 2020); *Doe 2 v. Red Roof Inns, Inc.*, No. 1:19-cv-03841-WMR, 2020 WL 1872337, at *3 (N.D. Ga. Apr. 13, 2020); *Doe 3 v. Red Roof Inns, Inc.*, No. 1:19-cv-03843-WMR, 2020 WL 1872333, at *3 (N.D. Ga. Apr. 13, 2020); *Doe 4 v. Red Roof Inns, Inc.*, No. 1:19-cv-03845-WMR, 2020 WL 1872336, at *3 (N.D. Ga. Apr. 13, 2020).
26 *See Doe 1*, 2020 WL 1872335, at *3 (citing 18 U.S.C. §§ 1591(a)(2), 1591(e)(4), 1595(a)).
27 *Id.* (citing *Noble v. Weinstein*, 335 F. Supp. 3d 504, 524 (S.D.N.Y. 2018)).
28 *Id.*

29 *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 767 (Tex. 2010).
30 *See UDR Tex. Props., L.P. v. Petrie*, 517 S.W.3d 98, 100 (Tex. 2017).
31 *Id.* (citation omitted).
32 *Del Lago Partners, Inc.*, 307 S.W.3d at 769 (immediately preceding conduct); *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 759 (Tex. 1998) (foreseeability of similar incidents).
33 *Jenkins v. C.R.E.S. Mgmt., L.L.C.*, 811 F.3d 753, 756 (5th Cir. 2016).
34 *Trammel Crow Cent. Tex., Ltd. v. Gutierrez*, 267 S.W.3d 9, 12 (Tex. 2008) (quoting *Timberwalk*, 972 S.W.2d at 756).
35 *Jenkins*, 811 F.3d at 756 (citing *Timberwalk*, 972 S.W.2d at 759).
36 After *Trammel*, courts have limited the proximity to the complex in question and its immediate environs. *E.g.*, *Flanagan v. RBD San Antonio L.P.*, No. 04-16-00761-CV, 2017 WL 5615567, at *4 (Tex. App.—San Antonio Nov. 22, 2017, no pet.) (collecting cases). Previously, some cases looked as far as 3.5 miles. *Id.* (citing *Tex. Real Estate Holdings, Inc. v. Quach*, 95 S.W.3d 395, 398–99 (Tex. App.—Houston [1st Dist.] 2002, pet. denied)). Control may still be a key element in determining whether nearby areas like the parking lot are part of that proximity. *LaFleur v. Astrodome-Astrohall Stadium Corp.*, 751 S.W.2d 563, 565–66 (Tex. App.—Houston [1st Dist.] 1988, no writ) (Astrodome operators were not liable for injuries photographer sustained across the street from the Astrodome because the operators had neither control nor the right to control the premises).
37 *Timberwalk*, 972 S.W.2d at 756–59.
38 *Id.* at 759.
39 *Id.*
40 *Trammel Crow Cent. Tex., Ltd. v. Gutierrez*, 267 S.W.3d 9, 11–12 (Tex. 2008).
41 *Id.* at 13 (citations omitted).
42 *Id.* at 15.
43 *Id.*
44 *Id.* at 16–17.
45 *Id.* at 17.
46 *Id.*
47 *Id.*
48 *Jai Jalaram Lodging Grp., L.L.C. v. Leribeus*, 225 S.W.3d 238, 240 (Tex. App.—El Paso 2006, pet. denied).
49 *Id.* at 244.
50 *Id.* at 244–45.
51 *Id.* at 245.
52 *Id.*
53 *Id.* at 245–46.
54 *Id.* at 246.
55 *Id.*
56 *Madison v. Williamson*, 241 S.W.3d 145, 153 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (citing *Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654, 656–57 (Tex. 1999)).
57 *Mellon Mortg.*, 5 S.W.3d at 654.
58 *Id.* at 657.
59 *Id.*
60 *Id.*
61 *Id.* at 658.
62 *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 768 (Tex. 2010).
63 *Id.* at 769.
64 *Canopius Capital Two Ltd. v. Jeanne Estates Apartments, Inc.*, No. 4:11-CV-4070, 2016 WL 1178790, at *4 (W.D. Ark. Mar. 23, 2016).
65 *Id.* at *1.
66 *Id.*
67 *Id.* at *6.
68 *Id.* at *4–5.
69 *Id.* at *4. Notably, the underlying case did involve a dispute over apartment complex insurance with Truck Insurance Exchange and Farmers Insurance Exchange. *Kolbek v. Truck Ins. Exch.*, 431 S.W.3d 900, 903 (Ark. 2014). The insurance policy applied to bodily injury and property damage, among other harms, arising out of the ownership, maintenance, or use of the premises. *Id.* at 908. In that case, the Supreme Court of Arkansas ultimately upheld a lower court's findings of fact and conclusions of law, finding that none of the allegations in the complaint were connected to the ownership, maintenance, or use of the apartment premises. *Id.*
70 *Id.* at *5.
71 *Id.* (While the court granted summary judgment as to the underlying suit, it did so because the occurrence occurred outside the policy inception.)
72 *M.A. v. Wyndham Hotels & Resorts, Inc.*, 2:19-cv-849, 2020 WL 1853216, at *1 (S.D. Ohio Apr. 13, 2020).
73 *Id.* at *2.
74 *Id.* at *2–3 (citing *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 638 (1st Cir. 1989); *Nautilus Ins. Co. ex rel. Ecklebarger v. C.C. Rider, Inc.*, No. 1:02-CV-128, 2002 WL 32073073 (N.D. Ind. Nov. 25, 2002); *Nieto v. Kapoor*, 61 F. Supp. 2d 1177 (D.N.M. 1999); *Sachs v. Reef Aquaria Design Inc.*, No. 06 C 1119, 2007 WL 2973841 (N.D. Ill. Oct. 5, 2007)).
75 *Id.* at *3 (citing Fed. R. Civ. P. 24(b)).
76 *Id.*
77 *Id.* (citation omitted).
78 *Id.*
79 *Id.*
80 *Id.* at *4.
81 *Ricchio v. Bijal, Inc.*, 424 F. Supp. 3d 182, 185–86 (D. Mass. 2019).
82 *Id.* at 185.
83 *Id.* at 186.
84 *Id.*
85 *See Atain Specialty Ins. Co. v. Varahi Hotel, LLC*, No. 1:20-cv-01582-WMR (N.D. Ga.).
86 *Ricchio*, 424 F. Supp. 3d at 185.
87 *Id.* at 185, 194.
88 *Id.* at 185.
89 *Id.* at 189.
90 *Id.*
91 *Id.* at 191.
92 *Id.*
93 *Id.* at 190.
94 *Id.* at 192.

