

SMU Annual Texas Survey

Volume 8

Article 8

2022

Insurance Law

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Recommended Citation

J. Price Collins & Aaron G. Stendell, *Insurance Law*, 8 SMU ANN. TEX. SURV. 177 (2022)
<https://scholar.smu.edu/smuatxs/vol8/iss1/8>

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INSURANCE LAW

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<https://doi.org/10.25172/smuatxs.8.1.8>

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I. TEXAS SUPREME COURT RECOGNIZES EXCEPTION TO
“EIGHT-CORNERS RULE”

Many liability insurance policies provide that the insurer will defend its insured against lawsuits that seek damages covered under the policy. In determining whether this duty to defend is triggered, Texas law requires the insurer to consider only the allegations within the four corners of the pleading in the context of the four corners of the insurance policy.¹ This deceptively simple rule, referred to as the “eight-corners rule,” has been the law in Texas for many years and has been strictly applied by Texas courts. The Texas Supreme Court holds that the eight-corners rule requires courts look to the facts alleged within the four corners of the pleadings, measure them against the language within the four corners of the insurance policy, and determine if the facts alleged present a matter that could potentially be covered by the insurance policy.²

Despite the apparent simplicity of the rule, its application has proven to be challenging in many instances where the allegations in the pleading are vague, ambiguous, or otherwise insufficient to clearly implicate the coverage under the subject insurance policy. For many years, Texas courts struggled with whether, in such circumstances, an exception to the rule should be recognized that would allow consideration of evidence extrinsic to the pleading and the policy to resolve the question of whether a duty to defend was owed. However, until recently, the Texas Supreme Court consistently declined to expressly recognize any exception to the eight-corners rule, although the supreme court did not completely foreclose the possibility that an exception might be appropriate in circumstances not yet presented to the supreme court.³

In absence of clear direction from the Texas Supreme Court, the U.S. Court of Appeals for the Fifth Circuit took the initiative to fashion a rule to guide federal courts faced with the task of determining whether a duty to defend exists in circumstances where the allegations in the pleading alone were insufficient to demonstrate that the coverage afforded by the subject policy was implicated.⁴ In 2004, making an “*Erie* guess,” the Fifth Circuit in *Northfield Insurance Co. v. Loving Home Care, Inc.* recognized

1. See *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006).

2. *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 380 (Tex. 2012) (citing *GuideOne*, 197 S.W.3d at 307).

3. *Richards v. State Farm Lloyds*, 597 S.W.3d 492, 495 (Tex. 2020); *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 654 (Tex. 2009); *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 497 (Tex. 2008); *GuideOne*, 197 S.W.3d at 311. *But see* *Loya Ins. Co. v. Avalos*, 610 S.W.3d 878, 884 (Tex. 2020) (recognizing a very narrow exception that allowed consideration of extrinsic evidence where the allegations in the pleading were fraudulent).

4. See *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 531 (5th Cir. 2004).

a limited exception to the eight-corners rule, allowing extrinsic evidence to be considered under limited circumstances.⁵ The *Northfield* rule provides that consideration of extrinsic evidence is permitted when: “(1) ‘it is initially impossible to discern whether coverage is potentially implicated’ and (2) ‘the extrinsic evidence goes solely to a *fundamental* issue of coverage which does not overlap with the merits of or engage in the truth or falsity of any facts alleged in the underlying case.’”⁶ In absence of authority from the Texas Supreme Court, this provided a workable framework for federal courts.⁷ However, state courts continued to struggle with the issue, having no definitive guidance from the Texas Supreme Court.⁸

After seventeen years of operating under the *Northfield* exception, the U.S. Court of Appeals for the Fifth Circuit called upon the Texas Supreme Court to squarely address the issue and clarify when, if ever, extrinsic evidence may be considered to determine the duty to defend.⁹ In *BITCO General Insurance Corp. v. Monroe Guaranty Insurance Co.*, the Fifth Circuit was asked to resolve a dispute between two insurers regarding their respective obligations to defend a mutual insured where the pleading against the insured was silent about a potentially dispositive coverage fact.¹⁰

In the underlying matter, David Jones sued 5D Drilling & Pump Service for damages resulting from 5D’s negligence involving 5D’s drilling operations.¹¹ Jones alleged that in 2014 “he contracted with 5D” to drill a well, but 5D’s drilling damaged his property.¹² The petition did not state when any alleged damage occurred.¹³ BITCO General Insurance Corporation and Monroe Guaranty Insurance Company each provided commercial general liability coverage to 5D: BITCO from 2013 to 2015 and Monroe from 2015 to 2016.¹⁴ When “5D demanded a defense from both insurers[,] . . . Monroe refused to defend, contending that any property damage occurred before its policy period began.”¹⁵ The underlying lawsuit settled, and BITCO sued Monroe in federal district court, seeking contribution for its defense costs.¹⁶ Monroe and BITCO “stipulated that 5D’s drill bit stuck in the bore hole . . . in or around November 2014,” which was before Monroe’s policy began in October 2015, but the district

5. *Id.*

6. *Richards*, 597 S.W.3d at 495 (emphasis added) (quoting *State Farm Lloyds v. Richards*, 784 F. App’x 247, 251 (5th Cir. 2019)).

7. *See, e.g.*, *Ooida Risk Retention Grp., Inc. v. Williams*, 579 F.3d 469, 476 (5th Cir. 2009) (applying exception); *Star-Tex Resources, L.L.C. v. Granite State Ins. Co.*, 553 F. App’x 366, 371–73 (5th Cir. 2014) (per curiam) (applying exception).

8. *See, e.g.*, *Weingarten Realty Mgmt. Co. v. Liberty Mut. Fire Ins. Co.*, 343 S.W.3d 859, 862–64 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

9. *See BITCO Gen. Ins. Corp. v. Monroe Guar. Ins. Co.*, 846 F. App’x 248, 252 (5th Cir. 2021) (per curiam).

10. *Id.* at 249.

11. *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, 640 S.W.3d 195, 197 (Tex. 2022).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 198, 198 n.1.

court found “it could not consider the stipulated extrinsic evidence.”¹⁷ Instead, applying a strict “eight-corners” doctrine and considering only Jones’s petition and the Monroe policy, the district court held that “Monroe owed a duty to defend because the property damage could have occurred anytime between the formation of the drilling contract in 2014 and the filing of Jones’s lawsuit in 2016.”¹⁸ Monroe appealed, and the Fifth Circuit certified the following questions to the Texas Supreme Court: (1) whether “the exception to the eight-corners rule” in *Northfield* is “permissible under Texas law”; and (2) “[w]hen applying such an exception, [whether] a court [may] consider extrinsic evidence of the date of an occurrence.”¹⁹

In response, the Texas Supreme Court held that extrinsic evidence may be considered to determine if a duty to defend was owed under certain circumstances, but the supreme court made clear it was not abandoning the well-established eight-corners rule.²⁰ Specifically, the supreme court held:

[I]f the underlying petition states a claim that could trigger the duty to defend, and the application of the eight-corners rule, due to a gap in the plaintiff’s pleading, is not determinative of whether coverage exists, Texas law permits consideration of extrinsic evidence provided the evidence (1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved.²¹

The supreme court noted that this standard is similar to that in *Northfield*, “with minor refinements.”²² First, while *Northfield* may invite courts to read facts into pleadings, *Monroe* requires courts to determine if “the pleading contain[s] the facts necessary to resolve the question of whether the claim is covered[.]”²³ Second, *Northfield* only looked at extrinsic evidence that went to a “‘fundamental’ coverage issue[.]” but *Monroe* “eliminate[d] this requirement.”²⁴ And finally, “the proffered extrinsic evidence must conclusively establish the coverage fact at issue” and not contradict the factual allegations in the pleading.²⁵

In response to the Fifth Circuit’s second certified question, the supreme court concluded that “evidence of the date of an occurrence may be considered if it meets the other requirements” for consideration of extrinsic evidence.²⁶ In this specific case, however, the stipulation of when damage occurred overlapped with liability, so it cannot be considered in deter-

17. *Id.* at 198.

