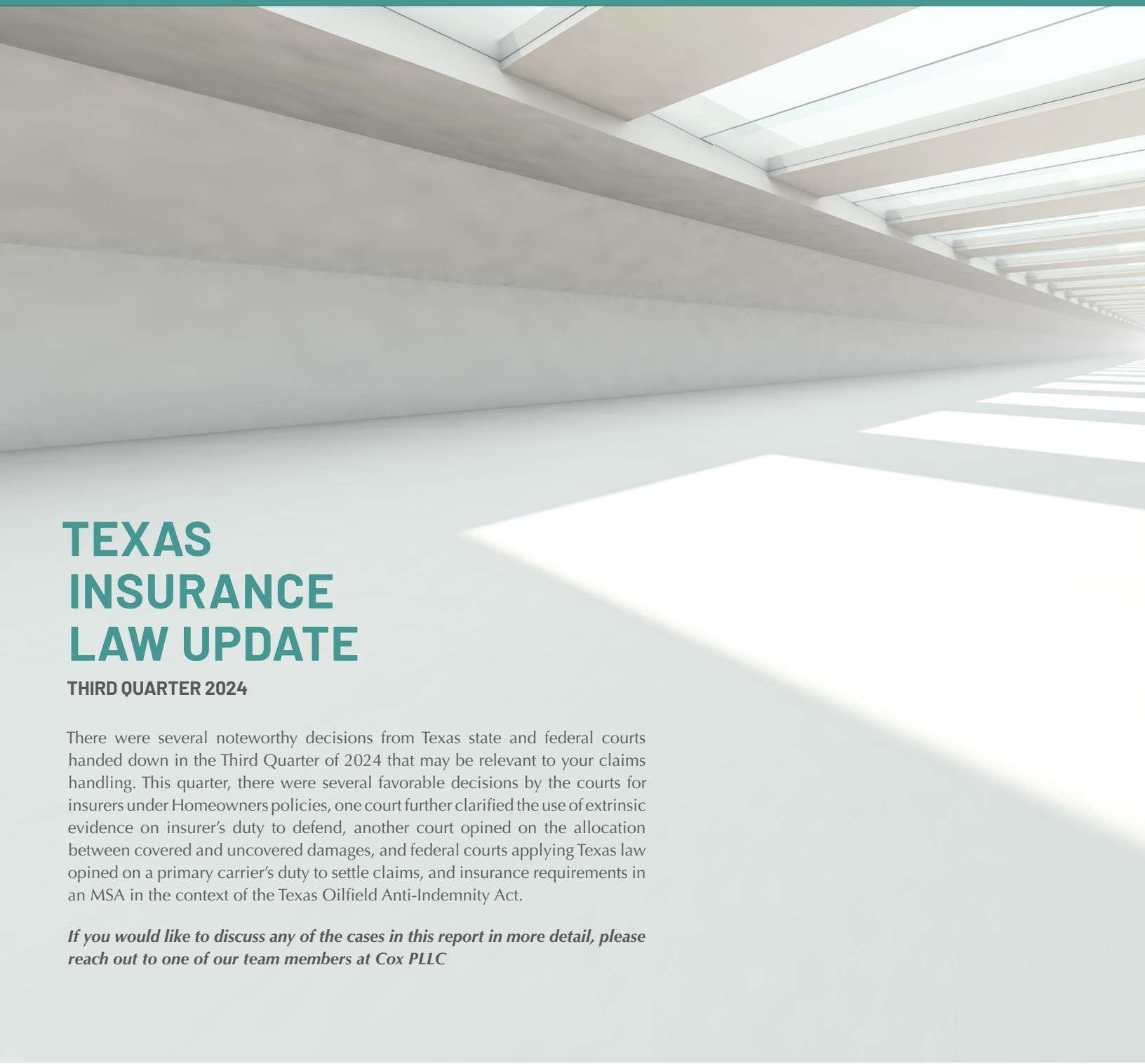
COX P.L.L.C. NEWS

OUR INSURANCE COVERAGE TEAM UPDATES OUR CLIENTS ABOUT TEXAS INSURANCE LAWS AND NOTEWORTHY DECISIONS FROM TEXAS STATE AND FEDERAL COURTS.



TEXAS INSURANCE LAW UPDATE

THIRD QUARTER 2024

There were several noteworthy decisions from Texas state and federal courts handed down in the Third Quarter of 2024 that may be relevant to your claims handling. This quarter, there were several favorable decisions by the courts for insurers under Homeowners policies, one court further clarified the use of extrinsic evidence on insurer's duty to defend, another court opined on the allocation between covered and uncovered damages, and federal courts applying Texas law opined on a primary carrier's duty to settle claims, and insurance requirements in an MSA in the context of the Texas Oilfield Anti-Indemnity Act.

If you would like to discuss any of the cases in this report in more detail, please reach out to one of our team members at Cox PLLC

COMMERCIAL GENERAL LIABILITY/ EXCESS/UMBRELLA

FIFTH CIRCUIT REVERSES AND REMANDS FOR A DETERMINATION OF COVERED AND UNCOVERED DAMAGES

The *Fifth Circuit in TIG Ins. Co., Woodsboro Farmers Coop.*, distinguished between defective installation or assembly and "property damage" under Texas law. In March 2013, Woodsboro Farmers Cooperative ("Woodsboro") contracted with E.F. Erwin, Inc. ("Erwin") to construct two Brock 105-foot diameter and 65-foot high grain silos in Woodsboro, Texas. Brock silos start as kits shipped from the manufacturer and are then assembled according to the manufacturer's manuals and specifications and thus it requires putting the pieces together pursuant to the instructions.

Erwin subcontracted the assembly of the grain silos to AJ Constructors, Inc. ("AJC") to construct the silos, with Erwin responsible for supervising the work. AJC began constructing the silos in May 2013 and completed construction in June or early July 2013. At various stages, Erwin inspected the quality and progress of AJC's work and although Erwin observed some cosmetic problems in the roofing, Erwin determined the silos were structurally sound and not defective. Erwin completed the rest of the project on November 1, 2013.

Before Woodsboro tendered its final payment, it noticed several defects that caused the silos to leak. To address the leaks, Woodsboro and Erwin signed an addendum to their original contract wherein Erwin agreed to repair all deficiencies. Sometime between November 2013 and May 2014, Erwin unsuccessfully attempted repairs. Woodsboro then contacted Buck Pitcock of Pitcock Supply, Inc. ("Pitcock"), to inspect them.