95 *Id.* at 188, 195.
96 *Id.* at 192.
97 *Id.*
98 *Id.*
99 *Id.*
100 *Id.* at 195.
101 *Id.* at 193–94.
102 *Id.* at 195.
103 *Id.*
104 *Nautilus Ins. Co. v. Motel Mgmt. Servs., Inc.*, 320 F. Supp. 3d 636, 643 (E.D. Pa. 2018), *aff'd*, 781 F. App'x 57 (3d Cir. 2019).
105 *Id.* at 637.
106 *Id.* at 638, 642–43.
107 *Id.* at 639.
108 *Id.*
109 *Id.* at 639, 641.
110 *Id.* at 641.
111 *Id.* at 643.
112 *Id.* The District Court substantiated its conclusion by stating that requiring an insurer to cover claims for intentional torts or criminal acts ran afoul with public policy. *Id.* The District Court stated that "financially benefitting from human sex trafficking is criminalized under the Pennsylvania Human Trafficking Law." *Id.* Thus, Pennsylvania public policy precluded coverage. *Id.* Note that public policy depends on the particular state. For example, there is authority in Texas that public policy prohibits allowing a person from insuring against his intentional misconduct. However, this is subject to exceptions, including that it does not apply to negligent supervision claims. *Roman Catholic Diocese of Dallas v. Interstate Fire & Cas. Co.*, 133 S.W.3d 887, 896 (Tex. App.—Dallas 2004, pet. denied).
113 *Nautilus Ins. Co. v. Motel Mgmt. Servs., Inc.*, 781 F. App'x 57, 60 (3d Cir. 2019).
114 *See id.* at 60 (collecting cases). The Third Circuit did not address whether public policy would also preclude coverage for the alleged criminal conduct and intentional torts because the insurance policy excluded coverage. *Id.* at 61 n.5.
115 In *Piligra v. America's Best Value Inn*, the court found that the necessary use of force or violence in rape precluded recovery for the plaintiff under the assault and battery exclusion. 10-254, p. 6 (La. App. 3 Cir. 10/6/10); 49 So.3d 479, 484; *see also Espinosa v. Accor N. Am., Inc.*, 2014-0001, p. 13–18 (La. App. 4 Cir. 9/24/14); 148 So.3d 244, 253–56 (where a CGL's assault and battery exclusion combined with a reinstating endorsement allowed a limited recovery when insured hotel failed to provide adequate security to guest who was robbed and shot in parking lot), *writ denied*, 2014-2446 (La. 2/13/15); 159 So.3d 466, *and writ denied*, 2014-2453 (La. 2/13/15); 159 So.3d 467; and *Ledbetter v. Concord Gen. Corp.*, 95-0809, p. 5–8 (La. 1/6/96); 665 So.2d 1166, 1169–71, *amended*, 95-0809 (La. 4/18/96); 671 So.2d 915 (holding that rape was clearly excluded by the assault and battery exclusion, but kidnapping was not because kidnapping did not necessarily involve force or violence upon another person).
116 *Millers Capital Ins. Co. v. Vasant*, No. RDB-18-0553, 2018 WL 5295899, at *1 (D. Md. Oct. 25, 2018).
117 *Id.* at *2.
118 *Id.*
119 *Id.* at *3.
120 *Id.* at *1–2.
121 *Id.* at *2 (emphasis added).
122 *Id.* at *4–5.
123 *Id.* at *6.
124 *Id.* at *6.
125 *Id.* at *7.
126 *Id.* at *6–7.
127 *Id.* at *7.
128 *Id.*
129 *Piligra v. Am.'s Best Value Inn*, 10-254, p. 13 (La. App. 3 Cir. 10/6/10); 49 So.3d 479, 488.
130 *Id.* at 482.
131 *Id.*
132 *Id.*
133 *Id.* at 484.
134 *Id.*
135 *Id.* at 485 (citing *P.D. v. S.W.L.*, 2007-2534 (La. App. 1 Cir. 7/21/08); 993 So. 2d 240, 244, *writ denied*, 2008-2770 (La. 2/13/09); 999 So.2d 1146).
136 *Id.* The policy also included a "Restaurant, Bar, Tavern, Night Clubs, Fraternal and Social Clubs Endorsement," which also excluded coverage. *Id.*
137 *Western Heritage Ins. Co. v. Magic Years Learning Ctrs. & Child Care, Inc.*, 45 F.3d 85, 88 (5th Cir. 1995); *see also, e.g.*, *McCain v. Promise House, Inc.*, No. 05-16-00714-CV, 2018 WL 2042009, at *1 (Tex. App.—Dallas May 2, 2018, no pet.) (enforcing settlement of negligence claims against employer relating to sexual abuse where the policy explicitly covered bodily injury "arising out of 'sexual or physical abuse'").

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