UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 11-10649

MID-CONTINENT CASUALTY COMPANY,

Plaintiff - Appellee

v.

ELAND ENERGY, INC; SUNDOWN ENERGY LP,

Defendants - Appellants

ELAND ENERGY, INC.; SUNDOWN ENERGY L.P.,

Plaintiff - Appellants

v.

MID-CONTINENT CASUALTY COMPANY

Defendant – Appellee

On Appeal from the U.S. District Court for the Northern District of Texas
No. 06-1576 consolidated with No. 06-1578
(Hon. Sidney A. Fitzwater)

Principal Brief of Appellants
Eland Energy, Inc. and Sundown Energy LP

CARL D. ROSENBLUM (Texas Bar No. 24045167; Louisiana Bar No. 2083)
MADELEINE FISCHER (Texas Bar No. 00785452; Louisiana Bar No. 5575)
ALIDA C. HAINKEL (Louisiana Bar No. 24114)
Jones, Walker, Waechter, Poitevent,
Carrère & Denègre, L.L.P.
201 St. Charles Avenue, 51st Floor
New Orleans, Louisiana 70170-5100
Telephone: (504) 582-8000
Facsimile: (504) 589-8296
Email: crosenblum@joneswalker.com
Email: mfischer@joneswalker.com
Email: ahainkel@joneswalker.com

No. 11-10649

MID-CONTINENT CASUALTY COMPANY,

Plaintiff - Appellee

v.

ELAND ENERGY, INC; SUNDOWN ENERGY LP,

Defendants - Appellants

ELAND ENERGY, INC.; SUNDOWN ENERGY L.P.,

Plaintiff - Appellants

v.

MID-CONTINENT CASUALTY COMPANY

Defendant – Appellee

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the appellants Eland Energy, Inc. and Sundown Energy LP certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Eland Energy, Inc., appellant, a privately held corporation that has no parent corporation

2. Sundown Energy LP, appellant, a Texas domestic limited partnership

3. Mid-Continent Casualty Company, appellee, a privately held insurance company; its parent company is Great American Holding, Inc. which is a privately held corporation

4. Carl D. Rosenblum, Madeleine Fischer, and Alida C. Hainkel, Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P., 201 St. Charles Avenue, 49th Floor New Orleans, Louisiana 70170-5100, counsel for appellants Eland Energy, Inc. and Sundown Energy LP

5. Levon G. Hovnatanian, Christopher W. Martin, Robert G. Dees, and Ethan D. Carlyle, Martin, Disiere, Jefferson & Wisdom, L.L.P., 808 Travis, Suite 1800, Houston, Texas 77002, counsel for appellee Mid-Continent Casualty Company

/s/ Carl D. Rosenblum
CARL D. ROSENBLUM
Attorney of record for Appellants Eland Energy, Inc. and Sundown Energy LP

STATEMENT REGARDING ORAL ARGUMENT

This appeal primarily seeks review of the district court's post-trial decision to negate every penny of an $8.45 million jury award to an insured, under which the district court took a complete about-face on its pre-trial ruling regarding the existence of a cause of action under Texas law and rejected every single finding of the jury as impermissibly unreasonable. The case concerns a complex series of facts and important issues on the scope of protection afforded to an insured against its insurer's bad acts under Texas (or, alternatively, Louisiana) law. The insured, Sundown, submits that oral argument will aid this Court in its resolution of the significant issues the appeal raises both on the proper application of insurance law and the limits that restrain a district court's post-trial review of a jury verdict.

TABLE OF CONTENTS

Page

Certificate of Interested Persons i

Statement Regarding Oral Argument iii

Table of Contents iv

Table of Authorities vi

Witness Key 1

Jurisdictional Statement 3

Statement of Issues 5

Statement of the Case 7

Statement of Facts 8

The hurricane, the spill, the suits and the policies 8

What Mid-Continent represented to Sundown 10

The secret visit 18

The secret sampling 25

The secret settlement offer 30

What Mid-Continent did behind Sundown's back 33

Summary judgment rulings, trial and post-trial motions 49

Summary of Argument 54

Argument 58

I. Issue One: Texas Law Provides a Cause of Action for Breach of an Insurer's Duty of Good Faith and Fair Dealing in the Context of Handling Third-Party Claims. 58

A. Standard of Review. 58

B. As the District Court Initially Held, Texas Law Fully Supports Recognition of a Cause of Action for Breach of an Insurer's Duty of Good Faith and Fair Dealing in the Context of Handling Third-Party Claims. 59

II. Issue Two: Sundown's Alternative Louisiana Law Breach of Good Faith and Fair Dealing Claim. 76

A. Standard of Review. 76

B. Louisiana Law Recognizes a Cause of Action for Breach of an Insurer's Duty of Good Faith and Fair Dealing in the Context of Handling Third-Party Claims. 77

III. Issues Three and Four: The District Court Impermissibly Usurped the Jury's Role in Its Post-Trial Second Guessing of the Jury's Findings on Sundown's Statutory Claims. 91

A. Standard of Review. 91

B. Issue Three: The District Court Improperly Reweighed the Evidence with Respect to Sundown's Statutory Claim for Unfair Settlement Practices Based on Mid-Continent's Failure to Provide a Prompt and Reasonable Explanation for Its Settlement Offer to Leopold. 93

C. Issue Four: The District Court Improperly Usurped The Jury's Role By Second Guessing The Jury's Finding On Producing Cause. 104

Conclusion 116

Certificate of Service 118

Certificate of Compliance 119

TABLE OF AUTHORITIES

Cases

2 Fat Guys Inv., Inc. v. Klaver, 928 S.W.2d 268 (Tex. App. 1996)......................106

American Motorists Ins. Co. v. Fodge, 63 S.W.3d 801 (Tex. 2001)................ 65, 66

Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987).........86

Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc), *overruled on other grounds*, *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc) 92

Brennan's Inc. v. Dickie Brennan & Co., 376 F.3d 356 (5th Cir. 2004)...............103

Brown v. Bryan County, OK, 219 F.3d 450 (5th Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001)..91

Deep Marine Technology, Inc. v. Conmaco/Rector, L.P., 515 F. Supp. 2d 760 (S.D. Tex. 2007)...83

Denton v. Morgan, 136 F.3d 1038 (5th Cir. 1998)...92

Doucet v. Middleton, 328 F.2d 97 (5th Cir. 1964)...66

Employers Casualty Company v. Tilley, 496 S.W.2d 552 (Tex. 1973)............ 71, 72

Fehlhaber v. Fehlhaber, 681 F.2d 1015 (5th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983)..66

G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544 (Tex. 1929) . 50, 60, 87, 88

Gabriel v. Lovewell, 164 S.W.3d 835 (Tex. App. 2005)............................. 105, 106

Gourley v. Prudential Property and Cas. Ins. Co., 734 So. 2d 940 (La. Ct. App. 1999), *writ denied*, 750 So.2d 969 (La. 1999) 79

Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179 (Tex. 1995).............105

Herrin v. Medical Protective Co., 89 S.W.3d 301 (Tex. App. 2002)......................85

Holtzclaw v. Falco, Inc., 355 So.2d 1279 (La. 1977)...85

Housing Authority of City of Dallas, Tex. v. Northland Ins. Co., 333 F. Supp. 2d 595 (N.D. Tex. 2004) 74

Klaxon v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487 (1941) 83

Lafauci v. Jenkins, (La. Ct. App. 2003), 844 So. 2d 19, *writ denied*, 842 So. 2d 403 (La. 2003) 82

Maguire v. Ohio Cas. Ins. Co., 602 A.2d 893 (Pa. Super. Ct. 1992) 73

Maryland Ins. Co. v. Head Indus. Coatings and Services, Inc., 938 S.W.2d 27 (Tex. 1996) 87

Millers Mut. Ins. Ass'n of Illinois v. Shell Oil Co., 959 S.W.2d 864 (Mo. Ct. App. 1997) 73

Mills v. Davis Oil Co., 11 F.3d 1298 (5th Cir. 1994) 76

Mooney Aircraft, Inc. v. Donnelly, 402 F.2d 400 (5th Cir. 1968) 66

National Beef Packing Co., L.L.C. v. Zurich American Ins. Co., 336 S.W.3d 181 (Mo. Ct. App. 2011) 73

Northern County Mut. Ins. Co. v. Davalos, 140 S.W.3d 685 (Tex.2004)...............74

Ortiz v. Flintkote Co., 761 S.W.2d 531 (Tex. App. 1988), *writ denied*, (1989) ...106

Pareti v. Sentry Indemnity Company, 536 So.2d 417 (La. 1988)............................81

Paz v. Brush Engineered Materials, Inc., 555 F.3d 383 (5th Cir. 2009).......... 58, 67

Penn-America Ins. Co. v. Zertuche, 770 F. Supp. 2d 832 (W.D. Tex. 2011) 106

Progressive Cnty. Mut. Ins. Co. v. Boyd, 177 S.W.3d 919 (Tex. 2005)........... 65, 66

Republic Ins. Co. v. Stoker, 903 S.W.2d 338 (Tex. 1995).............................. passim

Rideau v. Parkem Indus. Servs., Inc., 917 F.2d 892 (5th Cir. 1990).......................92

Roberie v. Southern Farm Bureau Cas. Ins. Co., 194 So. 2d 713 (La. 1967). 80, 81, 85

Salve Regina College v. Russell, 499 U.S. 225 (1991)..58

Scottsdale Ins. Co. v. National Emergency Services, Inc., 175 S.W.3d 284 (Tex. Ct. App. 2004), *review denied* (2 pets.) (2004)... 83, 86

SnyderGeneral Corp. v. Great American Ins. Co., 928 F.Supp. 674 (N.D. Tex. 1996), *aff'd*, 133 F.3d 373 (5th Cir. 1998)..83

Spence v. Glock, Ges. mbH, 227 F.3d 308 (5th Cir. 2000)......................................83

Stanley v. Trinchard, 500 F.3d 411 (5th Cir. 2007) 80

State Farm Lloyds v. Fitzgerald, 2000 WL 1125217 (Tex. App. 2000) (opinion withdrawn from publication)..106

State Farm Mutual Auto. Ins. Co. v. Traver, 980 S.W.2d 625 (Tex. 1998).... passim

Theriot v. Midland Risk Ins. Co., 694 So.2d 184 (La. 1997)..................................85

Thomas v. Hoffman-LaRoche, Inc., 949 F.2d 806 (5th Cir.1992), *cert. denied*, 504 U.S. 956 (1992) 62, 66, 67

Universe Life Ins. Co. v. Giles, 950 S.W.2d 48 (Tex. 1997) 87

Viking Ins. Co. of Wisconsin v. Hill, 787 P.2d 1385 (Wash. Ct. App. 1990) 73

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) 75

Statutes

28 U.S.C. § 1291 4

28 U.S.C. § 1332 3

La. R.S. 22:1220 77

La. R.S. 22:1973 .... 55, 77, 79

Rule 4(a), FED. R. APP. P. 4

TEXAS INS. CODE § 541.060 .... 101, 104

TEXAS INS. CODE § 541.061 113

TEXAS INS. CODE § 542.153 103

U.S. Const. amend. VII 92

Other Authorities

Frank L. Maraist & Thomas C. Galligan, Jr., *Burying Caesar: Civil Justice Reform and the Changing Face of Louisiana Tort Law*, 71 TUL. L. REV. 339 (1996) 14