Pitcock observed numerous faults with the silos' assembly, including missing or loose bolts; gaps in the tank walls and ceiling; incorrectly installed tank stiffeners; improper sealing; and unsecured roofing. Pitcock concluded that the failure to secure the roofs properly allowed them to "flex and move" in the wind and weather, causing the silos' metal parts to fatigue and bend, which Pitcock attributed to AJC's "poor workmanship." Because the silos are constructed by jacking up each section, starting with the roof, they had to be deconstructed in their entirety to fix the damage and then reconstructed.

In March 2015, Woodsboro hired Pitcock to repair the silos. New Brock kits were purchased because certain parts were so damaged they could not be re-used. When Pitcock finished its work in June 2015, the total repair and replacement cost was $805,642.74. At arbitration, the panel found AJC had negligently constructed the silos; the silos were defective and did not conform to the construction contract and subcontract; and Erwin was unwilling or unable to repair them. The panel awarded Woodsboro a total of $988,073.25 in damages. A Texas state court confirmed the award and issued a final judgment in September 2022.

In December 2018, TIG Insurance Company ("TIG"), sued Woodsboro and Erwin in the United States District Court for the Southern District of Texas, invoking diversity jurisdiction, and seeking declaratory relief on its duty to defend and indemnify as

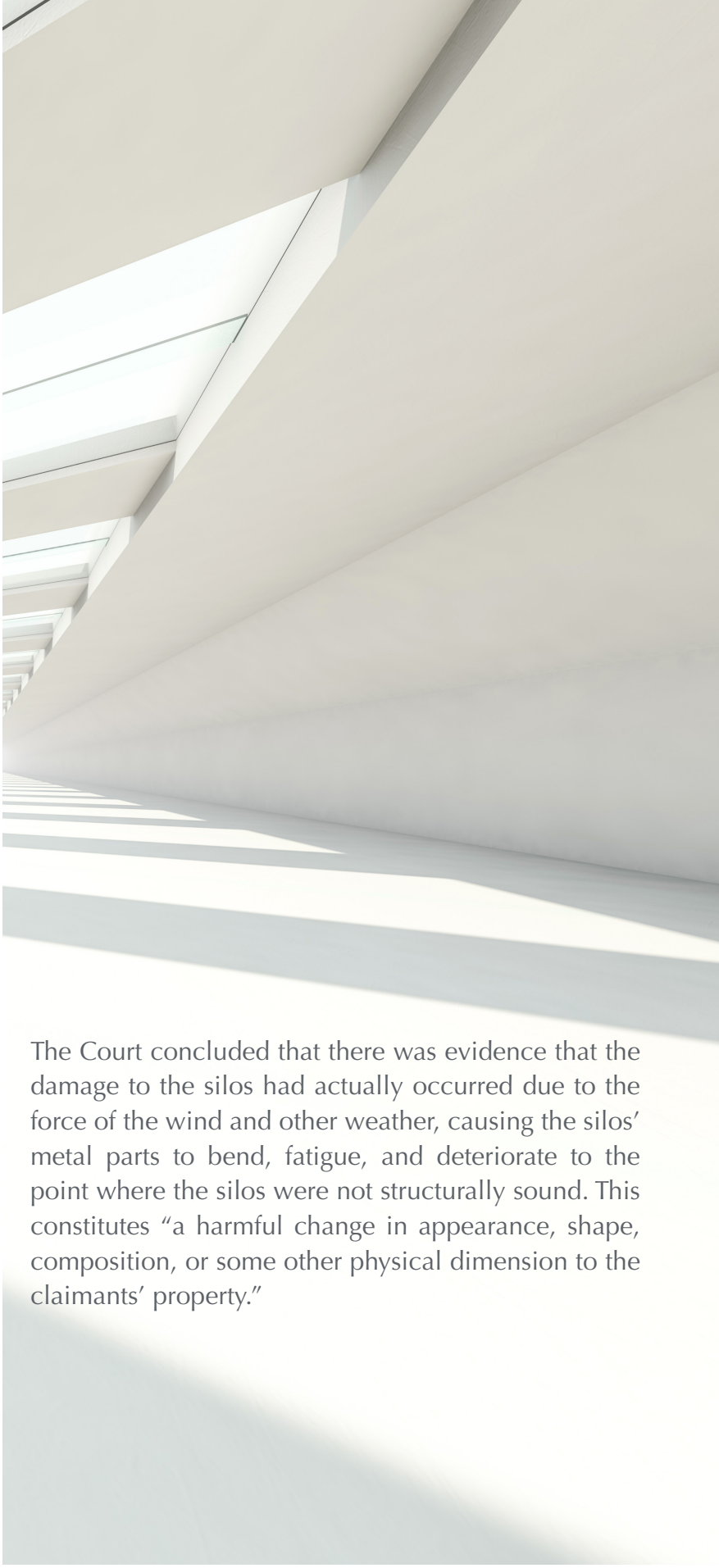
Erwin's liability insurer. In March 2022, the district court ruled on the parties' cross-motions for summary judgment by granting TIG's motion as to its duty to defend, finding the underlying pleadings failed to show that Erwin's breaches resulted in "property damage" as required for indemnity coverage under to apply. In June 2023, the district court granted the remainder of TIG's motion for summary judgment as to its duty to indemnify Erwin. The Court concluded there was no "physical injury to tangible property" or "loss of use" because Erwin's breach of the contract was separate and apart from the defective construction of the silos by AJC.

Initially, the Fifth Circuit noted that the Texas Supreme Court in *U.S. Metals, Inc., v. Liberty Mut. Group, Inc.*, 490 S.W.3d 20 (Tex. 2015), had described "physical injury to tangible property" for purposes of insurance coverage as requiring "tangible, manifest harm and does not result merely upon the installation of a defective component in a product or system." The TIG court further noted that what was needed to show physical injury apart from "intangible damage, such as diminution in value;" was "a harmful change in appearance, shape, composition, or some other physical dimension to the claimants' property." Thus, "faulty workmanship that merely diminishes the value of the [property] without causing physical injury or loss of use does not involve 'property damage.' "

The dispute centered on whether the problems with the silos were restricted to defective assembly, or whether Erwin caused tangible, manifest harm to the silos. Woodsboro insisted its evidence demonstrated the damage was from wind and weather which caused the silos' metal parts to degrade, bend, and fatigue. Although AJC's faulty workmanship exposed the silos' metal parts to harm, Woodsboro incurred repair and reconstruction costs because the wind and weather damaged the parts to such an extent that they became unusable. Despite the fact the arbitration panel had held that the silos were defective "as originally constructed," the Fifth Circuit held that did not mean Woodsboro's damages were exclusive of physical injury to the silos was caused by the wind and weather.