18. *Id.*

19. *Id.*

20. *Id.* at 201.

21. *Id.* at 201–02.

22. *Id.* at 202.

23. *Id.*

24. *Id.*

25. *Id.* at 203.

26. *Id.* at 204.

mining a duty to defend, even if undisputed.²⁷ The supreme court explained that the date of damage would implicate liability in that it would force the insured to “confess” damage occurred at all when its defense may be that there was no damage.²⁸ Here, the stipulation states that the drill bit was stuck in or about November 2014, but the insured, 5D, would likely have sought to establish that the drill bit was not the cause of the damage.²⁹ Yet, to trigger a duty to defend, 5D would be forced to argue that some of the alleged damage to the well occurred after November 2014, which would “undermine its liability defense” that there was no damage at any time.³⁰

At long last, the Texas Supreme Court has provided a much-needed exception to the eight-corners rule. Although the new rule stated in *Monroe* replaces the Fifth Circuit’s *Northfield* rule, due to the similarity in the rules, *Northfield* and those cases applying it should prove helpful to parties and courts as they begin to apply *Monroe* going forward.

II. COURTS ADDRESS COVERAGE ISSUES RELATING TO COVID-19

In the wake of the economic turmoil and hardships created by governmental responses to the COVID-19 pandemic, many insureds in search of financial relief turned to their property insurance policies to see what, if any, coverage might be available for their financial losses. Specifically, insureds sought coverage for losses that resulted from governmental orders that restricted their ability to conduct normal business operations, including some orders that required businesses to temporarily close their doors. While it is clear that many businesses experienced substantial financial losses, significant coverage issues exist with respect to whether these losses fall within coverage afforded for losses resulting from “direct physical loss or damage” to covered property. Moreover, many property policies include provisions that specifically exclude loss resulting from viruses.

A. NO COVERAGE FOR BUSINESS INCOME UNLESS THERE IS A “DIRECT, PHYSICAL LOSS” TO THE INSURED PROPERTY

In an effort to recoup some of the financial losses resulting from COVID-related interference with normal business operations, policyholders submitted claims for these losses to their property insurers under the “business interruption” or “business income” coverages afforded by their property insurance policies. Some policyholders argued that coverage under their property insurance policies was triggered by the pandemic because they lost the use of their business property as a result of the COVID-19 virus. However, several United States district courts in

27. *Id.*

28. *Id.*

29. *Id.* at *8.

30. *Id.*

Texas determined that coverage was not available because the policy requirement that loss result from “direct physical loss or damage to property” was not satisfied.

For example, in *Terry Black’s Barbeque, LLC v. State Automobile Mutual Insurance Co.*, the insured sued its insurer for “breach of contract . . . and violations of the Texas Insurance Code” after the insurer denied coverage for loss of business income.³¹ The insured argued, in part, that COVID-19 caused it to suffer “a direct physical loss of their properties” because the governmental shutdown orders suspended the use of the restaurant.³² Further, the insured asserted the presence of COVID-19 “on physical surfaces . . . , in the air, and in [people]” constitutes “physical damage.”³³ The insurer contended coverage was not available because the losses at issue did not result from physical damage to property.

To resolve this dispute, the U.S. District Court for the Western District of Texas had to determine whether the insured’s alleged losses resulted from a suspension of operations that was caused by “direct physical loss of or damage to property.”³⁴ Although “[t]he [p]olicy [did] not define ‘direct physical loss,’” the court found the insured’s interpretation of this phrase ignored the requirement that there be “direct physical loss of or damage to property.”³⁵ “[P]hysical loss’ requires there to be some ‘distinct, demonstrable, physical alteration of the property,’ as opposed to merely economic losses.”³⁶ The district court pointed to other district court holdings that COVID-19 and related business suspensions did not cause a direct physical loss to property.³⁷ The district court also noted (1) there was no allegation of COVID-19 being present at the restaurant; and (2) even if there was, the virus did not damage the property because it can be removed with routine cleaning.³⁸ This holding was recently affirmed by the U.S. Court of Appeals for the Fifth Circuit, joining the Second, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, “[i]n interpreting a ‘physical loss of property’ to require a tangible alteration or deprivation of property.”³⁹

Consistent with its holding in *Terry Black’s*, the U.S. District Court for the Western District of Texas later rejected an insured’s claim against its insurer for financial losses resulting from its compliance with a COVID-

31. *Terry Black’s Barbeque, LLC v. State Auto. Mut. Ins. Co.*, 514 F. Supp. 3d 896, 901 (W.D. Tex. 2021), *aff’d sub nom.* *Terry Black’s Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, 22 F.4th 450 (5th Cir. 2022).

32. *Id.* at 904.

33. *Id.* at 907.

34. *Id.* at 903–04.

35. *Id.* at 904 (emphasis in original)

36. *Id.* (quoting *Ross v. Hartford Lloyd Ins. Co.*, No. 4:18-CV-00541-O, 2019 WL 2929761, at *6 (N.D. Tex. July 4, 2019)).

37. *Id.* at 904–05.

38. *Id.* at 907.

39. *Terry Black’s Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, 22 F.4th 450, 456 (5th Cir. 2022) (citations omitted), *aff’g* *Terry Black’s Barbeque, LLC v. State Auto. Mut. Ins. Co.*, 514 F. Supp. 3d 896, 901 (W.D. Tex. 2021).

19 related government shutdown order.⁴⁰ In response to a denial of coverage, the insured sued its insurer for breach of contract and extra-contractual damages, claiming its financial losses were covered under provisions of the policy covering losses resulting from the “necessary suspension of your ‘operations’ during ‘the period of restoration.’”⁴¹ The insurer asserted coverage exists only when suspension of operations results from “‘direct physical loss of or damage to’ the property.”⁴² The district court granted the insurer’s motion to dismiss, holding that the insured failed to plead facts showing any direct physical loss or damage to property.⁴³ The district court cited holdings from numerous other district courts that loss of use of property due to the COVID-19 pandemic did not constitute direct physical loss of property.⁴⁴ As in *Terry Black’s*, the district court noted a “distinct, demonstrable, physical alteration of the property” is required.⁴⁵ Monetary harm due to shutdown orders does not constitute direct physical property loss nor does the presence of the virus cause direct physical damage.⁴⁶

Likewise, other U.S. district courts in Texas addressed the requirement that direct physical loss or damage to insured property must be present in order to trigger coverage for lost business income.⁴⁷ In *DZ Jewelry*, the insured argued that it was forced to close “because ‘people infected by the virus,’” or those who had been exposed to it, had visited the insured’s store and thereby contaminated it.⁴⁸ The insured further alleged that the “store was physically damaged because COVID-19 may remain on surfaces and in the air for days.”⁴⁹ The insurer denied coverage and the insured filed suit.⁵⁰ The insurer then moved to dismiss under Rule 12(b)(6).⁵¹ As to business-income loss, the U.S. District Court for the Southern District of Texas noted that while the policy did not define the phrase “direct physical loss or damage to property,” the U.S. Court of Appeals for the Fifth Circuit previously found that an insured must plead “distinct, demonstrable physical alteration of the property.”⁵² The district

40. *Uncle Nicky’s LLC v. Blackboard Ins. Co.*, No. 1:21-CV-30-RP, 2021 WL 2980587, at *5 (W.D. Tex. June 30, 2021), *report and recommendation adopted*, *Uncle Nicky’s LLC v. Blackboard Ins. Co.*, No. 1:21-CV-30-RP, 2021 WL 4487991 (W.D. Tex. July 18, 2021).