Restatement (Second) of Conflict of Laws § 6 .... 83, 84, 88, 89

Treatises

Charles Alan Wright, et al., FEDERAL PRACTICE AND PROCEDURE (3d ed. 2001) 73

Gordon L. Ohlsson, HOLMES' APPLEMAN ON INSURANCE 2d (2009) 73

WITNESS KEY

Allen, Gregg..president and owner of Sundown

Bergeron, Pat.. vice president of ES&H

Chernekoff, Mike..attorney with Jones Walker

Corley, Ray ....vice-president of claims of Mid-Continent

Futrell, Dana... outside adjuster hired by Mid-Continent

Haltom, Steve.............................. vice-president and home office claims supervisor of Mid-Continent

Hendy, Ron .... claims handling expert for Sundown

Hermes, Mary Frances .... controller of Sundown

Hilton, Tom..operations manager of Sundown

Leopold Chris... landowner in Port Sulphur

McGuire, Robin .... vice-president land and general counsel of Sundown

Quinn, Michael Sean............................... claims handling expert for Mid-Continent

Preston, Paul..........................attorney hired by Mid-Continent to defend Sundown, later became counsel for Mid-Continent

Pritner, Rolla .... claims supervisor of Mid-Continent

Ray, Gary ....insurance agent for Sundown

Shutts, Terry.. in-house adjuster for Mid-Continent

White, Russell .... claims handling expert for Mid-Continent

Wollaston, Gerald .... outside consultant hired by Mid-Continent

OTHER SIGNIFICANT NAMES

Clayton, Tony.........................attorney hired by Mid-Continent to defend Sundown

Greco, Lane .... contractor hired by Mid-Continent to estimate Leopold's cleanup costs

Lambert, Dennis......................... environmental engineer hired by Mid-Continent to sample Leopold's property

Levine, Steve...........................Phelps Dunbar attorney hired by Mid-Continent who gave advice to Sundown at first meeting

Muthig, Paul.................. environmental engineer hired by Mid-Continent to review Lambert's work

Slater, Ben.................. family owned land on which Sundown's facility was located

Yount, Scott .... attorney hired by Mid-Continent to defend Sundown and friend of Leopold

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332. This case is a civil action where the amount in controversy exceeds $75,000, exclusive of interest and costs, and is between citizens of different states.

Amount in controversy: Appellants' claim involved policy proceeds totaling $7,000,000 plus compensatory and punitive damages and attorneys fees attributable to statutory and common law bad faith actions of the appellee.

Citizenship of the parties:

- Appellant Eland Energy, Inc. is incorporated in Texas and maintains its principal place of business in Texas.
- Appellant Sundown Energy LP is a Texas domestic limited partnership with its principal place of business in Dallas, Texas. At the time of the filing these consolidated cases the following facts were true: The only partners of Sundown Energy LP were its sole general partners, Sundown General LLC and Sundown GP II, LLC, and its sole limited partners, Charles Timothy Allen and Orville Gregg Allen. Sundown General LLC was a single member Texas domestic limited liability company with its principal place of business in Dallas, Texas, and whose single member was Orville Gregg Allen. Sundown GP II, LLC, was a single member Texas domestic limited liability company

with its principal place of business in Dallas, Texas, and whose single member was Charles Timothy Allen. Charles Timothy Allen and Orville Gregg Allen were both citizens and residents of the state of Texas. Charles Timothy Allen died during the pendency of this case.

- Appellee Mid-Continent Casualty Company is an insurance company incorporated in the state of Oklahoma with its principal place of business in Oklahoma.

This Court has jurisdiction under 28 U.S.C. § 1291 because this is an appeal from a final judgment that disposed of all claims in this case. R 7069-70.

The final judgment was entitled Amended Judgment and was entered on June 14, 2011. Appellants filed their Notice of Appeal on June 29, 2011 noting that the appeal encompasses all opinions, orders and rulings in this matter. R 7357-58. This notice was timely under Rule 4(a), FED. R. APP. P.

STATEMENT OF ISSUES

Issue One: Whether, despite the district court's *pre*-trial holding and subsequent instruction to the jury that Texas law does provide a cause of action for breach of an insurer's duty of good faith and fair dealing in the context of handling third-party claims, the district court erred in its *post*-trial conclusion that Texas law does not.

Issue Two: Alternatively, if there is no Texas common law action for bad faith in handling third-party claims, whether the district court erred in its pre-trial dismissal of Sundown's *alternative* Louisiana law claim for the same thing, when Louisiana law does provide a cause of action for breach of an insurer's duty of good faith and fair dealing in the context of handling third-party claims and when the district court changed its mind on Texas law post-trial.

Issue Three: Whether the district court improperly reweighed the evidence in granting Mid-Continent's post-trial motion on Sundown's statutory unfair settlement practices counterclaim (knowing failure to give a prompt and reasonable explanation of a settlement offer), based on the district court's post-trial factual determination that a certain Mid-Continent letter – considered and rejected by the jury – provided a prompt and reasonable explanation of the policy basis for Mid-Continent's Leopold settlement offer.

Issue Four: Whether the district court improperly usurped the jury's role in granting Mid-Continent's post-trial motion on Sundown's statutory unfair settlement practices counterclaim (both as to the lack of a prompt and reasonable explanation of the settlement offer and as to misrepresentation of facts or policy provisions), based on the district court's post-trial second guessing of the jury's finding that Mid-Continent's misrepresentations were a "producing cause" of Sundown's damages notwithstanding the district court's determination that sufficient evidence supported that Mid-Continent, in fact, made such misrepresentations.

STATEMENT OF THE CASE

Mid-Continent Casualty Company filed suit for a declaratory judgment that it had no further duty to defend and indemnify Sundown Energy LP and Eland Energy, Inc. (collectively "Sundown") in three class actions arising from a hurricane-caused oil spill in Port Sulphur, Louisiana. Simultaneously, Sundown filed its own suit and a cross-claim in Mid-Continent's suit claiming bad faith against Mid-Continent. The cases were consolidated.

During the case several summary judgment motions were filed. In three opinions, the district court granted Mid-Continent the declaratory relief it sought and dismissed some of Sundown's claims. Sundown's remaining claims proceeded to a jury trial. The jury found in favor of Sundown on certain Texas statutory and common law bad faith claims and awarded Sundown a total of $8.45 million in compensatory, penalty and punitive damages.

Nine months later, in a 141-page opinion, the district court granted Mid-Continent's post-trial motions and completely overturned the jury verdict. Sundown appealed.

STATEMENT OF FACTS

The hurricane, the spill, the suits and the policies

On August 29, 2005 Hurricane Katrina tore through Port Sulphur, Louisiana. A towering storm surge moved buildings off their foundations and reduced much of the community to matchsticks.[1] Sundown's[2] oil and gas production facilities on both sides of the Mississippi River were destroyed and tanks containing crude oil were moved and mangled spilling their contents.[3] Less than a month later on September 24, 2005, Hurricane Rita's outer bands caused another storm surge which reflooded the devastated area.[4]

Under the aegis of the Unified Command (a consortium of state, federal and local agencies led by the Coast Guard),[5] Sundown began to clean up the spilled oil using its contractor ES&H.[6] The cleanup was well underway when reflooding

---

[1] R6261/18—6262/5; R7883/6-10. DX33 (West Potash before Katrina); DX14, DX38 (West Potash after Katrina). Record cites in this brief follow this format: R[page]/[lines]. There are two supplemental records which repeat some page numbers from the original record. When citing to a supplemental record, the letters "RS(1)" or "RS(2)" are used instead of "R." Exhibit cites are DX (Sundown exhibit), PX (Mid-Continent exhibit) or JX (Joint exhibit).

[2] Eland Energy, Inc. and Sundown Energy LP are sister companies and are referred to here collectively as "Sundown". R7426/11-18.

[3] R7433/3-18.

[4] R5997/10-22.

[5] R7438/6-16.

[6] R7431/18—7432/5.

from Hurricane Rita caused a setback.[7] The Unified Command dictated where Sundown was to clean up, specifying three geographic zones on each side of the river.[8] By January 17, 2006 the Unified Command was satisfied that all the zones on the west bank of the river (the Port Sulphur area) had been cleaned up and signed official documents declaring the west bank cleanup complete.[9]

In the second half of September 2005 three class action lawsuits were filed against Sundown alleging property damages supposedly caused by the oil spill.[10] The *Blanchard* case was filed on behalf of a class of property owners in the Port Sulphur area.[11] The *Barasich* and *Danos* cases were filed on behalf of classes of fishermen and oystermen in the same area.[12]

Sundown carried primary and excess liability coverage with Mid-Continent. In addition to traditional commercial general liability coverage, both policies contained oil and gas endorsements which overrode pollution exclusions and provided coverage for certain cleanup costs and defense and indemnity for third-

---

[7] R6014/13-21.

[8] DX11; R5988/1-7; R7697/16-19; R8253/17-20.

[9] DX188; R7439/22—7440/9.

[10] R7443/3-17.

[11] JX23.

[12] JX14; JX15.

party environmental damages claims.[13] The primary policy had a limit of $1,000,000 per occurrence with a $2,000,000 aggregate limit.[14] The excess policy had a single limit of $5,000,000.[15]

<u>What Mid-Continent represented to Sundown</u>

Shortly after Sundown became aware of the damage to its facilities and the spilled crude oil, it notified Mid-Continent of the occurrence[16] and that it was beginning cleanup.[17] And as each class action lawsuit was filed, Sundown again notified Mid-Continent and demanded defense and indemnity.[18]

Mid-Continent espoused changing positions regarding these notifications. As for Sundown's cleanup claim, Mid-Continent initially asserted that it appeared that Sundown's cleanup was "voluntary" – as opposed to mandated – for which there would be no coverage.[19] To mollify Sundown, Mid-Continent pointed out that if the spill was caused by an Act of God rather than Sundown's fault,

---

[13] R7597/5-12; R7598/12-17.

[14] R7597/14-19; DX32.

[15] R7597/20-24; JX5.

[16] PX4.

[17] R5927/15—5928/21.

[18] JX14; JX15; JX23.

[19] R8187/14-17; R8198/12-16.

Sundown could obtain reimbursement for its cleanup expenses from a federal fund established by the Oil Pollution Act.[20]

Mid-Continent and Sundown first met face-to-face to discuss the situation on September 21, 2005 at Sundown's Dallas offices.[21] Steve Haltom, a vice president of Mid-Continent, attended and, without notice to Sundown, brought an attorney with him named Steve Levine of Phelps Dunbar.[22] Although Haltom had hired Levine and Mid-Continent would later claim attorney-client privilege as to Levine, at the meeting Haltom said Levine didn't represent anyone and was there to give objective advice.[23]

After Tom Hilton, Sundown's operations manager, explained Sundown's cleanup efforts and what had happened with Sundown's facilities before, during, and after Hurricane Katrina,[24] Levine proceeded to give Sundown legal advice about how to proceed with both the cleanup and the class action lawsuits.[25] Mid-Continent had discovered the class action complaints in a search of court records

---

[20] JX8; R8187/9—8188/4; R7528/4-11; R7585/21—7586/1.

[21] R7497/21-25.

[22] R8191/16-18; R5937/6-16; R7499/9-14.

[23] R5937/17—5938/3; R7499/2-8; R8191/19-22.

[24] R7502/25—7503/5; R6268/16-23.