The Court concluded that there was evidence that the damage to the silos had actually occurred due to the force of the wind and other weather, causing the silos' metal parts to bend, fatigue, and deteriorate to the point where the silos were not structurally sound. This constitutes "a harmful change in appearance, shape, composition, or some other physical dimension to the claimants' property."

The Court also held that some of the damage to the silos was not on account of wind and weather and may be attributable to the defective construction. As such, the Fifth Circuit remanded the matter back to the district court for further proceedings to permit an allocation between covered and uncovered damages.



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FEDERAL COURT CLARIFIES MONROE'S IMPACT ON THE DUTY TO DEFEND: NO BURDEN TO PRESENT EXTRINSIC EVIDENCE

In the recent case of *Mid-Continent Casualty Co. v. Vibrant Builders, LLC*, the United States District Court for the Northern District of Texas offered significant clarification on the role of extrinsic evidence in determining an insurer's duty to defend under Texas law. Specifically, the case sheds light on the Texas Supreme Court's ruling in *Monroe Guaranty Insurance Co. v. BITCO General Insurance Corp.*, which carved out a narrow exception to the traditional eight-corners rule but made clear that this exception does not impose new burdens on insurers or insureds to provide extrinsic evidence.

Mid-Continent Casualty Company sought a declaratory judgment, claiming it had no duty to defend Vibrant Builders in a lawsuit brought by Moser Up at Henderson, Inc. The lawsuit alleged negligence by Vibrant during the construction of condominiums, leading to property damage. Mid-Continent argued that it was not required to defend or indemnify Vibrant because the alleged damages either occurred outside the policy's coverage period or fell under policy exclusions. A central issue was the timing of the damage, as the underlying complaint did not specify when the property damage occurred. Mid-Continent contended that without clear allegations regarding the dates of damage, it had no obligation to defend.

In its motion for summary judgment, Mid-Continent relied on *Monroe* to assert that extrinsic evidence was necessary to determine whether the property damage fell within the coverage period, as the complaint was silent on the timing of the alleged damage.

However, the Court rejected this argument, clarifying that *Monroe* does not require either the insured or insurer to present extrinsic evidence. Instead, the Court explained that Monroe allows extrinsic evidence to be considered, but only if it meets specific criteria: it must solely address coverage issues, not overlap with the merits of the underlying case, and must not contradict the facts in the complaint. The court emphasized that the use of extrinsic evidence is permissive, not mandatory, and when such evidence is not available, the traditional eight-corners rule remains the default framework.

The Court also addressed Mid-Continent's duty to defend in the absence of specific allegations about the timing of the property damage. Citing Texas case law, the Court noted that if a complaint is silent on the dates of the alleged damage, the insurer may still have a duty to defend if the allegations could potentially fall within the policy period.

In this instance, the court found that the broad property damage allegations in the underlying complaint—despite lacking date specificity—were sufficient to trigger Mid-Continent's duty to defend. Any ambiguities in the pleading were resolved in favor of the insured, consistent with Texas's long-standing rule that pleadings should be construed in the insured's favor in such cases.

The Court's decision reaffirms the broad scope of the duty to defend under Texas law, while also clarifying the limited and conditional role of extrinsic evidence post-Monroe. Although *Monroe* permits courts to consider extrinsic evidence in cases where the eight-corners rule alone does not resolve coverage questions, it does not compel either party to produce such evidence. The eight-corners rule remains the primary method for determining an insurer's duty to defend unless the specific conditions outlined in Monroe are satisfied. Moreover, the ruling underscores the principle that when the timing of the alleged damage is not explicitly stated in the pleadings, insurers must still provide a defense if the claims could potentially fall within the policy period. Insurers cannot rely solely on the absence of precise timing allegations to avoid defense obligations.

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NORTHERN DISTRICT OF TEXAS DENIES SUMMARY JUDGMENT IN STOWERS DISPUTE BROUGHT BY EXCESS INSURER AGAINST PRIMARY INSURER FOR FAILURE TO SETTLE CLAIMS

In *Endurance American Insurance Co. v. Lloyd's Syndicate 3624*, the U.S. District Court for the Northern District of Texas considered whether Lloyd's Syndicate 3624 ("Hiscox"), as the primary insurer, acted reasonably in rejecting settlement offers, ultimately exposing the excess insurer, Endurance American Insurance Company ("Endurance"), to an excess judgment. Both insurers filed motions for summary judgment, with Hiscox seeking a ruling that it had acted reasonably in rejecting the settlement offers and Endurance arguing that it was entitled to recover supplementary payments that Hiscox allegedly failed to make under the primary policy. Endurance claimed that Hiscox's failure to pay these amounts—such as court costs and interest—constituted a breach of its contractual obligations.

The case arose from a personal injury lawsuit against Atlantic Housing Management LLC ("Atlantic"), which held a $1,000,000 primary insurance policy with Hiscox and excess coverage with Endurance. The resident-plaintiff, injured on Atlantic's property, initially demanded $3,000,000 in settlement. Later, the plaintiff's counsel offered to settle the case for $1,000,000—the limit of Hiscox's policy. Hiscox rejected the offer, and the case proceeded to trial, resulting in a $3,500,000 jury verdict. Endurance, as the excess insurer, was required to cover the portion of the judgment exceeding Hiscox's policy limit. Endurance then brought suit, arguing that Hiscox had unreasonably failed to settle within its limits, thereby exposing both Atlantic and Endurance to an excess judgment.

The *Stowers* doctrine plays a central role in this dispute. Under Texas law, the Stowers duty requires an insurer to exercise ordinary care in the settlement of claims when there is a settlement demand within policy limits. If the insurer fails to accept a reasonable settlement offer, it can be liable for amounts exceeding the policy limits. The doctrine is designed to protect both the insured and, by extension, excess insurers from the risk of excess judgments. In this case, Endurance argued that Hiscox violated its *Stowers* duty by not accepting the plaintiff's $1,000,000 settlement offer, which was within its policy limits.