41. *Id.* at *2.

42. *Id.*

43. *Id.* at *5–6.

44. *Id.* at *4.

45. *Id.* at *5.

46. *Id.*

47. *See Selery Fulfillment, Inc. v. Colony Ins. Co.*, 525 F. Supp. 3d 771, 776 (E.D. Tex. 2021); *DZ Jewelry, LLC v. Certain Underwriters at Lloyds London*, 525 F. Supp. 3d 793, 801 (S.D. Tex. 2021); *Grailays, Inc. v. Sentinel Ins. Co., Ltd.*, No. 3:20-cv-01181-M, 2021 WL 3524032, at *4–6 (N.D. Tex. Aug. 9, 2021); *Mt. Hawley Ins. Co. v. Jamal & Kamal, Inc.*, 550 F. Supp. 3d 432, 436–37 (S.D. Tex. 2021).

48. *DZ Jewelry*, 525 F. Supp. 3d at 796.

49. *Id.* at 799.

50. *Id.* at 796.

51. *Id.*

52. *Id.* at 798 (quoting *Hartford Ins. Co. Midwest v. Miss. Valley Gas Co.*, 181 F. App’x 465, 470 (5th Cir. 2006)).

court went on to state that allegations of the possibility of COVID-19 remaining on store surfaces or in the air for days is different from alleging the actual presence of COVID-19.⁵³ Further, while the insured asserted that three of its employees tested positive for COVID-19, it did not allege these employees were in the store while contagious nor that the virus “lingered in the store so as to physically alter or damage the property.”⁵⁴ Moreover, even if the insured did allege the presence of COVID-19 in the store, this would not be an allegation that “COVID-19 caused physical damage to the store.”⁵⁵ “COVID-19 does not cause physical damage to property; it causes people to get sick.”⁵⁶ At most, COVID-19 changed the way the insured operated, but did not result in “direct physical loss of or damage to property.”⁵⁷ The insured did not allege direct physical loss or damage to its property because it failed to allege facts showing that any part of its insured “property required repair, rebuilding, or replacing.”⁵⁸ As such, the insured’s lawsuit was dismissed without prejudice.⁵⁹

In a similar case, the insured argued it suffered direct physical loss because “[t]he coronavirus physically caused property damage to . . . tangible property [by attaching to] surfaces for prolonged periods of time.”⁶⁰ The U.S. District Court for the Northern District of Texas held that the “mere presence of the virus” at the property, even if it attached to surfaces, did “not constitute . . . direct physical loss or damage” because the virus did not result in a “distinct, demonstrable, *physical alteration*” to the property.⁶¹ This is because the virus “can be removed from surfaces with routine cleaning and disinfectant.”⁶² Citing *DZ Jewelry*, the district court found that the threat of COVID-19 is not enough to cause physical damage to property, so it granted the carrier’s 12(b)(6) motion.⁶³

In *Selery Fulfillment, Inc. v. Colony Insurance Co.*, the U.S. District Court for the Eastern District of Texas reached the same conclusion as the Western, Southern, and Northern Districts in the cases discussed above. Here, the insured, Selery, sought coverage under its commercial property policy for lost business income caused by governmental shut-down orders and filed suit against its carrier when the claim was denied.⁶⁴ Selery argued that “physical loss” coverage encompassed loss of use

53. *Id.* at 799.

54. *Id.*

55. *Id.*

56. *Id.* (first citing *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.*, 513 F. Supp. 3d 1163, 1171 (N.D. Cal. 2021); and then citing *Uncork & Create LLC v. Cincinnati Ins. Co.*, 498 F. Supp. 3d 878, 883 (S.D. W. Va. 2020)).

57. *Id.* at 800.

58. *Id.* at 800–01.

59. *Id.* at 802.

60. *Vandelay Hosp. Grp. LP v. Cincinnati Ins. Co.*, No. 3:20-CV-1348-D, 2021 WL 2936066, at *2 (N.D. Tex. July 13, 2021) (citation omitted).

61. *Id.* at *6 (emphasis added) (quoting *ILIOS Prod. Design v. Cincinnati Ins. Co.*, No. 1:20-CV-857-LY, 2021 WL 1381148, at *7 (W.D. Tex. Apr. 4, 2021)).

62. *Id.* (quoting *ILIOS Prod. Design*, 2021 WL 1381148, at *7).

63. *Id.* at *7–8.

64. *Selery Fulfillment, Inc. v. Colony Ins. Co.*, 525 F. Supp. 3d 771, 773–74 (E.D. Tex. 2021).

caused by COVID-19.⁶⁵ The district court, however, found the insured failed to identify any direct physical loss or damage to its property.⁶⁶ There must be “direct physical loss of or damage to property,”⁶⁷ i.e., “actual structural alteration is required to constitute physical loss.”⁶⁸ The district court also noted that Selery failed to allege that COVID-19 had entered the insured premises.⁶⁹ Rather, it only alleged that government orders prevented Selery from conducting business and “[i]t is too big of a leap to suggest that government orders that restrict access to property constitute ‘property damage[.]’”⁷⁰ Because the pandemic itself “does not constitute a ‘direct physical loss of or damage’ to . . . property[.]” the insured failed to demonstrate it sustained covered loss and the insurer’s motion to dismiss was granted.⁷¹

However, in *Cinemark Holdings v. Factory Mutual Insurance Co.*, the United States District Court for the Eastern District of Texas reached a different result. In this case, the district court refused to grant an insurer’s motion to dismiss because the insured specifically pled COVID-19 was present in insured buildings and thereby damaged the properties “by changing the content of the air.”⁷² Before the pandemic, Cinemark purchased an “All Risks” policy, which among many things, protected them from “physical loss or damage by a communicable disease.”⁷³ Cinemark pleaded that, as COVID-19 spread throughout their properties, it changed the content of the air causing “[o]ver 1,700 . . . employees [to] test[] positive for, [be] exposed to, or display[] symptoms of COVID-19.”⁷⁴ According to Cinemark, the damage caused by the virus being in the air damaged its property by forcing it to close its theaters.⁷⁵ The insurer, relying on *Selery*, moved for judgment on the pleadings and argued that Cinemark failed to adequately allege property damage.⁷⁶ The district court disagreed, finding that this case was distinguishable from that case, reaching a different result in several respects.⁷⁷ First, the district court found that Cinemark, unlike the insured in *Selery*, specifically pleaded that COVID-19 was present on its premises and caused damage to its property by changing the content of the air in the building.⁷⁸ “Selery never alleged that COVID-19 entered the property, only that the pan-

65. *Id.* at 776 (citation omitted).

66. *Id.*

67. *Id.*

68. *Id.* at 778 (first citing *Hartford Ins. Co. v. Miss. Valley Gas Co.*, 181 F. App’x 465, 470 (5th Cir. 2006); and then citing *Ross v. Hartford Lloyd Ins. Co.*, No. 4:18-CV-00541-O, 2019 WL 2929761, at *6 (N.D. Tex. July 4, 2019)).

69. *Id.*

70. *Id.*

71. *Id.* at 776–77, 781.

72. *Cinemark Holdings v. Factory Mut. Ins. Co.*, 500 F. Supp. 3d 565, 569 (E.D. Tex. 2021).

73. *Id.* at 567.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 566, 568.