[25] R7501/4-11; R7506/19—7507/6.

and brought copies to the meeting.[26] Haltom and Levine explained to Sundown that it could pay for the cleanup costs itself and then make a claim against the OPA Fund for cleanup reimbursement if it could prove that the spill was caused by an Act of God rather than any fault of Sundown.[27] Levine opined that the storm surge (an Act of God) was the force that caused the spill from Sundown's crude oil tanks.[28] Haltom explained that there were coverage problems with a voluntary cleanup and urged Sundown to produce a written mandate for the cleanup from the Unified Command as proof that the cleanup was not voluntary.[29]

A second meeting occurred on October 7, 2005, again at Sundown's Dallas offices.[30] Haltom arranged this meeting stating that Mid-Continent had appointed attorneys to defend Sundown in the lawsuits and urging that it was "essential" that Mid-Continent and Sundown "meet and plot a unified plan to coordinate the defense of these cases."[31] This time Sundown brought its own attorneys, Carl Rosenblum and Mike Chernekoff of Jones Walker. Haltom brought Mid-

---

[26] R7504/21—7505/4.

[27] R8095/23—8096/12; R5939/7-12; R7503/18—7504/18.

[28] DX69/SELP-00094; DX71/SELP-15453.

[29] R7503/6-14; R7503/22—7504/17; R7568/12-17.

[30] R7509/8-15.

[31] JX17.

Continent-appointed defense counsel from two separate law firms, Paul Preston and Scott Yount, from one, and Tony Clayton, from another. Sundown's operations manager Tom Hilton and its controller Mary Frances Hermes attended, as well as Sundown's insurance agent Gary Ray.[32]

During the meeting, coverage issues regarding the cleanup were discussed. Haltom indicated that he might retreat from the position that the cleanup was voluntary and might not insist upon a written government mandate.[33] This time Haltom suggested that Mid-Continent and Sundown could participate in the cleanup together and could share in any proceeds recovered from the OPA Fund proportionately if that should happen.[34] Chernekoff asked Haltom whether the Mid-Continent policies would be replenished if Mid-Continent got back all its money from the OPA Fund, so as to be available for the lawsuits.[35] Haltom initially said yes,[36] but then backtracked and said he would have to check on it.[37]

---

[32] R7509/21—7510/5.

[33] R7648/7-20; R7511/3-10.

[34] R7512/4—7513/2.

[35] R7513/20-22.

[36] R7514/14-17.

[37] R7650/9—7652/4.

Turning to the lawsuits, Hilton again recounted the events leading up to Hurricane Katrina for the benefit of Mid-Continent-appointed defense counsel, Preston, Yount and Clayton.[38] Sundown and Mid-Continent had already agreed that Sundown should pursue an Act of God defense, both for purposes of obtaining reimbursement of cleanup costs from the OPA Fund and for defending the class action lawsuits. Louisiana had essentially abolished strict liability without negligence in 1996.[39] Thus, Act of God, if successful, was a complete defense to these suits.

For purposes of the coordination of defense efforts, the group discussed which set of attorneys would take the lead.[40] Haltom told Sundown that Mid-Continent was drafting reservation of rights letters in connection with the lawsuits, which everyone understood to mean that the defense offered by Mid-Continent would not be unqualified.[41] Therefore, it was agreed that any final decision on who would take the lead on the defense would be postponed until the reservation

---

[38] DX71/SELP-15465.

[39] Frank L. Maraist & Thomas C. Galligan, Jr., *Burying Caesar: Civil Justice Reform and the Changing Face of Louisiana Tort Law*, 71 TUL. L. REV. 339 (1996).

[40] R7640/23—7641/13.

[41] R7655/4-22; R8242/24-8243/2.

of rights letters had been received and reviewed by Sundown.[42] In the meantime, *the entire group agreed to coordinate all efforts through Jones Walker to avoid working at cross-purposes which could obviously be disastrous for Sundown*.[43] As Gary Ray (Sundown's insurance agent) put it, Sundown only had $6 million of coverage available for Hurricane Katrina with an additional $1 million for Hurricane Rita; the class action lawsuits could potentially cost Sundown tens of millions of dollars. Mid-Continent had only a piece of the pie and anything over those limits would have to be absorbed by Sundown itself. "And so it was very critical that there be a unified – uniform front down there on how these things [were] going to be handled."[44]

The agreement to work through Jones Walker pending receipt and analysis of the reservation of rights letters was a broad one applying to all aspects of the lawsuits,[45] but certain specific particulars were also discussed and agreed to. The most significant were:

- Sundown had received a message that Ben Slater had called. Slater's family owned the property on which Sundown's West Potash facility

[42] R8043/18-20; R7492/11-21.

[43] R5949/2-25; R5950/10-12; R7645/11-24; R8227/17-25; R8057/14-23.

[44] R5949/9-17.

[45] R7520/21—7521/5.

was located. No one had spoken to Slater since the hurricane, but all presumed he was calling with some kind of inquiry about the spill and the cleanup. It was agreed that Rosenblum of Jones Walker would return Slater's call.[46]

- No one was to visit the devastated area (which was closed to the general public) without coordinating with Jones Walker.[47] Specifically, Rosenblum agreed to arrange a joint visit using a private plane available to Sundown and Rosenblum himself was to attend any visit along with defense counsel hired by Mid-Continent.[48]

Sundown, through its highest officers, Gregg Allen and Tom Hilton, confirmed Sundown's desire that Rosenblum be present on any site visit.[49]

Toward the end of October as Rosenblum's schedule cleared he began making arrangements and informed Preston and Haltom that he could pick them up and fly everyone down to Port Sulphur on October 27, 2005.[50] However, around

---

[46] R8232/17-24.

[47] R5949/18-25; R8057/14-23.

[48] R7645/25—7646/15; R6275/16--6277/1; R8238/12-14.

[49] R5859/3-10; R8232/25-8233/9;R7459/1-11; JX25/MC-05269.

[50] DX144/SELP-14609; R8238/4-14; R7656/9-7657/1.

the same time, Sundown finally received Mid-Continent's reservation of rights letters on the three lawsuits.[51]

After reviewing the reservation of rights letters, Sundown concluded that Mid-Continent had a conflict of interest and, as a result, Sundown was entitled to choose its own defense counsel at Mid-Continent's expense.[52] On October 24, 2005, Mary Frances Hermes of Sundown faxed Haltom a letter explaining that, because of Mid-Continent's reservations of rights, Sundown was rejecting Mid-Continent's choice of counsel and would use Jones Walker for its defense.[53] On the same day, Rosenblum e-mailed Haltom and told Haltom that in light of Sundown's choice of counsel it would be inappropriate for Preston's group to visit Port Sulphur. Thus, the planned trip of October 27, 2005 was cancelled.[54]

On behalf of Mid-Continent, Haltom had no objection to Sundown's demand for independent counsel and eventually authorized the use of Jones Walker, albeit at sharply reduced hourly rates.[55] However, in doing so, he refused to concede the

---

[51] R7447/22-25.

[52] JX27/SELP-05670; R7657/4-24.

[53] JX28.

[54] JX27/SELP-05670.

[55] R7659/2-15; R7576/2-6.

validity of Sundown's contention that the reservation of rights letters had raised a conflict of interest for Mid-Continent.[56]

The secret visit

Sundown proceeded with the defense of the lawsuits through Jones Walker, continuing to assume that the agreement to present a unified front would be honored by Mid-Continent. The first inkling of any discord came on November 11, 2005 during a conversation between Jones Walker attorney Chernekoff and Ben Slater.[57] Chernekoff was answering Slater's questions about the status of Sundown's cleanup, when Slater casually mentioned that he and one of his environmental law partners had met with attorneys Preston and Clayton and another property owner, Chris Leopold, on the property in Port Sulphur.[58] Chernekoff was shocked to learn of this in light of the agreement at the October 7th meeting, the rejection of Preston and his colleagues as Sundown's counsel, and the cancelled joint visit.[59]

---

[56] The reservation that concerned Sundown was Mid-Continent's reservation on allegations of intentional acts. R7546/15-22; R7657/18-24. Haltom denied that there was a conflict. JX32; DX162. Sundown later learned that Preston had advised Haltom that Sundown's position was correct. R8243/15-25; DX153.

[57] R7661/2-7.

[58] R7663/12—7664/1.

[59] R7663/12 – 7664/9.

After hanging up with Slater, Chernekoff immediately called Haltom. Haltom apologized[60] and admitted that he'd understood the instructions at the meeting about coordination and cooperation and agreed he shouldn't have sent Preston and Clayton to Port Sulphur. He further agreed that after having sent them in violation of the agreement, he should have told Sundown about it.[61] Haltom denied that he had anything in writing about what happened during the unauthorized visit but offered to get a written summary from Preston (which he never did).[62] Chernekoff was adamant that nothing of this sort should happen again. Haltom promised that he would not do it again and that he would let Sundown know if he ever thought it appropriate to send anyone down to Port Sulphur.[63]

Over the next several months contacts between Sundown and Mid-Continent focused on cleanup costs and negotiation of Jones Walker's hourly rates. Sundown had initially submitted its paid cleanup bills to Mid-Continent for reimbursement.[64]

---

[60] R8250/18-22. Haltom's testimony is quite clear on this point on cross-examination, although when asked the same question on direct examination he denied having apologized. R6507/6-21. Haltom's inconsistent testimony in this and other instances destroyed his credibility.

[61] R7666/7-7667/3.

[62] R7667/4--R7669/7; R8251/1-19.

[63] R7669/17-25.

[64] R7583/8-23.

In mid-October, answering the question posed by Chernekoff at the October 7th meeting, Haltom advised Sundown that if Mid-Continent paid for the cleanup and then got its money back from the OPA Fund through the Act of God defense, its policies would *not* be replenished for use in the lawsuits.[65] Mid-Continent then sent Sundown a check for cleanup to date in the amount of $853,943.15 in mid-November.[66] On December 2, 2005, Hermes, Sundown's controller, returned the check to Mid-Continent, advising that Sundown had decided to place its cleanup claim in abeyance and save the benefits of its insurance policies for the lawsuits.[67] In Sundown's view, it was simply taking Haltom up on the suggestion he had made at the very first face-to-face meeting, that is, that Sundown would pay the cleanup costs itself and hope to be successful in retrieving those costs from the OPA Fund. Mid-Continent would not pay the cleanup costs and walk away from the lawsuits; instead, Mid-Continent would conserve its insurance for the lawsuits.[68] Sundown then continued to pay for the cleanup itself and did not send further paid bills to Mid-Continent for reimbursement.

---

[65] R7652/5—7653/9; R7524/15—7625/19; JX24.

[66] R7526/5-16; JX35/SELP-14677.

[67] R7527/6-22; JX39.

[68] R7528/4-11.

On March 22, 2006, Haltom wrote to Hermes for the first time since Sundown returned the $853,943.15 check four months earlier. He professed surprise and stated that it was not possible for Sundown to hold its cleanup claim in abeyance. Haltom enclosed a check for the $1,000,000 primary policy limit. Although Haltom had not received bills documenting what had been paid, he stated it was his "belief" that cleanup costs had exceeded $1,000,000.[69] Sundown did not retreat from its plan to continue paying for the cleanup itself. Upon receipt of the check, Hermes placed it in her desk drawer until it was eventually deposited in the court registry during this case.[70]

On April 6, 2006, Gregg Allen, president and owner of Sundown, wrote to Haltom stating he was uncertain of how to proceed with the application of the check, raising several questions. Additionally, Allen informed Haltom that at the class plaintiffs' request, Sundown had entered into preliminary talks to exchange information regarding "what they [plaintiffs] view[ed] as the value of their claim." Allen also advised that Sundown had been contacted by an attorney for the Plaquemines Parish School Board inquiring about settling outside of the class.