Hiscox contended that it acted reasonably in rejecting the $1,000,000 offer because, shortly thereafter, the plaintiff's counsel indicated a willingness to settle for less. Hiscox believed it could negotiate a better settlement, thereby saving money. The Court, however, found that there was a factual dispute as to whether this belief was reasonable. Specifically, there was no guarantee that the plaintiff would actually settle for less than $1,000,000, and Hiscox's failure to act on the $1,000,000 offer raised questions about whether it had exposed both the insured and the excess insurer to unnecessary risk. The Court noted that these factual issues regarding Hiscox's decision-making precluded granting either insurer's motion for summary judgment.

The Court also examined a second settlement discussion, where the plaintiff's counsel allegedly indicated a willingness to settle for $500,000. Hiscox argued that this was not a formal settlement offer, and thus, no *Stowers* duty was triggered. Endurance, however, pointed to internal records from Hiscox, which suggested that the $500,000 figure was a serious settlement number that Hiscox had considered but failed to act upon. The Court found that this created another factual dispute, which required further examination at trial. The nature of the settlement discussions and the clarity of the terms are crucial to determining whether a *Stowers* demand was made, and the court could not resolve these questions on summary judgment.

Ultimately, the *Stowers* analysis in this case highlights the delicate balance primary insurers must maintain in handling settlement negotiations. They are not only protecting their insured's interests but must also be mindful of the potential exposure of excess insurers. A primary insurer's failure to settle within policy limits when a reasonable insurer would have done so can result in significant financial consequences, as seen here, where Endurance was forced to cover the excess judgment.

By denying both motions for summary judgment, the Court underscored that disputes over the reasonableness of settlement decisions are often fact-intensive and must be carefully examined in light of all the circumstances. Whether Hiscox's decision to reject the $1,000,000 offer, based on the belief it could secure a lower settlement, was reasonable is a question that will ultimately be decided at trial.

PERSONAL AND COMMERCIAL AUTO

COURT REJECTS DEFAULT SUMMARY JUDGMENT BECAUSE PLAINTIFF FAILED TO FILE A RESPONSE BUT FINDS UM/UIM "OWNED BY" EXCLUSION PRECLUDED COVERAGE AS A MATTER OF LAW

The United States District Court for the Northern District of Texas, Dallas Division, recently granted Safeco Insurance Company of America's motion for summary judgment and dismissed the insured's breach of contract claims.

In *Matei v. Safeco Ins. Co. of Am.*, Matei purchased automobile and umbrella insurance policies from Safeco. Matei was involved in a vehicle collision on February 9, 2019, during the policy period, and allegedly suffered injuries. Matei made a claim against the other driver's insurance and was paid under that policy. Matei also made claims with Safeco for PIP and a UM/UIM claim. Safeco denied both the PIP and UM/UIM claims. Matei filed suit against Safeco and The Phoenix Integra Insurance Services in state court for breach of contract, violations of the Texas Insurance Code, and breach of duty of good faith and fair dealing. The insurers successfully severed the breach of contract claim against Safeco and the other extra-contractual claims against Safeco and Phoenix, which allowed Safeco to remove the breach of contract cause of action to federal court on diversity jurisdiction grounds.

Safeco moved for summary judgment on the breach of contract claim in federal court. The sole dispute on Safeco's motion was whether Safeco breached the auto insurance and umbrella policy by improperly denying coverage for Matei's claim for UM/UIM coverage. Under Texas law, there is no breach of contract claim until coverage under the policy is established. Matei did not file a response to the motion. The Court first addressed the effect of failing to file a response to a motion for summary judgment.

The Court reasoned that "[W]hen a nonmoving party does not file any response to a motion for summary judgment, the "failure to respond does not permit the court to enter a 'default' summary judgment." The Court held that a "motion for summary judgment cannot be granted simply because there is no opposition, even if failure to oppose violated a local rule." However, the Court did state that a court "may grant an unopposed summary judgment motion if the undisputed facts show that the movant is entitled to judgment as a matter of law." "[A]lthough the court is not permitted to enter a 'default' summary judgment, the court is allowed to accept the evidence adduced by plaintiffs as undisputed and may grant summary judgment if the motion and supporting materials show plaintiffs are entitled to it." Here, the pleading was not verified, Matei did not present any summary judgment evidence, however, the court Cccepted the evidence presented by the moving party.

The relevant portion of the auto policy exclusion stated: "We do not provide Uninsured/Underinsured Motorist Coverage for bodily injury sustained: 1. By an insured while occupying, or when struck by, any motor vehicle owned by that insured which is not insured for this coverage under this policy."

Here, Safeco established that Matei owned and was driving a 2017 Acura NXS at the time of his accident, which was not covered under Matei's auto policy with Safeco. Instead, the evidence showed that the vehicle was covered by another insurance company, American Modern Home Insurance. The court determined that Matei was not entitled to UM/UIM coverage by the policy and could not bring a claim for breach of contract against Safeco.

The Court went on to consider the umbrella policy, which stated: "This policy does not apply to any: 7. amounts payable under any b. uninsured motorists or underinsured motorists coverage or any similar coverage, unless this policy is endorsed to provide such coverage as shown in the Declarations."

Summary judgment evidence confirmed there was no such declaration providing for amounts payable under any UM/UIM coverage.The Court concluded that Matei was not entitled to payment for UM/UIM coverage under the policy and did not have a breach of contract claim against Safeco, thus granting Safeco's motion for summary judgment.

HOMEOWNERS AND COMMERCIAL PROPERTY

TEXAS FOURTEENTH COURT OF APPEALS IN HOUSTON AFFIRMS SUMMARY JUDGMENT FOR THE INSURER AFTER IT RESCINDED THE POLICY WHERE THE INSURED FAILED TO DISCLOSE IN THE POLICY APPLICATION A PRIOR INSURANCE FRAUD CONVICTION

In *Palma v. Allied Trust Insurance Company*, Jose Palma ("Palma") purchased a homeowners insurance policy from Allied Trust Insurance Company ("Allied"). A fire occurred at Palma's home during the Allied policy period and Palma submitted a claim against the policy. When Allied investigated the claim, it learned Palma had a prior insurance fraud conviction which Palma failed to disclose on his application for the Allied policy. Noting it would not have insured Palma had he disclosed the prior insurance fraud conviction, Allied sent Palma a letter rescinding the policy asserting his misrepresentation rendered the policy void.