78. *Id.* at 569.

demic prevented Selery from fully utilizing it.”⁷⁹ Interestingly, the district court did not address the *DZ Jewelry* case which also alleged some of its employees tested positive for COVID-19 and that the virus was “potentially present” in the store.⁸⁰ Second, and perhaps of greater significance, is the fact that the All Risk policy at issue was “much broader than the one in *Selery*” as it “expressly cover[ed] [the] loss and damage caused by ‘communicable disease[,]’” and there was no dispute that COVID-19 qualified as a “communicable disease.”⁸¹ Indeed, at least one other court has noted this distinction.⁸² Based on these factors, the district court denied the motion for judgment on the pleadings, noting “[a]t this stage of the proceedings, *Selery* is distinguishable.”⁸³ It should be noted that the district court did not reach an ultimate decision on the merits, but merely found Cinemark pleaded facts sufficient to avoid judgment of the case based on the pleadings.

B. LOSS DUE TO ACTS OF CIVIL AUTHORITY REQUIRES “DIRECT,
PHYSICAL LOSS” TO OTHER PROPERTY

As an alternative to the argument that loss of use of insured property due to government shutdowns constitutes loss or damage to insured property, insureds argued that their lost income was covered under policy provisions that provide coverage for certain losses that result from action of civil authority. However, insureds faced essentially the same obstacle to recovery. Specifically, civil authority coverage still requires a showing of physical damage to property.⁸⁴ In *Selery*, the court laid out what is needed to trigger the civil authority provision in the policy before it: “there [must] be property damage within a mile of the commercial premises, and . . . the civil actor [must] implement[] a measure to repair that damage or to gain access to the damaged property.”⁸⁵ The key to civil authority coverage is that access to the insured premises is prohibited because of damage to other property, not the insured property.⁸⁶

The *Selery* court found there was no coverage under the civil authority provision as “Selery [did] not allege that any property damage occurred

79. *Id.* (citing *Selery Fulfillment, Inc. v. Colony Ins. Co.*, 525 F. Supp. 3d 771, 776 (E.D. Tex. 2021)).

80. *DZ Jewelry, LLC v. Certain Underwriters at Lloyds London*, 525 F. Supp. 3d 793, 799 (S.D. Tex. 2021).

81. *Cinemark*, 500 F. Supp. 3d at 569.

82. *TMC Healthcare v. Cont'l Cas. Co.*, No. CV-21-00135-TUC-DCB (EJM), 2022 U.S. Dist. LEXIS 30367, at *29–30 (D. Ariz. R. Feb. 22, 2022) (holding that the communicable disease provision differentiated the Eastern District’s finding of coverage from other similar allegations).

83. *Cinemark*, 500 F. Supp. 3d at 569.

84. *Terry Black’s Barbeque, LLC v. State Auto. Mut. Ins. Co.*, 514 F. Supp. 3d 896, 908 (W.D. Tex. Jan. 21, 2021), *adopting* *Barbecue v. State Auto. Mut. Ins. Co.*, 514 F. Supp. 3d 896 (W.D. Tex. Dec. 14, 2020), *aff’d sub nom.* *Terry Black’s Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, 22 F.4th 450 (5th Cir. 2022); *DZ Jewelry*, 525 F. Supp. 3d at 801.

85. *Selery Fulfillment, Inc. v. Colony Ins. Co.*, 525 F. Supp. 3d 771, 780 (E.D. Tex. 2021).

86. *See DZ Jewelry*, 525 F. Supp. 3d at 801.

at any specific place close to its facility.”⁸⁷ Although civil authorities barred the insured from conducting business at the insured premises, it was not because of damage at any property near the insured premises but because of an “anticipated threat of COVID-19 throughout the state, city, and county.”⁸⁸ “Because there is no property damage, Selery cannot plausibly state a claim using the Civil Authority provision.”⁸⁹

Other courts in the survey period reached a similar conclusion.⁹⁰ In *DZ Jewelry*, the civil authority provision was not applicable because the insured did “not allege that the closure orders restricted access to [the insured’s] store because of physical damage to other property or premises.”⁹¹ “[O]rders closing or limiting capacity” of patrons or personnel “do not meet the coverage criteria required.”⁹² “[E]ven if the government orders alleged . . . could be construed as prohibiting Plaintiffs from accessing their premises, the orders were not issued due to direct physical loss of or damage to property other than at Plaintiffs’ premises.”⁹³

C. VIRUS EXCLUSION VARIANTS

In *Uncle Nicky’s*, the U.S. District Court for the Western District of Texas considered the applicability of the virus exclusion to COVID-19 claims.⁹⁴ The exclusion barred coverage for “damages ‘caused directly or indirectly by . . . [a]ny virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness or disease.’”⁹⁵ The district court found that COVID-19 is a virus and dovetails perfectly with the virus exclusion.⁹⁶ As such, even if Plaintiff pleaded a direct physical loss due to COVID-19, the virus exclusion would still bar coverage.⁹⁷

In a similar matter, *LDWB #2 LLC v. FCCI Insurance Co.*, an insured argued that a virus exclusion did not apply to the COVID-19 pandemic because the term “pandemic” was not specifically listed in the exclusion.⁹⁸ The U.S. District Court for the Western District of Texas brushed

87. *Selery*, 525 F. Supp. 3d at 780.

88. *Id.* at 781.

89. *Id.*; see also *Terry Black’s*, 514 F. Supp. 3d at 908 (citing *Hajer*, 505 F. Supp. 3d at 652).

90. See *ILIOS Prod. Design v. Cincinnati Ins. Co.*, No. 1:20-CV-857-LY, 2021 WL 1381148, at *8 (W.D. Tex. Apr. 12, 2021) (“Just as the COVID-19 pandemic did not cause direct physical loss to Plaintiff’s property, Plaintiff fails to show that there was direct physical loss to other property.” (quoting *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690, 694 (N.D. Ill. 2020))).

91. *DZ Jewelry*, 525 F. Supp. 3d at 801.

92. *Id.*; see also *ILIOS*, 2021 WL 1381148, at *8 (closure orders “did not prohibit Plaintiff from accessing its premises”).

93. *DZ Jewelry*, 525 F. Supp. 3d at 801 (quoting *Pappy’s Barber Shops, Inc. v. Farmers Grp., Inc.*, 487 F. Supp. 3d 937, 945 (S.D. Cal. 2020)) (alteration in original).

94. *Uncle Nicky’s LLC v. Blackboard Ins. Co.*, No. 1:21-CV-30-RP, 2021 WL 2980587, at *5–6 (W.D. Tex. June 30, 2021).

95. *Id.* at *6 (alteration in original) (citation omitted).

96. *Id.*

97. *Id.*

98. *LDWB #2 LLC v. FCCI Ins. Co.*, No. 1:20-CV-425-LY, 2021 WL 2744568, at *9 (W.D. Tex. July 1, 2021).

aside this assertion, stating that “[t]he coronavirus is a ‘virus which causes physical illness and distress[,]’” so “the [v]irus [e]xclusion unambiguously bars coverage for Plaintiff’s claims due to the coronavirus.”⁹⁹

In *ILIOS Production Design v. Cincinnati Insurance Co.*, an insured attempted to argue that the absence of a virus exclusion supported their argument that COVID-19 losses should be covered.¹⁰⁰ The U.S. District Court for the Western District of Texas firmly dismissed this assertion, stating that “an exclusion provision in an insurance policy would be triggered only if there were coverage under the [p]olicy[]” in the first place; as there is no claim within the scope of coverage, “the presence of a virus exclusion or lack thereof is irrelevant.”¹⁰¹