---

[69] JX46; R8118/15-8119/6; R8119/17—8120/9.

[70] R7544/11-19.

Allen suggested a meeting to bring Mid-Continent up to date on settlement issues.[71]

On April 25, 2006, Terry Shutts, a Mid-Continent adjuster working on the file under Haltom, wrote to Allen and asked for contact information for the Plaquemines Parish School Board. Shutts stated, "We do have an independent adjuster working in the area. Our desire is to investigate this new claim … as soon as possible."[72]

Sundown was alarmed that Shutts appeared to be unaware of the agreement to coordinate any contacts in Port Sulphur through Jones Walker. To make sure that Shutts understood the agreement and the gravity of the situation, Rosenblum wrote to Shutts on May 4, 2006 copying Haltom. First Rosenblum addressed information regarding potential claimants: Rosenblum attached a letter of inquiry from Amos Cormier and explained that the contact from the School Board had been oral only. For completeness, Rosenblum stated that Sundown had "recently received information very indirectly that a man named Chris Leopold may want Sundown to clean up his boathouse." Rosenblum again cautioned against Mid-Continent contacting anyone without coordinating with Sundown and explained how this could harm Sundown:

---

[71] R6543/15—6545/12; R7452/9-22; JX48

[72] R7950/15-7951/10; JX49.

It should be noted that each of these entities and individuals are, at present, part of the putative class that has been asserted in the Blanchard case, the case that we are defending. Although each has indicated an interest in settling separately from the class, their status cannot be finally determined until a class is defined and certified (or not certified), and, if certified, whether these entities and individuals complete an opt out process.

Because these potential claimants are intertwined with and part of the putative class, extreme care must be taken in any settlement contacts and negotiations so as to preserve the utmost benefit to Sundown from the policies at issue. Settling someone's case at a relatively high value, without thorough scientific testing to prove whether Sundown's oil is even involved, and without discounting for other factors such as the Act of God defense, and the absence of proof of negligence (no strict liability claims exist) could prejudice Sundown's ability to settle the class case within policy limits.

Additionally, as experienced by the defendant in the *Murphy Oil* class action pending before Judge Fallon, there could be potential challenges engendered through direct contact with putative class members, and care must be taken to stay within all ethical boundaries so as not to encourage such challenges.

We therefore request that you do not task your adjusters with making contacts or investigations of these inquiries without first coordinating with us. We pledge our full cooperation in this regard.

Further to the extent any of your employees, agents or adjusters have already made such contacts, we ask that you provide us with copies of any communications or summaries of communications.[73]

---

[73] JX53; R7952/6—7958/9.

Response to this letter came not from Mid-Continent, but from Robert Dees, an attorney with the Martin Disiere firm hired by Mid-Continent (and counsel for Mid-Continent in the instant case). Dees stated that Mid-Continent had a duty to investigate claims against its insured if these were *new* claims and asked that Rosenblum confirm that the School Board, Cormier and Leopold were part of the putative class asserted in *Blanchard* and *not* new claims. Dees then stated that Mid-Continent wanted Jones Walker to respond to the inquiries and copy Mid-Continent. In answer to Rosenblum's concerns, Dees placated, "Mid-Continent has no intention of interfering with the defense of its insured…."[74] He asked that in the future Mid-Continent be kept abreast of claims and demands for settlement. He requested a meeting to bring Mid-Continent up to date on the status of the litigation and *new* claims "*if any, apart from the pending lawsuits*."[75] Dees did not respond to the request for copies of communications between Mid-Continent and potential claimants – thus Sundown logically assumed there were none and that Mid-Continent was continuing to honor its agreement to work through Sundown and Jones Walker.

On June 16, 2006, Sundown and Mid-Continent held a third and final face-to-face meeting at Sundown's Dallas offices. Mid-Continent brought Haltom, Ray

[74] JX57/MC-011668.

[75] JX57/MC-011668.

Corley (another vice-president of Mid-Continent) and its attorney Robert Dees. Sundown brought Hermes, Robin McGuire (recently hired vice-president land and general counsel), and its Jones Walker attorneys, Rosenblum, Chernekoff and Madeleine Fischer.[76]

The secret sampling

Rosenblum began by explaining again the contacts that Sundown had received. The contacts had generally been vague, sporadic and cordial.[77] There had been no dollar demand from any of these individuals.[78] He stated that it would be premature to give a check to anyone and doing so would no doubt result in a ripple effect for the *Blanchard* class action.[79] Haltom stated he agreed and added that neither Mid-Continent nor Sundown wanted "neighboritis."[80]

Rosenblum reminded the group of the essence of Sundown's defense, saying, "[The] storm did [the] damage not us."[81] (McGuire had previously posed the rhetorical question: what could be the damage to something that had already

---

[76] R7552/13-7553/5; R6352/2-10; DX71/SELP-15492.

[77] R7553/8-12; DX71/SELP-15492/

[78] DX71/SELP-15494.

[79] R7555/14-20; R7553/21-23; DX71/SELP-15493.

[80] R7679/2-12; R7556/8-22; R6334/25—6335/9; R6632/19—6633/4; DX71/SELP-15495.

[81] R6631/7-12; DX71/SELP-15495; DX71/SELP-15493.

been destroyed by the storm?[82]) Haltom immediately agreed and then dropped an unexpected bombshell: Mid-Continent had taken 25 core samples on Chris Leopold's property that had come back within state tolerances. The sampling had found a hotspot on the property, but it was diesel oil – not Sundown's crude oil.[83]

Although relieved to hear that Mid-Continent's testing had proven that Leopold's property was not contaminated with Sundown's crude oil, Sundown was shocked to hear that Mid-Continent had contacted Leopold and conducted sampling with no notice to Sundown and its attorneys who were defending the lawsuits.[84] McGuire exclaimed that this was the first Sundown had heard of these samples and reiterated that, "[We] need to coordinate."[85] Corley of Mid-Continent vigorously concurred stating, "[We] need to be in each others hip pockets."[86]

McGuire emphasized that he wanted the investigation done through Jones Walker.[87] Haltom attempted to conciliate by stating that everything had been done

---

[82] R7553/13-20; DX71/SELP-15493.

[83] R7557/21-7558/3; R7679/25—7680/7; R6334/4-14; R6348/20-21; DX71/SELP-15495.

[84] R7679/16-20; R7679/25—7680/7; R7558/15-17; R7560/6-8; R6348/16-19.

[85] R7558/18-24; DX71/SELP-15495.

[86] R7559/23-25; R7680/8-16; R6340/18-22; R6631/13-15; DX71/SELP-15495.

[87] R6334/15-24; DX71/SELP-15495.

in December (2005) and January and that nothing was being done currently.[88] Dees volunteered that Mid-Continent had "*no desire to hire indep[endent] adjustors*" and would "*coordinate through J-W* [Jones Walker]."[89] Mid-Continent's only concern, according to Dees, was that *Sundown* had not immediately informed Mid-Continent of contacts that *Sundown* had received.[90] Haltom agreed to send the sampling results from the Leopold property to Sundown through Chernekoff.[91]

The group then discussed the three lawsuits.[92] The only demand had been from the *Blanchard* plaintiffs who claimed that the area of the spill was larger than the Coast Guard zones.[93] Sundown thought the demand of $9.5 million was out of line.[94] Motions to dismiss were pending in the other two suits.[95]

Finally, Dees asked why Sundown had not cashed the $1 million check that had been sent in March and Corley asked what Sundown wanted from Mid-

---

[88] DX71/SELP-15495-96.

[89] R6335/10-17; R6632/2-7; DX71/SELP-15496.

[90] R6335/10-17.

[91] R7678/15-21; R7679/16-20.

[92] R7677/15-22; R6331/3-9; R6631/1-6.

[93] R6332/5-10; DX71/SELP-15497.

[94] DX71/SELP-15497.

[95] DX71/SELP-15497.

Continent.[96] McGuire asserted that the costs of the litigation *plus* the cleanup would exceed 6 or 7 million dollars.[97] He proposed that Sundown would settle with Mid-Continent, cut it loose and proceed with the defense of the lawsuits on its own if Mid-Continent would do three things: 1) pay Sundown $7 million (6 million for Katrina and 1 million for the exacerbation of cleanup costs due to Rita – covered under the primary policy's aggregate limit); 2) bring payment of Jones Walker's bills through June up to date; and 3) release any purported claim to the OPA Fund for reimbursement of cleanup costs that Sundown itself intended to pursue.[98]

The meeting concluded on a cordial note[99] with Mid-Continent requesting all supporting documentation of cleanup bills to date in order to consider the

---

[96] R7681/18-22; R6335/18-19; R6634/2-9; DX71/SELP-15498-99.

[97] DX71/SELP-15499. Cleanup costs at the time of the meeting were approximately $5.3 million, JX60/MC-004524, and the final total after everything was completed was a little over $5.7 million. R6341/24—6342/4. Cleanup costs never exceeded the combined total of $6 million that Mid-Continent tendered to Sundown, allegedly for payment of Hurricane Katrina cleanup costs. R6719/8-10. Had Mid-Continent only paid actual cleanup costs, Mid-Continent would not have exhausted the excess policy and Haltom, per his promise to the reinsurers, would have continued to pay for defense of the class actions.

[98] R/7681/23-7682/16; R6336/24—6337/3; R6340/6-11; DX71/SELP-15501.

[99] R6350/21—6351/9.

proposed settlement.[100] Mid-Continent appeared to be favorably considering the proposal[101] because Corley commented that in confecting the policyholder's release, they needed to be sure to protect any chance Sundown had for a continued defense in the lawsuits from its second excess insurance carrier.[102] Corley explained that excess carriers generally have an option to defend when primary insurance is exhausted and that excess carriers generally exercise the option if they think they can save on their policy limits.[103]

Later in June, Haltom sent limited sampling results of the Leopold property to Sundown through Jones Walker attorney Chernekoff. [104] Chernekoff, an experienced environmental lawyer, knew there had to be more documentation such as a scope of testing plan. After repeated inquiries in which Chernekoff eventually expanded his request to include "**all** documents related to the Leopold property investigation,"[105] Haltom wrote an exasperated e-mail claiming he had already sent

---

[100] R6338/16-21; DX71/SELP-15500.

[101] R7682/17-20.

[102] R6338/22—6339/3; DX71/SELP-15500. Sundown had another excess layer above Mid-Continent's excess policy, but the higher excess policy excluded pollution. R6339/12-20; R6347/18—6348/12.

[103] DX71/SELP-15501.

[104] R7682/21—7683/14; R7683/15-23.

[105] R7687/2—7688/14; DX290/SELP-15330 (bold in the original).

everything he had and concluding, “I don’t don’t know how I can be more clear.”[106]

The secret settlement offer

However, something much worse than the suspicion that Haltom was hiding documents came to light during the course of the correspondence between Haltom and Chernekoff. In a mailed letter dated July 10, but not received by Chernekoff until July 21, Haltom let drop casually that, “In addition, based on the findings of no contamination to the property of Mr. Leopold other than some oil residue on some of the debris, we have extended an offer of $54,536.00 to Mr. Leopold.”[107] When Chernekoff read that an offer had been made he immediately called McGuire at Sundown.[108] McGuire could not believe his ears and immediately tried to call Haltom and Corley.[109] Failing to get through, he sent an e-mail stating that he had just read the July 10 letter and was confident that it must be a misstatement. He continued that if an offer had been made, it was erroneous and should be immediately withdrawn.[110] Moments after pressing the send button, Haltom

[106] DX290/SELP-15329.