Palma subsequently filed suit against Allied alleging breach of contract, breach of the duty of good faith and fair dealing, deceptive trade practices and unconscionable conduct, violations of the Texas Prompt Payment of Claims Act and Insurance Code, unfair insurance practices, fraud, and conspiracy. In its answer, Allied asserted, among other defenses, that it properly rescinded the policy due to Palma's "material misrepresentation." Allied filed a traditional motion for summary judgment arguing: (1) the policy was voided by its "concealment or fraud" provision; (2) Palma made a material misrepresentation; (3) Allied acted and relied on Palma's misrepresentation; and (4) the policy was void due to Palma's material misrepresentation. Allied asserted that Palma made the material misrepresentation with the intention that Allied act upon the misrepresentation and, but for the misrepresentation, Allied would not have contracted with Palma. As support, Allied submitted: 1) Palma's application; 2) the policy; 3) a certification of completion document; 4) correspondence with the agent; and 5) Palma's conviction for insurance fraud. In response, Palma argued there was no intentional or material misrepresentation and further argued that under Texas Insurance Code § 705.004(c), "it is a question of fact whether a misrepresentation for the policy or in the policy itself was material to the risk or contributed to the contingency or event on which the policy became due and payable." As evidence that there was no intentional or material misrepresentation, Palma submitted Allied's letter advising the letter was void due to Palma's misrepresentation.

The trial court granted summary judgment in Allied's favor on all claims without specifying the reasons for the decision. Palma then filed a motion for new trial and a motion for reconsideration based on the argument that Allied failed to prove the misrepresentation was material or intentional. After the trial court failed to rule on the motion, Palma appealed.

On appeal, Palma argued there was no material or intentional misrepresentation and that under Texas Insurance Code § 705.004(c) and common law, "whether a misrepresentation is material is a question of fact." Palma further argued that because Allied failed to allege or support facts that 1) Palma's misrepresentation was material or 2) the misrepresentation contributed to the event or contingency on which the policy became due and payable, summary judgment was improper. However, Allied contended there was undisputed evidence in the record to establish Palma's misrepresentation was material, including its own letter to Palma asserting the misrepresentation was material. Allied further noted that there was no evidence from Palma to the contrary.

"'Materiality is viewed as of the time of the issuance of the policy, . . . and if the representation concerned a matter which was material to the risk at that time, and did actually induce the insurer to issue the policy, . . . it is grounds for avoidance of the policy without proof that the condition misrepresented actually caused the loss.'"

Allied argued that Palma indicated he had never been convicted of, in relevant part, insurance fraud and that Palma agreed, via the "Applicant's Statement" in the application, that the policy would be void if information provided in the application was false or misleading such that the misrepresentation would affect the premium assessed or eligibility of the risk per Allied's underwriting guidelines. In its letter rescinding the policy, Allied advised Palma that it would have not issued the policy at all if Allied knew of the insurance fraud conviction at the time it issued the policy. The appellate court concluded the evidence submitted by Allied established the misrepresentation by Palma was material to the risk. Palma was not able to point to any evidence raising a question of fact on this issue and maintained that whether a misrepresentation is material to a risk is always a question of fact relying on § 705.004(c) that "'[i]t is a question of fact whether a misrepresentation made in the application for the policy or in the policy itself was material to the risk.'" The Court overruled Palma's first issue on appeal noting that while Allied submitted undisputed evidence to support its defense, Palma failed to provide evidence to dispute Allied's facts.

Next, Palma argued that Allied could not have relied on the misrepresentation because Palma did not submit the application until after Allied issued the policy. However, because Palma failed to raise this argument with the trial court, Allied argued that Palma waived the argument. The appellate court agreed with Allied that Palma waived this argument on appeal and overruled Palma's second issue.

Finally, Palma argued that § 705.004, which provides that a false statement in an application does not make a policy void or voidable, is not a defense against a suit brought on the policy "if it is shown at trial" that the misrepresentation was material to the risk, a policy cannot be voidable unless the matter goes to trial. Again, however, Palma had not raised this issue with the trial court and the appellate court concluded Palma had not preserved the issue for review. Moreover, the Court advised that even if it found the issue was preserved, the plain language of the statute indicated reliance on a false statement is not a defense to a suit brought to enforce the policy but that it is a defense where an insurer demonstrates the misrepresentation is material to the risk. The Court further noted the common law also sets forth requirements an insurer must meet to establish its defense. The Court concluded that none of the requirements prevented an insurer's ability to obtain summary judgment on its defense where facts are undisputed.

Here, Palma failed to raise the argument with the trial court that there could be no reliance by Allied on the application because was submitted after the policy was issued and, therefore, the issue was waived on appeal and there was no evaluation of the claim by the appellate court. If the issue had not been waived upon appeal, Allied would have had the burden to prove, among the other factors, that it relied on Palma's false representation to properly rescind the policy.

THE FEDERAL DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GRANTS SUMMARY JUDGMENT FOR THE INSURER WHERE THE INSUREDS FAILED TO COOPERATE, PROVIDE REQUIRED DOCUMENTS, OR ALLOW INSPECTION OF ALLEGEDLY DAMAGED PERSONAL PROPERTY

In *Ansah v. Nationwide Prop. & Cas. Ins. Co.*, the insureds purchased a homeowners policy from Nationwide. Following a freeze event on February 17, 2021, the insureds made a claim for damages to their dwelling and personal property caused by the freeze. While investigating the claim, Nationwide paid $87,122.07 for damage to the dwelling and at least $35,984.83 for damage to personal property. Disagreeing with Nationwide's valuation, the insureds invoked the Policy's appraisal provision and the appraisers determined the actual cash value of the damage to the dwelling to be only $78,936.05. In addition, the appraisal of the personal property was not completed.

Nationwide sent a letter to the insureds' counsel stating the appraisal of the insured's personal property was delayed because Nationwide's appraiser was not provided the requested detailed list of damaged personal property or allowed to view the items claimed to be damaged. Nationwide again requested the information and cited the insureds' duties under the policy, which included a duty to show damaged property. Nationwide's appraiser advised that the insureds' appraiser confirmed the allegedly damaged personal property had been disposed of and there were not any photos or documentation of the items disposed of. Subsequently, counsel for the insureds further argued that Nationwide's request for recovery of the depreciation portion of the clients' items was unwarranted, that it was not a requirement under the policy, and that Nationwide had failed to provide a basis for the request.

The insured then sued Nationwide, alleging breach of contract, breach of the duty of good faith and fair dealing, violations of the Texas Insurance Code and Texas Deceptive Trade Practices Act, common law fraud, and conspiracy.