The U.S. District Court for the Eastern District of Texas considered a different exclusion, which the insurer argued precluded coverage for losses caused by viruses, including COVID-19.¹⁰² The policy in that case included “an exclusion for damage caused by ‘fungi, wet rot, dry rot, bacteria, or virus’” (the Exclusion); however, the district court found it did not apply to the insured’s COVID-19 claims.¹⁰³ The insurer moved to dismiss, relying solely on the Exclusion,¹⁰⁴ which purported to bar coverage for “loss or damage caused directly or indirectly by” the “[p]resence, growth, proliferation, spread or any activity of ‘fungi,’ wet rot, dry rot, bacteria or virus.”¹⁰⁵ The district court noted that the term “virus” was not defined in the Exclusion, but a separate policy endorsement providing coverage for destroyed or corrupted electronic data defined “virus” as a “malicious code or similar instruction introduced into or enacted on a computer system.”¹⁰⁶ Further, the district court observed the term “virus” was listed in the Exclusion with fungus, wet rot, dry rot, and bacteria, all of which cause structural or mechanical damage, not physical illness.¹⁰⁷ Therefore, the district court concluded “virus” as used in the Exclusion was ambiguous.¹⁰⁸ The district court acknowledged that this holding is an outlier from other virus exclusion cases because the other cases involve policies with “far clearer [virus exclusion] language[,]” do not conflate the term “virus” with malicious code on a computer system, and do not list virus with fungi and rot losses.¹⁰⁹

99. *Id.*

100. *ILIOS Prod. Design v. Cincinnati Ins. Co.*, No. 1:20-CV-857-LY, 2021 WL 1381148, at *9 (W.D. Tex. Apr. 12, 2021).

101. *Id.*

102. *See Risinger Holdings v. Sentinel Ins. Co.*, Civil Action No. 1:20-CV-00176, 2021 WL 4520968, at *6 (E.D. Tex. Sept. 30, 2021).

103. *Id.* at *6.

104. *Id.* at *5–6.

105. *Id.* at *8 (citation omitted).

106. *Id.* at *9 (citation omitted).

107. *Id.* at *9–10.

108. *Id.* at *9.

109. *Id.* at *6.

III. UNINSURED AND UNDERINSURED MOTORIST (UM/ UIM) COVERAGE

A. LIABILITY OF THE UNINSURED/UNDERINSURED MOTORIST AND DAMAGES MAY BE ESTABLISHED IN A DECLARATORY JUDGMENT ACTION AGAINST THE UM/UIM INSURER

The Texas Supreme Court has stated “[t]he UIM contract is unique because, according to its terms, benefits are conditioned upon the insured’s legal entitlement to receive damages from a third party.”¹¹⁰ Simply requesting UIM benefits or filing suit against the UIM insurer does not trigger a duty to pay.¹¹¹ “[N]either a settlement nor an admission of liability from the tortfeasor establishes UIM coverage, because a jury could find that the other motorist was not a fault or award damages that do not exceed the tortfeasor’s liability insurance.”¹¹² Therefore, a policyholder must establish two elements in order to obtain UM/UIM benefits: (1) the insured must establish fault on the part of the uninsured or underinsured driver; and (2) the insured must prove the extent of their damages.¹¹³ Absent an obligation to pay, it is impossible to establish that an insurer wrongfully refused to pay and as such, claims for breach of contract, common law bad faith, and violations of the Texas Insurance Code fail.¹¹⁴

In 2021, the Texas Supreme Court clarified that a UM/UIM insured is not required to sue the at-fault driver to establish the requisite elements for coverage.¹¹⁵ The insured has the option to establish these elements through a declaratory judgment action brought against the UM/UIM insurer.¹¹⁶ In *Allstate Insurance Co. v. Irwin*, the insured, Daniel Irwin, was in a car wreck in which the other driver was at fault and underinsured.¹¹⁷ Irwin settled with the other driver’s auto insurer for the policy limits and submitted a claim to his own UIM insurer, Allstate Insurance Company, to compensate him for damages in excess of the other driver’s policy limits.¹¹⁸ Irwin demanded the UIM policy limits of \$50,000.00, but Allstate declined. Irwin then filed a declaratory judgment action against Allstate under the Uniform Declaratory Judgment Act (UDJA) to establish his entitlement to UIM policy benefits and attorney’s fees.¹¹⁹ The jury deter-

110. *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006).

111. *Id.*

112. *Id.* (citing *Henson v. S. Farm Bureau Cas. Ins. Co.*, 17 S.W.3d 652, 654 (Tex. 2000)).

113. *See id.* at 818–819.

114. *See Love v. Geico Indem. Co.*, No. 6:16-CV-354-RP, 2017 WL 8181526, at *3–4 (W.D. Tex. Oct. 2, 2017) (dismissing breach of contract claim against UM/UIM insurer as unripe since plaintiff did not obtain a judgment establishing unknown driver’s liability and resulting damages).

115. *Allstate Ins. Co. v. Irwin*, 627 S.W.3d 263, 265–66 (Tex. 2021).

116. *Id.* at 265.

117. *Id.* at 266.

118. *See id.*

119. *Id.*

mined Irwin's damages to be nearly half of a million dollars and the trial court entered judgment for the UIM policy limits and awarded Irwin his attorney's fees.¹²⁰ Allstate paid its UIM limit, but "appealed the award of attorney's fees," arguing, in part, that the use of the UDJA circumvented *Brainard*.¹²¹ The appellate court affirmed, finding "that the UDJA was properly invoked to determine . . . UIM benefits."¹²²

The supreme court found the insured's use of a declaratory judgment to determine the liability of the underinsured motorist and the amount of the insured's damages to establish a right to UIM benefits was appropriate.¹²³ It noted that nothing in *Brainard* precludes use of a declaratory judgment to recover UIM benefits and numerous state appellate and federal courts have reached the same decision.¹²⁴ Additionally, the supreme court found the award of attorney's fees to the insured was not improper since the UDJA expressly authorizes the trial court to award fees.¹²⁵ Although the prerequisites for UIM benefits may be established in a declaratory judgment action, the supreme court noted that a breach-of-contract claim would not be ripe unless an insurer refuses to pay UIM benefits once the underlying conditions of liability and damages have been established.¹²⁶

B. INSUREDS MAY NOT AVOID BIFURCATED TRIALS BY ONLY BRINGING EXTRACONTRACTUAL INSURANCE CODE CLAIMS

The Texas Supreme Court held that the insureds could not litigate their extracontractual claims for unfair settlement practices arising out of underinsured motorist claims without first establishing the insurer's liability under the policy.¹²⁷ In disputes between insureds and insurers over UIM benefits, insureds typically assert claims for breach of the insurance policy as well as extracontractual claims for violations of the Texas Insurance Code.¹²⁸ "The common practice has been to sever and abate the Insurance Code claims while an initial trial is conducted on the breach-of-contract claim to determine whether the underinsured motorist was liable for the accident and, if so, the amount of damages suffered by the insured."¹²⁹ "A plaintiff who succeeds [on the breach-of-contract claim] may then proceed to litigate its Insurance Code claims."¹³⁰ Here, the UIM insureds alleged that, because they did not bring breach-of-con-

120. *Id.*

121. *Id.* (citing *Allstate Ins. Co. v. Irwin*, 606 S.W.3d 774, 778–80 (Tex. App.—San Antonio 2019, pet. granted), aff'd, 627 S.W.3d 263 (Tex. 2021)).

122. *Id.* (citing *Allstate Ins. Co.*, 606 S.W.3d at 778–80 (Tex. App.—San Antonio 2019, pet. granted), aff'd, 627 S.W.3d 263 (Tex. 2021)).

123. *See id.* at 270.

124. *Id.* at 267.

125. *Id.* at 270–272.

126. *See id.* at 267.

127. *In re State Farm Mut. Auto. Ins. Co.*, 629 S.W.3d 866, 870 (Tex. 2021) (orig. proceeding) (citing *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018)).