[107] R7690/19—7691/3; DX266.

[108] R7691/20—7692/7.

[109] R6372/2—6374/16.

[110] R6372/2-6; DX276.

returned McGuire's call. Upon confrontation, Haltom admitted making the offer but said it had been rejected.[111] Haltom said the offer had been made before the June 16th meeting, but he hadn't mentioned anything about it because, "he didn't think it was important."[112] McGuire asked what in the world had possessed Haltom "to make a $54,000 offer to somebody that you've already tested their land and you found no Sundown oil on it."[113] Haltom said "I don't know."[114] McGuire asked him, "[I]s this the way you treat all your insureds?" Haltom responded, "No."[115]

A couple of weeks later, Dees wrote a letter and said that the $54,436 offer had been made on June 2, 2006 to Leopold by an e-mail from Haltom to Leopold's attorney, Peter Wanek. According to Dees, Haltom withdrew the offer by e-mail on July 21, 2006, the same day as the conversation between McGuire and Haltom, thus confirming that it had *not* been previously rejected as Haltom represented.[116]

---

[111] R6372/10-25.

[112] R6373/1-16.

[113] R6373/24—6374/3.

[114] R6374/4.

[115] R6374/5-7.

[116] DX295.

Meanwhile, in reliance upon the discussions about a potential policyholder's release at the June 16th meeting, McGuire had sent Mid-Continent all the cleanup bills and other documentation requested by them to evaluate Sundown's settlement proposal.[117] Rather than respond to the proposal, however, Mid-Continent sent Sundown a check for $5 million representing its excess policy limits[118] and then sued Sundown in this case for a declaration that it had no further duty to indemnify or defend. Hermes put the $5 million check in her desk drawer until it was deposited in the court's registry in this case.[119] Mid-Continent's tendered checks totaled $6 million, even though the documented cleanup costs sent by McGuire only totaled $5.4 million and the ultimate cleanup total was only $5.7 million.[120]

Sundown filed its own suit and counterclaim against Mid-Continent on a number of grounds, most importantly for bad faith under Texas statutory and common law and alternatively under Louisiana law.

Shortly thereafter the *Blanchard* plaintiffs amended their lawsuit to add Chris Leopold as a class representative.[121]

---

[117] DX269.

[118] JX68.

[119] R7544/11-19.

[120] N. 97, *supra*.

[121] DX309.

What Mid-Continent did behind Sundown's back

As discovery proceeded in the instant suit, a much more complete picture of Mid-Continent's deceptions, misrepresentations and broken promises emerged. Mid-Continent had originally been the one to suggest that it was absolutely essential for Mid-Continent and Sundown to coordinate their efforts. Mid-Continent agreed with the plan at the end of the October 7th meeting to funnel everything through Rosenblum of Jones Walker to insure that Mid-Continent and Sundown did not work at cross-purposes. Mid-Continent's first violation of this, sending Preston and Clayton to Port Sulphur without telling Sundown, was discovered on November 11th in Chernekoff's conversation with Ben Slater. Haltom, Mid-Continent's representative, apologized, recognized it was a violation of the agreement, and promised Chernekoff that he would forward to him a report of the visit (which he never did) and that Mid-Continent would not under any circumstances send anyone to Port Sulphur without first consulting Sundown. Thereafter, Sundown had no reason to suspect that Mid-Continent was not abiding by the agreement for many months. When in April of 2006 it appeared that Mid-Continent's adjuster, Terry Shutts, was going to try to contact the Plaquemines Parish School Board, Sundown wrote a detailed letter explaining the necessity of a coordinated approach and explicitly warning of the results of making any settlement offers at that point. Sundown then heard nothing more until the June

16th meeting when it heard about the sampling and a month later when Sundown discovered the settlement offer to Leopold. But, Mid-Continent had done much much more.

Sundown later learned that Yount, Preston's partner, was Leopold's friend[122] and, despite the agreement to coordinate, Yount contacted Leopold around the time of the October 7th meeting.[123] Yount bragged about his friendship with Leopold and told Preston that Leopold could get them through the security barricades into Port Sulphur for an inspection.[124] Preston via e-mail requested authority from Haltom to make the visit, without telling Sundown or Jones Walker, and explicitly stated that the downside of such a visit would be that Sundown and Jones Walker would "be unhappy."[125] Preston, more solicitous of Mid-Continent than of his own client Sundown, pointed out that on the other hand Mid-Continent had a lot of money at stake.[126] Haltom authorized the visit brushing off concerns of Sundown

---

[122] R8055/23—8056/3; R5860/4-6; R6130/18-23; JX25/MC-005269.

[123] R6090/10—6091/3; DX121/SELP-05864/0793. These are Preston's notes of October 7, 2005. His handwriting is hard to read, but on the referenced page the following phrases appear: "Scott [Yount] has friend nearby insureds land" and "Chris" and "Contact Slater and others re what we can do."

[124] R8234/9-25; R8235/12-23; JX25/MC-005268-69.

[125] JX25/MC-005268.

[126] R8069/11—8070/9; R5491/5-12; R6492/3-22; JX25/MC-005268.

and Jones Walker saying he didn't care about "some bruised ego."[127] Even after receiving the e-mail from Rosenblum about Rosenblum's arrangements for a visit for October 27th,[128] Preston planned his own a secret visit and carried out that visit on October 24th without notice to Sundown or Jones Walker.[129] When Rosenblum and Chernekoff contacted Haltom on October 24th to say that Sundown was exercising its right to select its own counsel (and canceling the planned joint visit),[130] Haltom said nothing about the fact that Preston and Clayton were that very day meeting with Leopold and Slater in Port Sulphur.[131]

On October 25, 2005, Preston wrote a letter reporting on the visit and faxed it to Haltom.[132] The letter described the meetings and recommended an aggressive settlement strategy, [133] even though Preston admitted he had no idea whether the oil he saw came from Sundown[134] and noted to himself that most of the damage was

---

[127] JX25/MC-005268.

[128] R8070/10-18; JX27/SELP-05670/0599.

[129] R8066/17-22; R6092/21—6098/19; R8044/2-8.

[130] JX27/SELP-05670/0599.

[131] R8239/25—8240/24.

[132] R6502/12-14; JX30.

[133] R6502/25—6503/16.

[134] R8064/25—8065/12; R8048/15-23; R8050/23-25.

caused by the storm surge.[135] Haltom lied when he told Chernekoff on November 11th that he did not have anything in writing from Preston about the visit.[136] Had Sundown been provided with the letter, Sundown would have known about the course upon which Mid-Continent was embarking and would have been able to address it with Mid-Continent.

Haltom also lied to Chernekoff when he told him that he would not violate the agreement to work cooperatively with Sundown again.[137] In fact, Preston e-mailed Leopold and Slater later in November to tell them how to contact Mid-Continent to resolve their "claims" – claims which Sundown did not even know existed.[138] Preston recommended an expert environmental adjuster to Mid-Continent, Luther Holloway.[139] Mid-Continent sent Holloway to evaluate Leopold's property in late November.[140] Then in mid-December when Holloway

---

[135] R8050/2-11.

[136] R7668/18—7669/14.

[137] R7669/17—7670/18.

[138] DX170. Although Preston testified that neither Leopold nor Slater had made any claims or demands for money during the October 24th secret visit, R8067/20—8068/5, in his e-mail of November 14th (after his representation of Sundown had been terminated) he told them to contact Mid-Continent, "If/when you are interested in *attempting resolution of your claims against Sundown*." (Emphasis added.)

[139] DX160.

[140] R6567/20-25; R7896/5-13; DX170.

became ill, Haltom hired his good friend, Dana Futrell, to continue adjusting Leopold's claim.[141] At Haltom's direction, Rolla Pritner, a Mid-Continent claims supervisor, instructed Futrell to evaluate Leopold's property damage to set a "baseline" for cleanup costs and to "locate other claimants" whose names Leopold had promised to provide if Mid-Continent treated him well.[142] Haltom readily admitted at trial that Mid-Continent had embarked on a strategy to locate and settle with as many landowners as it could using Leopold's property as a baseline, but falsely characterized this as something Sundown had agreed to.[143]

Futrell was a property damage adjuster with no experience in investigating liability claims, much less claims for environmental liability or damage.[144] (Leopold later called him a "used car salesman."[145]) He set about determining how much Leopold's claim was worth without regard to whether Sundown had any liability in the matter or whether Sundown's oil was even on Leopold's property. Futrell admitted he had no concern for how his actions might impact Sundown or

---

[141] R6576/25—6577/15; R7819/23—7820/2; R7821/6—7822/5.

[142] JX3/MC-007363; R7910/13-19; R7911/8—7912/2; R6116/21—6117/13; R7828/12—7829/17; R7830/22—7831/2.

[143] R6649/22—6650/13; R8209/1-9.

[144] R7819/12-22.

[145] R6106/17-24.

the lawsuits,[146] and he didn't really know who Sundown was.[147] In short, he treated his assignment as if Leopold were the insured rather than Sundown.[148]

At Leopold's request,[149] Futrell obtained from Mid-Continent the name of an engineer, Dennis Lambert, to do soil testing on Leopold's property.[150] After reviewing a proposal of over 200 pages from Lambert (copied to Haltom, contrary to his statements to Chernekoff that he had nothing of the sort[151]), Mid-Continent gave the go-ahead for Lambert to get started.[152] Lambert performed the sampling in mid-March, noting no odors detected and no visible evidence of oil contamination in the soil.[153] Lambert sent the samples to the lab and when the results came back, sent them to Mid-Continent *and Leopold*, but again nothing was sent to Sundown or Jones Walker.[154]

---

[146] R7824/19-25; 7835/16—7836/10; R7843/6-17.

[147] R7823/19-25; R7826/21-25; R7827/7-10.

[148] R6238/7-11; R6210/21—6211/18; R6212/12-20; R6218/6-14.

[149] R7834/24—7834/5.

[150] R7830/7-9.

[151] R6616/4—6618/4; R7847/2—7843/7.

[152] JX43/MC-001177.

[153] JX45; R6213/16—6214/1.

[154] JX47/MC-001102; R6214/2-7.

Lambert advised Mid-Continent and Leopold that he had found two hot spots out of 25 locations sampled. Lambert did not explain the findings but stated "both borings are on the side in which the spill migrated from the adjacent property."[155] Lambert continued to speak to Leopold by telephone about Leopold's now-burgeoning claim.[156]

In early May, Lambert wrote to Futrell, Haltom and Shutts saying that he believed the source of the hot spots was the spill and that he planned to report the site to the Louisiana DEQ.[157] Haltom knew that a massive cleanup had been done under the oversight of the Coast Guard and the Louisiana DEQ and that the Coast Guard had signed off on the cleanup of the west side of the river as complete.[158] Concerned about Lambert's findings and especially about Lambert's indication that they would be reported to the state authorities,[159] Haltom asked Paul Muthig, a well-qualified environmental consultant[160] to review and evaluate Lambert's

[155] JX47/MC-001102.

[156] R6216/17—6217/14; DX220.

[157] JX54.

[158] R7439/22-7440/9; DX188.

[159] R8159/5-15.