Nationwide moved for summary judgment on all claims. As to the breach of contract claim, Nationwide argued it has no duty to provide coverage where the insured fails to cooperate in the investigations or fails to show Nationwide the damaged property if the failure prejudices Nationwide. The insureds argued that they made the personal property available for inspection. However, their only evidence was a list of items claimed to be damaged. The Court concluded the list did not satisfy the policy requirements to cooperate, submit an inventory supported by bills or receipts, or allow Nationwide or its appraiser to view the damaged property. Accordingly, the Court concluded the insureds' failure prejudiced Nationwide's appraisal and found Nationwide had no duty to make further payment as to damaged personal property.

As to the insureds' breach of the duty of good faith and fair dealing claim, the Court noted that under Texas law, while a bad faith claim generally cannot survive in the absence of a valid claim under the policy, there is an exception if the insurer's bad faith causes an injury independent of the loss of policy benefits. The Court found Nationwide performed its obligations under its policy and that the insureds provided no evidence of an independent injury. As to the insureds' claim under the Texas Prompt Payment of Claims Act, the Court found the claim failed because the insureds failed to provide evidence that Nationwide was obligated to pay more than it had already paid or that Nationwide failed to meet any of the act's deadlines. As to the insureds' claims of violations of the Texas Insurance Code, the court found the claim failed because the insureds failed to provide evidence that Nationwide engaged in any of the practices prohibited by the code. Finally, as to the insureds' fraud and conspiracy claims, the insureds failed to allege or provide evidence of a material false representation by Nationwide or how they relied on same and there was no evidence to support the fraud conspiracy claim. Therefore, the Court found that all of the insureds' claims against Nationwide failed and granted summary judgment in favor of Nationwide.

The Court found the claim failed because the insureds failed to provide evidence that Nationwide was obligated to pay more than it had already paid or that Nationwide failed to meet any of the act's deadlines.

THE FEDERAL DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GRANTS SUMMARY JUDGMENT FOR HOMEOWNER'S INSURER BASED ON THE POLICY'S EARTH MOVEMENT EXCLUSION AND ANTI-CONCURRENT CAUSATION CLAUSE

In *Deatley v. AmGuard Insurance Company*, the parties disputed whether damage to the insured's home's foundation was caused by a plumbing leak or another source not covered by the insured's homeowners policy with AmGuard.

The policy covered foundation damage caused by, among others, plumbing leaks, but not losses caused by earth movement. Around the beginning of January 2023, the insured discovered damage, including cracks in his home's foundation. In February 2023, the insured filed a claim with AmGuard who in turn hired an engineer to inspect the home. The engineer concluded that cracks in the foundation, cracks in the brick veneer and interior finishes, and joint separations and out-of-square doorframes were caused by long-term soil-related differential movement of the foundation and not the leak reported at the freshwater supply line. AmGuard disclaimed coverage April 19, 2023.

In May 2023, the insured hired a leak detection technician who detected a leak in the home's water line, and a property damage inspector, who concluded the foundation cracks were caused by water leaks. A follow-up inspection confirmed the foundation movement was caused by seasonal moisture fluctuations and trees close to the foundation and not a leak from the freshwater supply line. Accordingly, AmGuard did not change its position.

The insured filed suit in state court and AmGuard removed the case to the Southern District of Texas. The insured filed a Motion to Compel Arbitration and Abatement and subsequently the court permitted AmGuard to file a Motion for Summary Judgment related to the coverage issue.

AmGuard argued that although the policy covered foundation damage caused by water leaks, the "Earth Movement" exclusion applied, which precluded coverage for "foundation damage that is 'caused directly or indirectly' by earth movement, 'regardless of any other cause or event contributing concurrently or in any sequence to the loss.'" The Court acknowledged AmGuard's two engineering reports that concluded soil movement caused the foundation damage. The Court also acknowledged the insured's property damage report, which concluded the damage was caused by a water leak. However, the Court further noted that the insured's inspector did not conclude that long-term soil movement was not a direct or indirect cause of the foundation damage."

Because the insured failed to show that soil movement was not a concurrent cause of the foundation damage, the Earth Movement exclusion applied, and the Court concluded it was irrelevant that a plumbing leak may have been an additional contributor to the damage. Therefore, the insured's breach of contract claim failed.

Further, the Court found that the insured failed to identify an injury independent of his right to benefits and concluded AmGuard was entitled to summary judgment on the insured's extra-contractual claims. Finally, the Court concluded appraisal was not appropriate inasmuch as there was no coverage under the policy and no need to determine an amount of loss. Accordingly, the Court denied the insured's Motion to Compel Appraisal and Abatement and granted AmGuard's Motion for Summary Judgment.

THE SOUTHERN DISTRICT OF TEXAS GRANTS SUMMARY JUDGMENT FOR THE INSURER WHERE A TORNADO THAT CAUSED DAMAGE TO THE INSURED'S PROPERTY WAS NOT A "NAMED STORM" AS DEFINED BY THE POLICY

In *QBE Specialty Insurance Company v. Eduro Healthcare, LLC*, the issue was whether tornado damage sustained by the insured was covered under the insured's commercial property policy.

On January 24, 3023, a tornado damaged the insured's property, and the insured filed a claim against the policy. The policy provided that the insurer will pay for damage to covered property caused by a Covered Cause of Loss, which included, among others, windstorm or hail. A Specified Perils Exclusion Endorsement removed all other covered causes except windstorm or hail and Endorsement 1 limited windstorm or hail damage to those instances caused by a Named Storm. The Property Endorsement stated that a "Named Storm" included weather phenomena the U.S. National Hurricane Center designated by name and not just a number. The insurer denied the claim asserting that because the January 24, 2023 tornado that struck the insured's property was not a Named Storm, the damage was not covered under the policy. The insurer filed suit seeking a declaratory judgment that the damage was not covered by the policy and the insured counterclaimed for breach of contract and violations of the Texas Insurance Code.

The insured argued 1) the policy's structure made it ambiguous; 2) that the term Named Storm was not defined in or applied to Endorsement 1; 3) that coverage was illusory because the U.S. National Hurricane Center only names cyclones and not other storms; and 4) the restriction to storms designated by the U.S. National Hurricane Center applied to only part of the Named Storm definition. Alternatively, the insured argued the January 24, 2023 tornado was a Named Storm.