128. *Id.*

129. *Id.*

130. *Id.*

tract claims, “there [is] no breach-of-contract claim[] to sever, . . . [so] no bifurcation . . . is required.”¹³¹

The UIM insureds submitted claims for UM/UIM benefits to their UM/UIM insurer, State Farm Mutual Automobile Insurance Company (State Farm). A dispute arose between the insureds and State Farm regarding the amount of UM/UIM benefits owed.¹³² In the subsequent lawsuits, the insureds alleged violations of the Texas Insurance Code, but did not allege breach of UIM policies.¹³³ State Farm moved to bifurcate the trials in order to first establish the amount of UM/UIM benefits, if any, the insureds were entitled to recover before litigating any extracontractual claims. State Farm’s motions to bifurcate were denied, so State Farm initiated a mandamus proceeding.¹³⁴

The supreme court unanimously held that UM/UIM claimants “must first obtain determinations of the third-party drivers’ liability and the amount of damages” to establish coverage.¹³⁵ Because there was no judgment establishing the liability of the tortfeasor and the amount of damages, the insureds were required to first establish entitlement to UIM benefits before proceeding with a trial on the Insurance Code claims.¹³⁶ The supreme court stated that bifurcated trials in UIM litigation provide two benefits: (1) preservation of judicial resources as the first trial may find an uncovered claim; and (2) introduction of the insurer’s settlement offer may be admissible in the first trial but not the second as it may be prejudicial when considering bad faith claims.¹³⁷ These reasons exist even when there is no breach-of-contract claim.¹³⁸

C. JUDGMENT, NOT VERDICT, IS REQUIRED TO ESTABLISH UNINSURED DRIVER’S LIABILITY

In another mandamus proceeding, the Texas Supreme Court considered whether a jury verdict against an at-fault driver and in favor of a UIM insured, which had not been reduced to judgment, was binding on the UIM insured with respect to their claim for UIM benefits.¹³⁹ In *In Re USAA General Indemnity Co.*, the supreme court noted:

Under a standard Texas automobile insurance policy, an insured seeking underinsured motorist (UIM) benefits may pursue a variety of options: (1) sue the insurer directly to establish the motorist’s fault and the insured’s damages without suing the motorist; (2) sue the underinsured motorist with the insurer’s written consent, making the negligence judgment binding against the insurer for purposes of the

131. *Id.*

132. *Id.* at 871.

133. *Id.*

134. *Id.* at 871–72.

135. *Id.* at 875.

136. *See id.* at 876.

137. *Id.* at 876–77.

138. *Id.* at 877.

139. *In re USAA Gen. Indem. Co.*, 629 S.W.3d 878, 881(Tex. 2021) (orig. proceeding).

insurer's liability under the UIM policy; or (3) sue the underinsured motorist without the insurer's written consent and then relitigate the issues of liability and damages in a suit for benefits under the UIM policy. The consent requirement protects the insurer from being bound to a default judgment or an inadequate defense by the underinsured motorist, leaving it to the insurer to determine whether to rely on the motorist's defense.¹⁴⁰

In this case, the insured sued the at-fault driver; however, the UIM insurer did not consent to be bound by a judgment against the at-fault driver.¹⁴¹ Therefore, the third option applied in this case, and the insured also was required to sue the UIM insurer.¹⁴² The insured joined the UIM insurer to its lawsuit against the other driver.¹⁴³ The at-fault driver moved to bifurcate and abate the UIM portion of the lawsuit in order to avoid any potential prejudice that might result from injecting insurance into the trial of the liability and damages issues.¹⁴⁴ The liability trial proceeded, and the jury returned a verdict in favor of the UIM insured and against the at-fault driver.¹⁴⁵ Before a judgment could be entered, the UIM insured and at-fault driver reached a settlement for "approximately the amount of the jury verdict[.]" and the at-fault driver's liability insurer agreed to fund the settlement.¹⁴⁶ After the trial court dismissed the liability case against the at-fault driver, the UIM insurer notified the UIM insured that it consented to the lawsuit against the at-fault driver.¹⁴⁷

Subsequently, the trial court lifted the abatement on the UIM portion of the lawsuit.¹⁴⁸ The UIM insurer moved for summary judgment on the ground that the UIM insured recovered the full amount of the damages awarded by the jury from the at-fault driver's insurer.¹⁴⁹ The trial court denied the motion, and the UIM insurer sought a mandamus from the Court of Appeals for the Fourth District of Texas at San Antonio, which summarily denied the request for mandamus relief.¹⁵⁰ In reviewing the matter, the supreme court determined that the UIM insured was not bound by the jury's verdict, and was free to litigate the issue of liability and damages against the UIM insurer.¹⁵¹ Specifically, the supreme court concluded that the doctrine of collateral estoppel was inapplicable since the jury verdict was not reduced to a final judgment.¹⁵² Additionally, the UIM insurer's attempt to consent to be bound by the result of the trial between the UIM insured and the at-fault driver was ineffective to bind

140. *Id.* at 880–81.

141. *Id.* at 881.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 882.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 882–83.

151. *See id.* at 883.

152. *Id.* at 884.

the UIM insured.¹⁵³ This is because at the time of its consent, the case had been dismissed.¹⁵⁴ The UIM insurer could only consent to the outcome of the liability trial, which in this case ended in dismissal, rendering the verdict unenforceable.¹⁵⁵ “[A]s a stranger to the verdict,” the UIM insurer could not “revive the verdict reached without its participation by consenting to the . . . trial post-dismissal.”¹⁵⁶ Instead, “its consent caused it to be bound by the outcome” (the dismissal).¹⁵⁷ Therefore, in light of the dismissal, the at-fault driver’s liability and the UIM insured’s damages remained undetermined.¹⁵⁸ The supreme court did not address whether the UIM insurer’s post-trial consent was timely, as the supreme court determined the timing was immaterial under the facts of this case.¹⁵⁹ Had a judgment been entered on the verdict, it seems the insurer’s consent would not have been necessary at that point as the UIM insured would have been bound to the judgment under the doctrine of collateral estoppel. Presumably, had the UIM insurer consented to be bound to the trial against the at-fault driver in order for the UIM insured to establish its entitlement to UIM benefits, the UIM insurer could have either required the insured to obtain a judgment against the driver or agreed to consent to the settlement and dismissal as part of a negotiated resolution of the UIM claim.¹⁶⁰

IV. FIFTH CIRCUIT HOLDS CREDIT CARD DATA BREACH CONSTITUTES “PERSONAL AND ADVERTISING INJURY”

Landry’s, Inc. contracted with Paymentech, LLC to process Visa and MasterCard payments at Landry’s retail properties.¹⁶¹ Paymentech discovered problems with credit card transactions at some of Landry’s properties and, after conducting an investigation, found that a data breach occurred at numerous locations.¹⁶² Landry’s then discovered the breach resulted from an unauthorized program installed on its payment-processing devices, which was designed to retrieve personal information from credit card users.¹⁶³ “[S]ome of [this] . . . information was used to make unauthorized charges.”¹⁶⁴ This data breach created liability for Paymentech to Visa and MasterCard under its contracts with those companies.¹⁶⁵ Paymentech then turned to Landry’s to recoup its losses pursuant

153. *Id.* at 885–86.

154. *Id.* at 886.

155. *See id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 887.

160. *See id.* at 883–84.