[160] R7913/14—7914/3.

work.[161] A day or two *before* June 2, 2006,[162] Haltom asked Muthig to go back to the site with Lambert to discuss the matter with him and to stop Lambert from reporting his results to the state.[163]

Without waiting for Muthig to get back, Haltom sent a settlement offer by e-mail to Leopold through his attorney Peter Wanek on June 2, 2006.[164] The offer of $54,536 was based upon a $98,560 estimate by Greco Construction for hauling off all debris and grubbing the soil on Leopold's property.[165] True to Mid-Continent's demonstrated concern for Leopold but apparent disdain for its insured Sundown, Futrell had obtained the estimate from a friend of Leopold's at Leopold's request – Lane Greco.[166] Futrell asked Greco to supply a "worst case scenario" estimate.[167] Meanwhile, government agencies were hauling off residential, and later commercial, debris for free. (In fact, Leopold eventually did have all the debris on his property removed for free.[168])

---

[161] R7689/3-20.

[162] DX244.

[163] DX244; R6622/2-5

[164] JX58; R8158/1-3.

[165] JX58; JX52; R6127/1-21.

[166] R7836/11—7837/14; R6112/12—6113/15.

[167] JX4/MC-000908; R6228/2—6229/20.

[168] R7841/12-14; R6084/5-21; R6118/12-14; R6120/5-7; R6120/8-19.

On June 11, 2006, Muthig formally reported the results of his analysis and investigation to Haltom and Shutts.[169] Muthig excoriated Lambert's work. First, he noted that Lambert had made a mistake on the screening values, a mistake that Lambert's firm admitted.[170] Using the correct values, there were no samples exceeding limits for crude oil. The only positive findings related to diesel. Since Sundown's oil was crude, not refined diesel, the oil detected could not have been from Sundown.[171] Muthig went on to cite four primary reasons for his opinion that the oil was not from Sundown and concluded that "to date there is *no* information to show that the minor amount of Diesel Range Organic impacts in eight percent of the soil samples taken by Lambert Engineers is in any way related to a crude oil release that occurred approximately 0.5 miles away during a high flood event."[172] Muthig also noted that reporting Lambert's results to the Louisiana DEQ would probably result in an investigation into Leopold's own past practices, "and not the continued investigation to an oil spill that was properly reported to authorities and

---

[169] DX248.

[170] R8159/22—8160/21; DX248/MC-009656.

[171] DX248/MC-009658; R5780/8-24.

[172] DX248/MC-009658; R7689/3-20.

subsequently remediated."[173] Muthig told Mid-Continent to inform Leopold of his explanation.[174]

But Haltom never sent Muthig's letter to Leopold,[175] leaving Leopold to falsely believe that there was Sundown oil on his property. He never mentioned Muthig's name in the meeting with Sundown a few days later on June 16th.[176] He never sent Muthig's report to Chernekoff when Chernekoff repeatedly asked him for *all* documents concerning Mid-Continent's investigation.[177] It took forced discovery in the instant lawsuit before Sundown uncovered Muthig's involvement and opinions.[178] Haltom admitted knowing that Muthig's report could have been very beneficial to Sundown and had no good explanation as to why he had kept it hidden[179] and why he didn't send it to Leopold.[180]

---

[173] DX248/MC-009656; R6622/6—6623/5.

[174] DX248/MC-009658.

[175] R6623/9-12; R6623/21—6624/3.

[176] R6348/16—6349/25. Haltom, however, made reminder notes to himself during the June 16 meeting referencing both "Lambert data report" and "Muthig Analysis." JX60/MC-004525.

[177] R6618/9—6621/3.

[178] R7688/15—7689/2; 7689/21—7690/2.

[179] R6620/10—6621/3.

[180] R6623/21—6624/3.

Haltom kept other personnel at Mid-Continent in the dark about his offer to Leopold.[181] Corley did not find out until McGuire sent his e-mail on July 21st. Pritner, the Tulsa claims supervisor on the case, found out only shortly before he gave a deposition in the instant case;[182] and Shutts, the adjuster assigned to the matter, only found out during his deposition in this case.[183] Both criticized Haltom's handling when they learned what Haltom had done. Pritner said he'd never paid claims on a spill when Mid-Continent had determined the spill was not the insured's fault.[184] Some determination on liability should have been made before making offers,[185] and if it wasn't Sundown's oil on the property, the "baseline" would be zero and no offer should have been made to Leopold.[186] Pritner also expressed concern that Preston had violated Sundown's instructions and continued to have contact with Slater and Leopold well after he had been told that Sundown did not want Preston to continue as its attorney.[187] Pritner stated that he didn't know about Preston's secret visit at the time it occurred and noted that

181 R6624/8—6625/1.

182 R7918/6-12.

183 R6624/24—6625/1.

184 R7877/24—7878/2.

185 R7898/24—7899/6.

186 R7914/4-18.

187 R7898/7-16.

Sundown was entitled to Preston's report of that visit[188] – a report that Haltom claimed did not exist when he spoke to Chernekoff.[189] In agreement with Pritner, Shutts stated that he wouldn't have made an offer where the insured had no liability.[190] He also stated that Mid-Continent should have told Sundown it was talking to Leopold and that Leopold should have been informed of the results of Muthig's analysis and corrections to Lambert's analysis and should not have been left to believe that his property was contaminated with Sundown's oil.[191]

Haltom was well aware of the consequences of such a preposterous offer. After all, well before he made the offer, Rosenblum had warned in writing that a high offer without any proof that Sundown's oil was involved would prejudice Sundown's ability to settle the *Blanchard* class action within policy limits among other problems.[192] Haltom himself stated at the meeting of June 16th that Mid-Continent agreed that offers should not be made and that making an offer could cause "neighboritis" – deliberately concealing that he had already made such an

---

[188] R7903/17-23; R7904/11-15

[189] Ns. 62 & 136, *supra.*

[190] R7935/1-5.

[191] R7953/18-7954/9; R7948/17-7949/9

[192] R6626/7-6627/2.

offer.[193] Further, when the offer finally came to light in the letter to Chernekoff and the phone call to Sundown's McGuire, Haltom got out an adding machine and calculated that based on the Blanchard plaintiffs' current settlement demand of $9.5 million,[194] the most that Sundown could be responsible for would be about $13,600 per household assuming Sundown simply accepted the demand without asserting its Act of God defense or any defense at all.[195] Incredibly, Haltom had offered Leopold four times that amount![196] If every household in the class got the amount he'd offered to Leopold, Sundown's exposure would rise to about $38 million! Haltom's secret plan (concocted with Preston[197]) to seek out claimants and convince them to settle outside the class action,[198] using Leopold's property as a baseline,[199] had radically increased Sundown's exposure and created high-value claims outside the existing litigation that Sundown knew nothing about. Haltom clearly wanted to find a way to spend Mid-Continent's policy limits to stop incurring defense costs and get out of the case as quickly as possible.

---

[193] N. 80, *supra*. Haltom claimed he "overlooked it." R6638/12-17.

[194] Per settlement demand letter DX240.

[195] DX277; R6637/14—6638/11.

[196] R6638/9-11.

[197] R6503/3-16.

[198] R6477/9-23; R6579/3-6.

[199] R8136/1-14.

Haltom withdrew Leopold's offer at McGuire's insistence,[200] but the damage had already been done. Lambert's communications with Leopold led him to believe his soil was contaminated with Sundown's oil. Mid-Continent never explained to Leopold that Lambert had made mistakes in screening values[201] or that the diesel oil in the two hot spots could not have come from Sundown.[202] Leopold was never given Muthig's report that explained these issues, despite Muthig's explicit instructions to Mid-Continent to do so.[203] The "worst case scenario" estimate that Mid-Continent had obtained from Greco led Leopold to believe the cleanup of his property would cost almost $100,000.[204] In fact, Leopold testified that he had received an oral offer of $100,000 from Mid-Continent,[205] although the only written offer was for $54,536.[206] Thus, when Haltom withdrew the offer on July 21, 2006, Leopold was angry, told everyone that he could that they should sue Sundown and that Sundown was bad,[207] and

---

[200] R8165/1-15.

[201] R6142/1-14.

[202] R6143/7-18.

[203] N. 174 and 175, *supra*; R6143/1-17; R6145/15-25.

[204] JX52.

[205] R6115/10-25.

[206] R6134/3-8; R6129/22-24.

[207] R6167/8-25.

signed on with the *Blanchard* attorneys to become a class representative – giving those attorneys access to information about Mid-Continent's settlement offer and the misleading and erroneous communications that Lambert had made to Leopold. It was only at Leopold's deposition in this case that he learned of the Muthig analysis.[208] At that point, Leopold said that if he had known of Muthig's analysis that the diesel found on his land did not come from Sundown he would have thought differently of Sundown.[209]

Sundown succeeded in getting the *Barasich* and *Danos* class actions (involving fishermen and oystermen) dismissed without paying a penny.[210] The *Blanchard* case, with Leopold now a class representative, was a different story. As explained by McGuire, Mid-Continent's behind-the-scenes activities and offer to Leopold poisoned the well for a similar result in *Blanchard*. Settlement negotiations with the plaintiffs' attorneys in *Blanchard* were now tainted by the offer and chances of a dismissal for nothing vanished.[211] As Sundown's Gregg Allen testified, Leopold's property was not within the Coast Guard zones and there was proof positive that Sundown's oil was not on the property, but once the news

[208] R6140/7—6141/11; R6146/2-10.

[209] R6143/25—6144/17; R6145/15-25.

[210] R5781/10-21; R5782/4-9; R7590/23—7591/7.

[211] R6393/4-6394/3; R6395/23-6396/25.

about Leopold's offer "got around" there was no way out.[212] McGuire negotiated the best settlement he could at $2 million, as the cash portion, which Sundown paid for entirely out of its own money, together with an agreement to remediate any Sundown oil found on any class members' property.[213] Mid-Continent refused to contribute having tendered policy limits on cleanup costs (that did not exceed policy limits) and having withdrawn from the defense.[214]

Discovery revealed that Haltom had promised Mid-Continent's reinsurers that it would continue to defend Sundown until its excess limits of an additional $5 million were exhausted.[215] However, Mid-Continent could not exhaust the excess policy in March, and for many months after, because Sundown, at Haltom's suggestion, had placed its Katrina claim in abeyance and was not sending its cleanup bills to Mid-Continent for reimbursement (and the cleanup never did exceed the excess limits). Accordingly, in early June when Haltom made his "baseline" offer to Leopold, Haltom's scheme was to exhaust the excess policy

---

[212] R5776/14-5778/6; R5779/2-21; R5788/14-22.

[213] R5779/1-3; JX 96-99.

[214] JX86.

[215] Despite Mid-Continent's withdrawal of its defense only upon its tendering of its excess policy limits, the district court decided that Mid-Continent could have legally stopped defending Sundown at the time of its tender of the primary policy limit of $1 million on March 22, 2006. Memorandum Opinion of 3/30/09, R2267 at R2298. *See also* DX206; R6627/20—6628/9.

with the many claims he planned to engender if Leopold accepted the offer and spread the word to the neighbors as Leopold had earlier promised to do.[216] Mid-Continent could then withdraw its defense and stop paying legal bills which were expenses outside the policy limits.[217]

Sundown provided all of the cleanup documentation to Mid-Continent in July, 2006 in response to Mid-Continent's request for the supposed purpose of evaluating the proposal for a policyholder's release that the parties had discussed at the meeting of June 16th.[218] But instead of using the documentation in good faith settlement negotiations, Mid-Continent used the documentation to tender its excess policy limits (even though the cleanup costs had not reached the excess policy limits), withdraw from Sundown's defense, and file this lawsuit.