The Court acknowledged that the multi-step coverage definition in the policy required more reading but reasoned that nothing in the Specified Perils Exclusion Endorsement or Endorsement 1 created doubt on the plain language of same modifying the original scope of coverage. Moreover, the Court noted that the insured cited no authority that such a structure created an ambiguity. Rather, the Court reasoned that when the policy and endorsements were read in combination, it was clear the only Covered Causes of Loss are windstorms and hail caused by a Named Storm.

Next, the Court concluded that the Named Storm definition unambiguously applied to the entire policy. Although the insured argued the Named Storm definition applied only to the Property Endorsement, the Court noted the Property Endorsement by its terms stated the endorsement's clauses shall apply to coverage provided by all underwriters, carriers, and insurers of the policy and that there was no language in the definition of Named Storm stating it did not apply to the whole policy.

As to whether coverage was illusory, the court noted that under Texas law, if a policy provides coverage for other claims, coverage is not illusory. Because the policy provided coverage for tropical cyclones named by the U.S. National Hurricane Center, the court concluded coverage was not illusory.

The insured argued that naming requirement by the U.S. National Hurricane Center applied only to the other weather phenomena category but the court was not persuaded by this argument.

Finally, the insured argued that the January 24, 2023 tornado qualified as a Named Storm because the media referred to the tornado as the "Pasadena Tornado" and the Small Business Association assigned the tornado a Texas disaster number. The Court concluded this argument failed because it was premised on the argument that neither the Named Storm definition nor the U.S. National Hurricane Center naming requirement applied. Moreover, the Court observed it would be "very surprising for parties to a property insurance contract to intend that coverage would depend on how local media happened to describe a storm instead of the NHC's objective classification criteria, which are publicly and specifically defined in advance."

The Court found that the January 24, 2023 tornado was not a Named Storm as that term was defined by the policy nor caused by a Named Storm and declared there was no coverage under the policy for the insured's damage. The Court entered a take nothing judgment on the insured's counterclaims.

MOTOR CARRIER

GEORGIA FEDERAL DISTRICT COURT HOLDS THAT INSURER OF A POLICY WITH SELF-INSURED RETENTION IS AN EXCESS INSURER AND NOT A PROPER PARTY TO A LAWSUIT IN A DIRECT-ACTION STATE.

In the case of *Berg v. Travelers Indem. Co. of Conn. Travelers Indemnity Company of Connecticut ("Travelers")* issued a business auto policy to McCormick Trucking, Inc. ("McCormick"). McCormick's employee was operating a tractor-trailer when it was involved in a motor vehicle accident with Andrea Berg. Berg in turn initiated a lawsuit against McCormick and its employee operating the vehicle at the time of the accident. Taking advantage of the fact that Georgia is a direct-action state, Berg also named Travelers as a defendant on the grounds Travelers was McCormick's insurer.

In response, Travelers filed a motion for summary judgment contending that it was not a proper party to the lawsuit because it has been held on a number of occasions that excess insurers are not subject to Georgia's direct-action statute. In support of this position, Travelers provided evidence which demonstrated the Travelers' policy only applied to damages that were in excess of McCormick's self-insured retention of $350,000. Ultimately, the Court dismissed Travelers from the case on the grounds that the self-insured retention effectively rendered the auto policy an excess policy. This case demonstrates that in certain states self-insured retentions are not merely treated as a substitute for a deductible, but rather are considered an alternative form of primary level of insurance.

Accordingly, it is important to consider how a court views a self-insured retention for purposes of determining the impact it has in developing the insurance tower and if the retention potentially modifies the duties that an insurer owes an insured when a suit is commenced.

TEXAS FEDERAL DISTRICT COURT HOLDS THAT NEGLIGENT HIRING CLAIMS AGAINST FREIGHT BROKERS ARE PREEMPTED UNDER THE FEDERAL AVIATION ADMINISTRATION AUTHORIZATION ACT

In the case of Farfan v. Old Dominion Freight Line, Inc., Eric Escoto was killed when his vehicle was struck by a vehicle owned by Just Van Transport, Inc. ("Just Van") that was carrying a load for Old Dominion Freight Line, Inc. ("Old Dominion"). Following the accident, Mr. Escoto's estate brought a lawsuit against Old Dominion. In the pleadings, claimants alleged that Old Dominion was a motor carrier, however, Claimants also acknowledged that Old Dominion entered into an agreement with Just Van to haul the load.

The claims asserted against Old Dominion include causes of action for negligence and gross negligence against Old Dominion related to its hiring, entrusting, and monitoring of Just Van and Jesus Anduju. Old Dominion filed a motion to dismiss the lawsuit, arguing that federal law expressly preempted Claimants' state law negligence claims against a licensed freight broker.

First the Court addressed the Claimants' allegations that Old Dominion was a motor carrier instead of a broker. The Court noted that based on the conduct alleged against Old Dominion, it was clearly acting as a broker rather than a motor carrier. Accordingly, the Court disregarded the Claimants' allegations of Old Dominion as a motor carrier on the grounds it was a false legal conclusion, and the court would treat Old Dominion as a broker for purposes of analyzing its motion to dismiss.

Next, the Court addressed if the Claimants' claims against Old Dominion were preempted by 49 USC Sec. 14501(c)(1) of the Federal Aviation Administration Authorization Act ("FAAAA") which provides: "States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier…or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." Thus, to establish preemption under this statute, a party must show both that: (1) a state enacted or attempted to enforce a law; and (2) the state law relates to broker rates, routes, or services, or has a significant economic effect on them. The statute also contains a safety exception which states that the preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." The Court reasoned that based on the express language of the statute, a court is required to answers two questions to determine if a claim is preempted: (1) does the preemption provision apply, and (2) does the safety exception nevertheless prevent preemption.

In discussing this analysis, the Texas court noted that the Fifth Circuit Court of Appeals has not addressed the issue of whether negligent hiring claims against brokers are preempted. However, since 2020, three Circuits Courts of Appeals (Seventh, Ninth, and Eleventh) have addressed this. On the first step of the analysis, all three courts found that the preemption provision applied. In other words, they found that negligent hiring claims against a broker are in fact preempted as such claims relate to "rates, routes, and services" of the broker that fall under § 14501(c)(1). On the second step, however, the Circuits were split on whether these kinds of common law claims fall within the safety exception. The Ninth Circuit found that the negligent hiring claims

did fall within the safety exception (and thus the claims are not preempted), however, the Seventh and Eleventh Circuits found that these claims did not fall within the safety exception (and thus the claims were preempted).