161. *Landry’s, Inc. v. Ins. Co. of Pa.*, 4 F.4th 366, 367 (5th Cir.2021).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 367–368.

to terms of its contract with Landry's requiring Landry's to "indemnify Paymentech for any assessments, fines, or penalties stemming from" Landry's failure to comply with certain requirements designed to protect credit card customers.¹⁶⁶ After Landry's refused to pay Paymentech, Paymentech sued Landry's.¹⁶⁷

Landry's tendered the lawsuit to its insurer, Insurance Company of the State of Pennsylvania (ICSOP).¹⁶⁸ ICSOP's policy provided coverage for "those sums that [Landry's] becomes legally obligated to pay as damages because of 'personal and advertising injury[.]'" which was defined to include "[o]ral or written publication, in any manner, of material that violates a person's right of privacy."¹⁶⁹ ICSOP denied coverage and Landry's sued ICSOP.¹⁷⁰

The U.S. District Court for the Southern District of Texas held that Paymentech's contractual indemnity claim "did not allege a 'violat[ion] [of] a person's right of privacy' because" Paymentech's lawsuit sought indemnity for its own losses and did not involve any claims by cardholders for violation of their rights of privacy.¹⁷¹ Additionally, it found that Paymentech "did not allege a 'publication' because it" only alleged "that '[a] third party hacked into [the] credit card processing system and stole customers' credit card information.'"¹⁷² The district court therefore granted ICSOP's motion for summary judgment.¹⁷³ However, on appeal, the U.S. Court of Appeals for the Fifth Circuit reversed the district court and found that Paymentech sufficiently alleged a "personal and advertising injury" to trigger ICSOP's duty to defend under an "eight-corners" analysis.¹⁷⁴

Regarding the policy's requirement of an "[o]ral or written publication," the Fifth Circuit noted this phrase was not defined.¹⁷⁵ Therefore, the Fifth Circuit sought to determine the "plain and ordinary meaning[]" of these words in order to determine the parties' intent.¹⁷⁶ The Fifth Circuit concluded "the parties intended the broadest possible definition."¹⁷⁷ Under this broad framework, the Fifth Circuit found that Paymentech "allege[d] that Landry's published its customers' credit card information" in two ways.¹⁷⁸ First, Landry's allegedly exposed customers' data to hackers "as the . . . 'data was being routed through affected systems[.]'"¹⁷⁹ Second, the hackers published the information when they used it to make

166. *Id.* at 368.

167. *Id.* (citation omitted).

168. *Id.*

169. *Id.* (alterations in original).

170. *Id.*

171. *Id.* (alterations in original)

172. *Id.* (alterations in original)

173. *Id.*

174. *Id.* at 371-72.

175. *Id.* at 369.

176. *Id.* (citing *DeWitt Cnty. Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 101 (Tex. 1999)).

177. *Id.*

178. *Id.* at 370.

179. *Id.*

unauthorized purchases.¹⁸⁰ The Fifth Circuit concluded that either one of these types of publications was sufficient to satisfy the “publication” requirement in the policy.¹⁸¹

In rejecting ICSOP’s argument that Paymentech’s lawsuit was not for a violation of a right of privacy, the Fifth Circuit noted that the policy did not limit coverage to “violations of privacy rights[.]”¹⁸² Rather, the policy extended coverage to “injuries that *arise out of*” violations of privacy rights.¹⁸³ The Fifth Circuit noted it was “undisputed that [people have] a ‘right of privacy’” with respect to their credit card data, and that unauthorized use of that data violates this privacy right.¹⁸⁴ As a result, the Fifth Circuit concluded Paymentech’s lawsuit alleged an injury that arose out of a violation of a privacy right.¹⁸⁵

ICSOP argued that the policy should be construed as extending only to tort claims, rather than a contractual indemnity claim such as that alleged by Paymentech.¹⁸⁶ Noting that nothing in the policy limited coverage to tort claims and relying on Texas Supreme Court precedent in *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, the Fifth Circuit rejected ICSOP’s argument.¹⁸⁷ The Fifth Circuit’s decision in this case reinforces that, with respect to the duty to defend, courts must focus on “the facts alleged” in the pleadings rather than “the actual legal theories” asserted.¹⁸⁸

V. PAYMENT OF AN APPRAISAL AWARD DOES NOT
PRECLUDE LIABILITY UNDER PROMPT PAYMENT
STATUTE, BUT DOES PRECLUDE
LIABILITY FOR BREACH OF
CONTRACT

In *Hinojos v. State Farm Lloyds*, the Texas Supreme Court reiterated that an insurer’s “payment of an appraisal award does not absolve the insurer of statutory liability when an insurer accepts a claim but pays only part of the amount it owes within the statutory deadline.”¹⁸⁹ The insured, Louis Hinojos, reported a hail claim which the insurer, State Farm Lloyds (State Farm), promptly investigated.¹⁹⁰ State Farm determined the loss was less than the deductible and, therefore, no insurance proceeds were

180. *Id.*

181. *Id.*

182. *See id.* at 368, 371.

183. *Id.* at 371 (emphasis in original).

184. *Id.*

185. *See id.*

186. *Id.*

187. *Id.* (citing *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1 (Tex. 2007)).

188. *Id.* (quoting *St. Paul Fire & Marine Ins. Co. v. Green Tree Fin. Corp.-Texas*, 249 F.3d 389 (5th Cir. 2001)).

189. *Hinojos v. State Farm Lloyds*, 619 S.W.3d 651, 653 (Tex. 2021) (first citing *Barbara Techs. Corp. v. State Farm Lloyds*, 589 S.W.3d 806 (Tex. 2019); and then citing *Alvarez v. State Farm Lloyds*, 601 S.W.3d 781 (Tex. 2020) (per curiam)).

190. *Id.* at 654.

paid.¹⁹¹ Hinojos disputed State Farm's decision, so State Farm conducted a second investigation that uncovered additional loss exceeding the deductible, resulting in payment by State Farm.¹⁹² Hinojos then sued State Farm for, among other things, Chapter 542 violations for "delaying payment on the claim."¹⁹³ "State Farm invoked the . . . appraisal clause[]" approximately fifteen months after Hinojos filed suit.¹⁹⁴ The appraisal found the loss was significantly greater than the amount determined by State Farm.¹⁹⁵ "Within a week of the appraisers' decision, . . . State Farm tendered . . . additional" payment to Hinojos for the additional amount of loss found by the appraisers.¹⁹⁶ "State Farm moved for summary judgment" on Hinojos's Chapter 542 claims, "contending that 'timely tendering of the appraisal award precludes prompt payment damages under Chapter 542 of the Texas Insurance Code.'"¹⁹⁷ However, Hinojos argued that statutory liability applied because State Farm failed to pay the full loss within the statutorily required time frame.¹⁹⁸ "The trial court granted summary judgment[]" for State Farm, and the Court of Appeals for the Eighth District of Texas at El Paso affirmed.¹⁹⁹

The court of appeal's decision in this case was handed down prior to the supreme court's holdings in *Barbara Technologies Corp. v. State Farm Lloyds* and *Alvarez v. State Farm Lloyds*.²⁰⁰ Relying on those decisions, the supreme court in this case held that "State Farm's payment of the appraisal award outside the statutory deadline does not relieve it of Chapter 542 liability."²⁰¹ The supreme court pointed out that the statute defines "claim" as: "a first party claim that: (a) is made by an insured or policyholder under an insurance policy or contract or by a beneficiary named in the policy or contract; and (b) must be paid by the insurer directly to the insured or beneficiary."²⁰²

The supreme court focused on the "must be paid" language in the "claim" definition.²⁰³ A partial payment, therefore, does not constitute payment of the "claim" because it does not include the full amount that "must be paid."²⁰⁴ The supreme court noted that if a partial payment could satisfy the prompt payment requirement under the statute, an insurer could simply "pay a nominal amount toward a valid claim to avoid

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 654–55.

199. *Id.* at 655.

200. *Id.* at 655–56 (first citing *Barbara Techs. Corp. v. State Farm Lloyds*, 589 S.W.3d 806 (Tex. 2019); and then citing *Alvarez v. State Farm Lloyds*, 601 S.W.3d 781 (Tex. 2020)).