<u>Summary judgment rulings, trial and post-trial motions</u>

During the course of the litigation, the parties filed several rounds of summary judgment motions. The district court's rulings on those motions granted Mid-Continent much of the relief it requested – a declaratory judgment that its duty to defend ended on March 22, 2006,[219] notwithstanding that Mid-Continent

---

[216] N. 142, *supra*.

[217] R8207/1—8208/7.

[218] DX269.

[219] N. 215, *supra*.

thereafter continued to engage in activities detrimental to Sundown under the pretext of providing a defense to the claims against Sundown. The district court's rulings on the motions also narrowed Sundown's claims but left several viable claims for trial. For purposes of this appeal, the following summary judgment rulings by the district court are significant:

- The district court granted Mid-Continent summary judgment on Sundown's claims under Louisiana law, which were asserted in the alternative in the event Texas law did not provide a remedy. The district court's reason was: "Because the court holds that *Texas law applies and does provide a remedy* for the claims Sundown asserts, it grants summary judgment dismissing Sundown's alternative claims brought under Louisiana law."[220] The italicized phrase refers to the court's holding in an earlier portion of the opinion that Texas law did provide a remedy against insurers for unfair practices in settling third-party claims beyond a *Stowers* claim.[221]
- In the same opinion, the district court held that Sundown had "not adduced evidence that would enable a reasonable jury to find that it

[220] *Midcon I* at R2360-61 (emphasis added).

[221] R2328-29. *G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544 (Tex. 1929), requires an insurer, in the third-party context, to protect its insured by accepting a reasonable settlement offer within policy limits.

> suffered damages from Mid-Continent's untimely notice of the Leopold settlement offer…… A reasonable jury could only find that Sundown was injured by the making of the settlement offer itself, coupled with Mid-Continent's failure to inform Leopold that Sundown's spills may not have impacted his property."[222]

Sundown's remaining claims were tried to a jury over ten days beginning on August 16, 2010. The jury received instructions on both Texas common law bad faith (as recognized in the district court's pretrial rulings) and statutory bad faith. The jury returned a verdict in favor of Sundown[223] on the following points that are significant in this appeal:

- In connection with Sundown's Katrina statutory bad faith claim, Mid-Continent a) misrepresented to Sundown a material fact or policy provision relating to the coverage at issue; and b) failed to provide promptly to Sundown a reasonable explanation of the factual and legal basis in the policy for Mid-Continent's offer of a settlement of a claim.[224]

---

[222] R2327.

[223] R3552-80.

[224] R3564-66. The jury actually found that Mid-Continent violated the Texas Insurance Code in *five* different ways, all of which the district court reversed, but Sundown appeals only two of those reversals here: that relating to

- As to the finding that Mid-Continent failed to promptly provide a reasonable explanation of the factual and legal basis in the policy for its offer of settlement, Mid-Continent acted "knowingly".[225] "Knowingly" was defined as "actual awareness of the falsity, unfairness, or deceptiveness" of an act and "[a]ctual awareness may be inferred if objective manifestations indicate that a person acted with actual awareness."[226]
- In connection with Sundown's claim for breach of the duty of good faith and fair dealing, Mid-Continent a) consciously undermined Sundown's defense in the *Blanchard* case and that act caused Sundown injury independent of Sundown's policy claim; and b) failed to conduct a reasonable investigation of Sundown's Katrina claim and that act caused Sundown injury independent of Sundown's policy claim.[227]

Mid-Continent's failure to explain the settlement offer and that relating to Mid-Continent's misrepresentations.

[225] R3567.

[226] R3562.

[227] R3567-68.

- As to the findings of breach of the duty of good faith and fair dealing Mid-Continent acted fraudulently, maliciously or with gross negligence.[228]
- Sundown was awarded $2,000,000 in compensatory damages in the form of the increased cost of the *Blanchard* settlement (*i.e.*, the cash portion of the settlement).[229]
- As a result of Mid-Continent's *knowing* statutory violation Sundown was awarded $1.75 million in additional damages.[230]
- As a result of Mid-Continent's breach of duty of good faith and fair dealing committed fraudulently, maliciously or with gross negligence, Sundown was awarded $4.7 million in exemplary damages.[231]

The parties filed post-trial motions. In a 141 page opinion issued on June 14, 2011 the district court completely overturned the jury's findings in favor of Sundown and entered judgment in favor of Mid-Continent.[232]

---

[228] R3569.

[229] R3573.

[230] R3575.

[231] R3576.

[232] *Midcon IV*, R6928-7028.

SUMMARY OF ARGUMENT

Issue One:

Before trial, the district court held that Texas law *did* provide Sundown with a remedy for insurer bad faith in handling third-party claims. The district court incorporated this view in its instructions to the jury and the jury found that Mid-Continent acted in bad faith by consciously undermining Sundown's defense and conducting an unreasonable investigation of Sundown's Katrina claim. However, after trial the district court overturned the jury verdict holding that Texas law does not provide such a cause of action. This about-face was erroneous because the district court was bound to follow considered *dicta* in the *Traver* and *Stoker* cases indicating that Texas does recognize such a cause of action under the right set of facts. Further, the district court failed to follow precedent from this Court in the *Northwinds* case, which recognized the "*Stoker* standard." Four additional factors make this case an appropriate case in which to give life to the promise of *Traver* and *Stoker's* considered *dicta*: 1) Mid-Continent used the counsel it had hired to *defend* Sundown as a weapon *against* Sundown, a practice prohibited by the *Tilley* case. 2) Mid-Continent's motivation behind its bad faith actions was to exhaust its policy limits through inflated settlements to escape paying for Sundown's defense – a practice frowned upon in the majority of jurisdictions that have considered the issue. 3) Mid-Continent was defending Sundown under a reservation of rights of

the type that created a conflict of interest and thus Mid-Continent lost its right to control the defense of the case. 4) Mid-Continent's acts of bad faith affected the *Blanchard* case which was a class action and thus had a far greater potential to do permanent and lasting harm to the insured than if it had been an individual case.

Issue Two:

Before trial, the district court dismissed Sundown's alternative claims under Louisiana law because it found that Sundown had an adequate remedy in Texas law. If the district court's post-trial holding that no such remedy existed in Texas law was correct, it was error for the court to have dismissed the Louisiana law claims. Based on the factual findings of the jury, Louisiana law would clearly have provided Sundown a remedy for the damages caused by Mid-Continent's conduct. La. R.S. 22:1973(A) codifies the previously-recognized duty of an insurer to deal fairly and in good faith with its insured, and Louisiana recognizes a cause of action for breach of the duty in the third-party claims-handling context. Applying Texas choice-of-law analysis, if Texas does not provide a remedy here and Louisiana law does, then Louisiana law should apply.

Issue Three:

The jury had abundant evidence for its finding that Mid-Continent did not provide a prompt and reasonable explanation for the Leopold offer. The district court's determination that Haltom's July 10, 2006 explanation of the Leopold

settlement offer was a reasonable and prompt explanation of the basis in the policy for the offer was wrong. The letter was late under any standard and was both facially nonsensical and also untrue and unreasonable when viewed in the context of other evidence. The district court erred by relying only upon the letter itself and ignoring the letter's inherent inconsistency and all the surrounding evidence of unreasonableness. The district court thus did not faithfully apply the standard required to overturn a jury verdict but instead improperly reweighed the evidence, invading the jury's province.

Issue Four:

The district court also failed to faithfully apply the standard required to overturn a jury verdict when it reversed the jury's findings that Mid-Continent's statutory violations (no prompt reasonable explanation of the settlement offer and a multitude of misrepresentations) were a producing cause of Sundown's damages, specifically the $2 million cash portion of the settlement of the *Blanchard* case. Mid-Continent's misrepresentations led directly to the $54,000+ offer to Leopold which would not have been made had Mid-Continent been forthright about what it was up to. Simple mathematics demonstrate that 20 similar offers would exceed the $1 million primary policy limit. Given that there were 696 households in the putative class and thousands of individuals, Mid-Continent's offer was not only wildly unreasonable but was four times the amount of the *Blanchard* plaintiffs'

opening settlement demand on an average per household basis, a fact recognized by Haltom in his "calculation tape." Mid-Continent's actions increased Sundown's exposure in the *Blanchard* case by tens of millions of dollars. Mid-Continent was well aware of the potential for "neighboritis" both because of its own knowledge of the concept and because it had been specifically warned by Rosenblum *before* making the offer to Leopold that making a relatively high offer without scientific proof that Sundown's oil was involved, without discounting for the Act of God defense, and without proof of any negligence by Sundown, could prejudice the case. Under Texas law, "producing cause" is not equivalent to "proximate cause." It does not require foreseeability and all that is required is proof of a causal connection beyond the point of mere possibility. Under this standard, the jury had more than enough evidence to find that Mid-Continent's statutory violations were a producing cause of Sundown's damages, and the district court's reversal of the jury verdict was, once again, a mere substitution of the district court's view for the reasonable findings of the jury.

ARGUMENT

I. Issue One: Texas Law Provides a Cause of Action for Breach of an Insurer's Duty of Good Faith and Fair Dealing in the Context of Handling Third-Party Claims.

A. Standard of Review.

The *de novo* standard of review applies to the issue of whether the district court erred in its post-trial legal conclusion that Texas law does not provide a cause of action for breach of an insurer's duty of good faith and fair dealing in the context of handling third-party claims.[233] As an *Erie* court and in its *de novo* review of the district court's decision on state law, this Court first looks to determine whether any final decisions of the Texas Supreme Court "are dispositive."[234] "If there is no apposite decision, this court must forecast how" the Texas Supreme Court "would rule."[235] "This prediction may be based on [Texas] case law, dicta, general rules on the issue, decisions of other states, and secondary sources."[236]

---

[233] *See, e.g., Mills v. Davis Oil Co.*, 11 F.3d 1298, 1301 (5th Cir. 1994) ("We must review *de novo* the district court's determination of state law.") (citing *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991)).

[234] *Paz v. Brush Engineered Materials, Inc.*, 555 F.3d 383, 392 (5th Cir. 2009) (citations and internal quotations omitted).

[235] *Id.*

[236] *Id.*

B. As the District Court Initially Held, Texas Law Fully Supports Recognition of a Cause of Action for Breach of an Insurer's Duty of Good Faith and Fair Dealing in the Context of Handling Third-Party Claims.

In the first of its three summary judgment opinions leading up to trial[237] the district court held that Texas law recognizes a cause of action for breach of an insurer's duty of good faith and fair dealing in "the processing of a claim."[238] Consistently with this ruling, the district court instructed the jury on how to evaluate and decide Sundown's claim that Mid-Continent "breached its duty of good faith and fair dealing by consciously undermining Sundown's defense in the Underlying Litigation and by failing to conduct a reasonable investigation of Sundown's Hurricane Katrina claim."[239] The district court instructed: "Under Texas law, an insured may recover for breach of the duty of good faith and fair dealing where an insurance company commits some act, so extreme, that the act would cause injury independent of the policy claim."[240] In its verdict, and directly following the district court's instructions, the jury found that Sundown had proven each of the essential elements of its breach of duty of good faith and fair dealing

[237] In this brief the three summary judgment opinions are referenced in chronological order as *Midcon I, Midcon II, and Midcon III*. The trial court's opinion overturning the jury verdict is referred to as *Midcon IV*.