In analyzing the first prong, the Court found that the Claimants' negligent hiring claim against Old Dominion was covered by the preemption provision because it sufficiently relates to "rates, routes, and services" of the broker that fall under § 14501(c)(1). Essentially, the claim that Old Dominion negligently arranged for Just Van to transport the shipment, causing the motor vehicle accident at issue had more than a tenuous relationship to broker services. Accordingly, the relationship was direct, and consequently, Claimants' negligence claim was preempted.

With regard to the second prong, the Court held that the motor-vehicle safety exception did not apply to "save" Claimants' claims. Specifically, the Court concurred with the Seventh Circuit's opinion in Ye v. GlobalTranz Enterprises, that the phrase "with respect to motor vehicles" "massively limits the scope" of the motor-vehicle-safety exception, requiring a "direct link between a state's law and motor vehicle safety." Applying this interpretation of the safety exception to the facts of the case, the Court held there was no direct link between motor vehicle safety and Old Dominion's alleged negligence in brokering the load at issue to Just Van. The Court noted that Claimants allegation was that Old Domino was negligent in selecting Just Van to transport the load—not that Old Dominion itself violated any law or regulation directly related to a motor vehicle, or even that Old Dominion was the owner or operator of any vehicle at issue. Accordingly, Old Dominion's link to motor vehicle safety was several steps removed because Old Dominion's role was limited to brokering the load to Just Van, who in turn hired Anduju as the driver, who in turn drove negligently. Consequently, the Court found that the relationship between Old Dominion's alleged negligence and any motor vehicle accident was too attenuated to fall within the motor-vehicle-safety exception. Therefore, the Court granted Old Dominion's Motion for Dismissal.

This case stands for two propositions. First, it acknowledges that courts will disregard false legal conclusions in pleadings when determining if a motor carrier is actually serving as a motor carrier or a broker. Second, this case provides an important insight with regard to the currently developing area of law regarding the scope of preemption afforded brokers under 49 USC Sec. 14501(c)(1).

Accordingly, when faced with negligent hiring claims against insureds that might be classified as brokers, insurers must be mindful of the jurisdictions they are in and recent opinions to determine if the allegations of negligent hiring are preempted.

1. 2024 U.S. App. LEXIS 24003 * (5th Cir. September 20, 2024).
2. *Id.* quoting *U.S. Metals, Inc.*, 490 S.W.3d at 25.
3. *Id.*
4. *Id.*
5. No. 3:22-CV-2184-B, 2024 U.S. Dist. LEXIS 149429 (N.D. Tex. 2024).
6. 640 S.W.3d 195 (Tex. 2022).
7. No. 3:23-CV-0133-B, 2024 U.S. Dist. LEXIS 135203 (N.D. Tex. 2024)
8. No. 3:23-cv-2091-BN, 2024 U.S. Dist. LEXIS 157574 (N.D. Tex. 2024).
9. *Id.* at *8 (quoting *Boyd v. Fam. Dollar Stores of Texas, LLC,* No. 3-22-cv-1368-D, 2023 U.S. Dist. LEXIS 107849 (N.D. Tex. 2023).
10. *Id.* (citing *John v. La. (Bd. Of Trustees) for State Colleges & Universities*, 757 F.2d 698, 709 (5th Cir. 1985)).
11. *Id.* (citing *Bryan v. Cano*, No. 22-50035, 2022 U.S. App. LEXIS 30953 (5th Cir. 2022)).
12. *Id.* at *12 (quoting *Williams v. Sake Hibachi Sushi & Bar, Inc.*, No. 3:18-cv-517-D, 2020 U.S. Dist. LEXIS 106701 (N.D. Tex. 2020).
13. *Id.* at 13-14
14. *Id.* at *15
15. No. 14-23-00063-CV, 2024 Tex. App. LEXIS 5769 (Tex. App.—Houston [14th Dist.] Aug. 13, 2024, no pet. h.).
16. *Id.* at *4.
17. *Id.* at *7 (quoting *Robinson v. Reliable Life Ins. Co.*, 554 S.W.2d 231, 234 (Tex. App.—Dallas 1977), aff'd, 569 S.W.2d 28 (Tex. 1978)).
18. *Id.* at *8-9.
19. *Id.* at *5-6 (citing Am. Nat'l Ins. Co. v. Arce, 672 S.W.3d 347, 353 (Tex. 2023)).
20. No. H-23-2488, 2024 U.S. Dist. LEXIS 151472 (S.D. Tex. 2024).
21. No. 4:24-cv-1559, 2024 U.S. Dist. LEXIS 140056 (S.D. Texas [Houston Division], Aug. 7, 2024, mem. op.).
22. *Id.* at *6.
23. *Id.* at *7-8 (quoting *Bilotto v. Allied Prop. & Cas. Ins. Co.*, 79 F. Supp. 3d 660, 668, 673 (W.D. Tex. 2015) (quoting *Tex. Renegade Constr. Co. Inc. v. Hartford Lloyd's Ins. Co.*, 546 Fed. Appx. 400 (5th Cir. 2013)) and citing additional cases).
24. No. H-23-2626, 2024 U.S. Dist. LEXIS 121751 (S.D. Tex. July 11, 2024).
25. *Id.* at *11 (footnote omitted).
26. *Id.* at *12.
27. No. 1:22-CV-02591-LMM, 2024 U.S. Dist. LEXIS 153105 (N.D. Ga. Aug. 14, 2024).
28. No. 4:23-CV-3470, 2024 U.S. Dist. LEXIS 156972 (S.D. Tx. Aug. 12, 2024).
29. 74 F.4th 453 (7th Cir. 2023).

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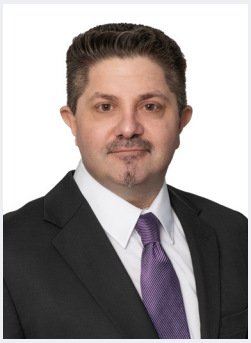

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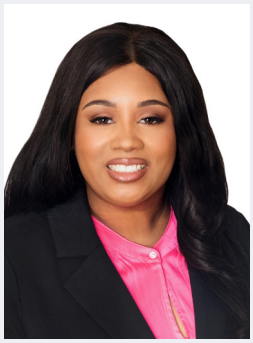

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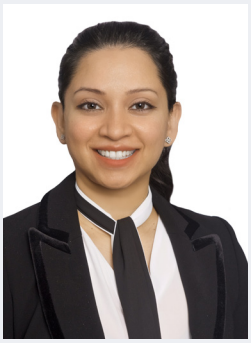

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