201. *Id.* at 656.

202. *Id.* (quoting Tex. Ins. Code § 542.051(2)).

203. *See id.*

204. *See id.*

the prompt payment deadline” imposed by the statute.²⁰⁵ “Accordingly, [the supreme court] h[e]ld that an insurer’s acceptance and partial payment of the claim within the statutory deadline does not preclude liability for interest on amounts owed but unpaid when the statutory deadline expires.”²⁰⁶ This is because “a partial payment mitigates the damage resulting from a Chapter 542 violation.”²⁰⁷ “Interest accrues only on the unpaid portion of a claim.”²⁰⁸ The supreme court suggested, without specific guidance, that Chapter 542 liability might be avoided to the extent an insurer makes a pre-appraisal payment that “roughly correspond[s]” to the amount ultimately owed; however, that did not happen in this case.²⁰⁹

In *Randel vs. Travelers Lloyds of Texas*, the U.S. Court of Appeals for the Fifth Circuit addressed a similar fact pattern.²¹⁰ Travelers Lloyds of Texas Insurance Company (Travelers) allegedly underpaid a homeowner’s claim arising from a fire.²¹¹ The homeowners “filed a petition in Texas state court to compel appraisal[]” and an appraisal was undertaken wherein the appraisers determined the loss was nearly double the amount paid by Travelers.²¹² Travelers then paid the appraisal award.²¹³ Despite the payment, the homeowners continued to pursue another suit in state court “alleg[ing] that Travelers underpaid their claims.”²¹⁴ Upon removal to federal court, the U.S. District Court for the Southern District of Texas granted summary judgment in favor of Travelers on all claims.²¹⁵ The district court held that payment of the appraisal award eliminated any liability for breach of contract and bad faith.²¹⁶ Further, the district court found that Travelers complied with the Texas Prompt Payment of Claims Act requirements by “making reasonable pre-appraisal payments.”²¹⁷ With respect to the breach-of-contract claim, the Fifth Circuit agreed with the district court that payment and acceptance of an appraisal award bars a breach-of-contract claim because the insured “received every dollar they are owed” and “there is nothing left to litigate on this claim.”²¹⁸ Following *Hinojos*, the Fifth Circuit found that Travelers’ partial pre-appraisal payment did not automatically prevent prompt-payment liability.²¹⁹ The Fifth Circuit noted that, under *Hinojos*, prompt-payment liability could only be avoided to the extent Travelers’ partial payment

205. *Id.* at 656–57.

206. *Id.* at 658.

207. *Id.*

208. *Id.*

209. *See id.*

210. *Randel v. Travelers Lloyds of Texas. Ins. Co.*, 9 F.4th 264, 265 (5th Cir. 2021).

211. *Id.* at 265.

212. *Id.* at 266.

213. *Id.*

214. *Id.* at 266–267.

215. *Id.* at 267.

216. *Id.*

217. *Id.*

218. *Id.* at 268.

219. *Id.*

“‘roughly correspond[ed]’ to the amount ultimately owed.”²²⁰ The Fifth Circuit declined to comment on “just how close a pre-appraisal payment needs to be to ‘roughly correspond’ with the final amount owed[.]” noting there was a “substantial gap . . . between the pre-appraisal . . . payments and the appraisal award.”²²¹

VI. TEXAS APPELLATE COURT CONFIRMS AN INTENTIONAL ACT IS NOT AN OCCURRENCE, EVEN IF DONE BY MISTAKE

In *Latray v. Colony Insurance Co.*, the Court of Appeals for the Seventh District of Texas at Amarillo addressed whether or not an intentional act based on the mistaken belief of an insured qualified as a covered occurrence.²²² Here, the insured accepted a job moving debris for erosion control purposes.²²³ The insured moved forty tons of debris onto property he believed was under the ownership and control of the person that hired him.²²⁴ However, the property’s true owner discovered the debris on his property and sued the insured for “illegal dumping and damage to his land.”²²⁵ The court issued a judgment against the insured “for \$50,000.00, plus \$309.00 in court costs.”²²⁶ Afterward, the court “appoint[ed] Latray as a receiver” to satisfy the judgment creditors, who in turn sought relief against the insured’s policy with Colony to satisfy the judgment.²²⁷

The policy at issue defined an “‘occurrence’ as ‘an accident, including continuous or repeated exposure to substantially the same general harmful conditions’” but, as is typical in commercial general liability policies, it failed to describe the term “accident.”²²⁸ Relying on previous Texas Supreme Court precedent, the court held the two factors which determine “whether an insured’s action constitutes an accident [are]: (1) the insured’s intent and (2) the reasonably foreseeable effect of the insured’s conduct.”²²⁹ Applying this test, the court found that the insured “intended to move the debris” to the location at issue, and “the damages were a reasonably foreseeable result of [that] . . . conduct.”²³⁰ The insured’s mistaken belief that he had permission to move the debris to this

220. *Id.* at 269 (quoting *Hinojos v. State Farm Lloyds*, 619 S.W.3d 651, 658 (Tex. 2021)).

221. *Id.*

222. *Latray v. Colony Ins. Co.*, No. 07-19-00350-CV, 2021 WL 5127520 at *8–10 (Tex. App.—Amarillo Nov. 4, 2021, no pet.) (mem. op.).

223. *Id.* at *1.

224. *Id.*

225. *Id.* at *2.

226. *Id.*

227. *Id.*

228. *Id.* at *5.

229. *Id.* (citing *Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651, 663 (Tex. App.—Houston [14th Dist.] 2006, pet. denied), *abrogated by* *Gilbert Tex. Const., L.P. v. Underwriters at Lloyd’s London*, 327 S.W.3d 118 (Tex. 2010)).

230. *Id.*

particular location did not factor into the determination of “accident” as defined by Texas law.

VII. THE *STOWERS* DOCTRINE DOES NOT APPLY TO SETTLEMENTS LESS THAN THE POLICY LIMITS

In a mandamus proceeding, the Texas Supreme Court considered whether an insured could assert a “*Stowers* claim for negligent failure to settle” where an “insurer chose to settle claims against its insured within policy limits but obtained a release . . . contingent on the insured paying \$100,000.00 of the \$350,000.00 settlement.”²³¹ In the underlying litigation, the plaintiff demanded \$350,000.00, but the insurer refused to pay more than \$250,000.00.²³² The plaintiff threatened to seek amounts at trial far in excess of the insured’s policy limits.²³³ To settle the case, the insured agreed “to pay the additional \$100,000.00 without waiving her right to seek recovery” from her insurer.²³⁴ The insured subsequently sued the insurer for reimbursement, alleging breach of contract and negligent failure to settle.²³⁵ The insurer sought to dismiss the insured’s lawsuit.²³⁶

The supreme court agreed with the insurer that the insured did not have a basis to assert a *Stowers* claim based on negligent failure to settle in the absence of a judgment in excess of the policy limits.²³⁷ The supreme court noted that it has “consistently recognized the requirement that an insured be liable in excess of policy limits—whether as a result of judgment or settlement—in order to bring a *Stowers* claim.”²³⁸ The supreme court “decline[d] to extend *Stowers* to cases in which there is no” excess liability.²³⁹ The supreme court did allow the insured to proceed with her claim for breach of contract based on her theory that the insurer was obligated to indemnify her for the full amount of the settlement.²⁴⁰

231. *In re Farmers Tex. Cnty. Mut. Ins. Co.*, 621 S.W.3d 261, 264 (Tex. 2021) (orig. proceeding).

232. *Id.* at 265.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 264.

238. *Id.* at 267. (first citing *Am. Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 481 (Tex. 1992); and then citing *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 829 (Tex. 1990)).

239. *Id.*

240. *Id.* at 270.