[238] *Midcon* I, R2267 at 2237-38, 2341, 2357-58, 2360-61.

[239] Court's Charge to the Jury, R3552 at 3567-68.

[240] *Id.*

claim and that Mid-Continent had acted fraudulently, maliciously or with gross negligence in its breach.[241] The jury's findings resulted in its award to Sundown of $2 million in compensatory damages and $4.7 million in exemplary damages.[242] The district court originally entered judgment in accordance with the jury's verdict. However, in a complete about-face, the district court granted Mid-Continent's post-trial motion for judgment as a matter of law and completely vacated the jury's damage award to Sundown.

The district court's about-face rested on its determination (more appropriately, "redetermination") that, other than under *Stowers*,[243] "there is no cause of action against an insurer for breach of duty of good faith and fair dealing in the context of third-party claims handling under Texas law."[244] In making this redetermination, however, the district court improperly dismissed as mere unbinding *dicta* dispositive language on an insurer's duty of good faith from two Texas Supreme Court decisions and further labored painstakingly – yet unavailingly – to distinguish an apposite decision of this Court. The district

---

[241] *Id.* at R3568-69.

[242] *Id.* at R3573, R3576.

[243] *Stowers* addresses failure of an insurer to settle within policy limits. N. 221, *supra*.

[244] *Midcon IV*, R6928 at 6970.

court's about-face cannot withstand scrutiny under this Court's *de novo* standard of review.

First, despite explicitly relying on it in its first summary judgment ruling (*Midcon I*) and in instructing the jury on Sundown's breach of duty of good faith and fair dealing claim,[245] in its post-trial reversal of the jury verdict the district court labeled as unbinding *dicta*[246] the "consciously undermine" language from the Texas Supreme Court's 1998 decision in *State Farm Mutual Auto. Ins. Co. v. Traver*.[247] In *Traver*, the Texas Supreme Court had stated that the insured's allegations were "quite different" from a claim that "the insurer merely refused a defense" because the insured's allegations were instead that "the insurer consciously undermined the insured's defense"[248] – a description that precisely fits Mid-Continent's conduct here. The district court based its belated decision to pass this language over as mere *dicta* on its conclusion that the insured's "claim for breach of duty of good faith and fair dealing was not before the *Traver* court."[249] While the district court's change of heart on this matter obviously prejudiced

[245] R3568.

[246] *Midcon IV* at R6952.

[247] 980 S.W.2d 625, 629 (Tex. 1998).

[248] *Traver* at 629.

[249] *Midcon IV* at R6955.

Sundown which tried the case based on the earlier rulings, more importantly for purposes of this appeal, the district court's post-trial holding was simply wrong as a matter of law.

It is true that in *Traver* the Texas Supreme Court did not directly address whether the insurer breached its duty of good faith and fair dealing by its alleged "consciously" undermining of the insured's defense against a third-party claim because the insured had not challenged the court of appeals' judgment on the alleged breach of the duty of good faith and fair dealing claim.[250] Nevertheless, the Texas Supreme Court recognized that, unlike the mere refusal of a defense by an insurer, allegations that an insurer "consciously undermined the insured's defense" of a third-party claim *would give rise to a claim for breach of the insured's duty of good faith and fair dealing*.[251] Because the Texas Supreme Court said as much in a "plain unconditioned statement," the district court was obligated to follow it as "considered dictum" and "convincing evidence of the likely result" under Texas law.[252] The district court's post-trial rejection of *Traver*'s "consciously undermine" language as *dicta*, therefore, ignored its *Erie*-court duty to adhere to

---

[250] 980 S.W.2d at 629 ("*Traver* has not challenged the court of appeals' judgment on . . . the duty of good faith and fair dealing").

[251] *Id.*

[252] *Thomas v. Hoffman-LaRoche, Inc.*, 949 F.2d 806, 812 (5th Cir.1992), *cert. denied*, 504 U.S. 956 (1992).

"considered dicta" of the Texas Supreme Court. The district court's earlier decision to apply *Traver*'s "consciously undermine" language as Texas law and then to instruct the jury on it as Texas law was correct and reinforces that it is, in fact, "considered dictum." Under its *de novo* standard of review, and following *Traver,* this Court should remedy the prejudice incurred by Sundown from the district court's about-face.

Second, the district court examined the "extreme act" language used by the Texas Supreme Court in *Republic Ins. Co. v. Stoker*[253] and concluded, for a number of reasons, that it did not provide Sundown with a remedy. In *Stoker*, the Texas Supreme Court stated: "We do not exclude, however, the possibility that in denying the claim, the insurer may commit some act, so extreme, that would cause injury independent of the policy claim."[254] The district court first determined that *Stoker*'s "extreme act" language was solely in reference to an insurer's handling of a first-party claim.[255] The district court, therefore, distinguished the *Stoker* situation from Sundown's situation, which concerns Mid-Continent's handling of

---

[253] 903 S.W.2d 338, 341 (Tex. 1995). This language was the basis for the district court's charge to the jury at R3567 that, "an insured may recover for breach of the duty of good faith and fair dealing where an insurance company commits some act, so extreme…."

[254] *Id.* at 341.

[255] *Midcon IV* at R6957.

third-party claims (like the *Blanchard* class claims) against Sundown.[256] Next, in the same manner it had handled *Traver*, the district court took an about-face and concluded that the *Stoker* "extreme act" language was *dicta* because it related only to the Texas Supreme Court's opining on the theoretical possibility of such a claim, given that Texas Supreme Court did not decide that the plaintiff/insured in fact stated such a claim.[257] Finally, the district court concluded that the *Stoker* language had not been applied by any Texas court.

In connection with the district court's final point, a review of the cases decided after *Stoker* that the district court discussed shows that, in fact, none of them states that *Stoker* does not afford a cause of action for an "extreme act" of an insurer in breach of its obligation of good faith and fair dealing in the context of third-party claims-handling. Rather, for the most part, they refer to the *Stoker* "extreme act" language and reaffirm the "possibility" of a bad faith claim under appropriate circumstances. For example, in *Progressive Cnty. Mut. Ins. Co. v.*

---

[256] Regardless, it must be noted that Mid-Continent's offending conduct resembles the first-party claim context because much of it occurred directly in its dealings with its insured Sundown. Mid-Continent repeatedly reassured Sundown that it would proceed one way, but behind Sundown's back proceeded in a completely different way. This is a far more extreme case than if Mid-Continent had simply openly disagreed with Sundown and told Sundown that it planned to seek out people who would be willing to settle on an individual basis outside the existing lawsuits.

[257] *Midcon IV* at R6957-59.

Boyd,[258] the Texas Supreme Court affirmed that it had "left open the possibility that an insured's denial of a claim it was not obliged to pay *might nevertheless* be in bad faith if its conduct was extreme and produced damages unrelated to and independent of the policy claim" but noted that the insured plaintiff in that case "has made no such allegations."[259] And in *American Motorists Ins. Co. v. Fodge*,[260] the Texas Supreme Court reaffirmed that in *Stoker*, "we did not exclude the possibility that an insurer's denial of a claim it was not obligated to pay *might nevertheless* be in bad faith if its conduct were 'extreme' and produced damages unrelated to and independent of the policy claim" but found that the *Stoker* "extreme act" cause of action did not apply to worker's compensation claims, like those at issue, because of the detailed statutory regime in place for making and resolving those types of claims.[261] Accordingly, the various cases referenced by the district court show – not that Texas courts have rejected the existence of a *Stoker* "extreme act" claim – but instead that the Texas courts have consistently reaffirmed it as a possibility while not yet finding a case with facts sufficiently extreme to apply it. Again, the district court erred when it held to the contrary.

---

[258] 177 S.W.3d 919 (Tex. 2005).

[259] *Id.* at 922 (emphasis added).

[260] 63 S.W.3d 801 (Tex. 2001).

[261] *Id.* at 804 (emphasis added).

Given that, since its 1995 *Stoker* decision, the Texas Supreme Court has at least twice, in *Boyd* and *Fodge*, reiterated the possibility of an "extreme act" claim and considering this Court's pronouncement of it as the Texas "*Stoker* standard,"[262] the *Stoker* "extreme act" cause of action at this point falls squarely within the confines of "considered dicta," which, under Fifth Circuit precedent, the district court was obligated to follow.[263] As this Court set forth in *Mooney Aircraft, Inc. v. Donnellly*, "[w]e do not deem Pennsylvania Supreme Court dicta to be unhallowed" because the "seals of specific decision are not the sine qua non of a legal proposition."[264] By disregarding the Texas Supreme Court's repeated recognition of its *Stoker* "extreme act" language, the district court, therefore, ignored its obligation under *Erie* to accept Texas state law.

---

[262] *Northwinds Abatement, Inc. v. Employees Ins. Wausau*, 258 F.3d 345, 353 (5th Cir. 2001) ("Examined under the deferential standard of appellate review, the evidence supports a finding of an extreme extra-contractual act sufficient to satisfy the *Stoker* standard.").

[263] *Thomas v. Hoffman-LaRoche*, 949 F.2d at 812; *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1023 (5th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) ("That it might be viewed as dictum is irrelevant, for, where we are bound by state law, considered dictum is to be followed as well as a precise holding") (citation omitted); *Mooney Aircraft, Inc. v. Donnelly*, 402 F.2d 400, 405 (5th Cir. 1968) ("'The obligation to accept local law extends not merely to definitive decisions, but to considered dicta as well.'") (*quoting* 1A Moore, Federal Practice ¶0.307(2), at 3312, as quoted and followed in *Doucet v. Middleton*, 328 F.2d 97, 102 (5th Cir. 1964)).

[264] *Mooney* at 405.

The district court's "forecast"[265] effort accordingly improperly turned a blind eye both to the *Traver* court's "plain unconditioned statement"[266] regarding an insurer's legal duty to refrain from "consciously" undermining its insured's defense and to the Texas Supreme Court's consistent reaffirmation of the possibility of a *Stoker* "extreme act" claim. Upon review, this Court should reverse the district court's incorrect *Erie* (second) guess.

The last hurdle the district court had to overcome to dismantle its previous holding that Texas *does* recognize a breach of good faith and fair dealing claim in the third-party claims-handling context was this Court's decision in *Northwinds Abatement, Inc. v. Employees Ins. of Wausau*.[267] In *Northwinds* the Court stated:

> Where, as here, there has been no breach of contract or violation of the duty of good faith and fair dealing, the bar for establishment of extra-contractual liability is high: the insurer must "commit some act, so extreme, that [it] would cause injury independent of the policy claim." [citing *Stoker*]. . . . . Wausau's successful efforts to persuade the Facility to sue Northwinds baselessly involved acts that a reasonable jury could find extreme, and they clearly caused Northwinds extra-contractual damages, as the company had to spend over $55,000 defending itself against the lawsuit. Examined under the deferential standard of appellate review, the evidence

[265] *Paz*, 555 F.3d at 392.

[266] *Thomas v. Hoffman-LaRoche*, 949 F.2d at 812.

[267] 258 F.3d 345 (5th Cir. 2001).

> supports a finding of an extreme extra-contractual act sufficient to satisfy the *Stoker* standard.[268]

Initially, the district court sought to overcome the applicability of *Northwinds* by its conclusion that, in it, this Court did not apply the *Stoker* language in the context of the insured's claim for breach of good faith and fair dealing and instead discussed the *Stoker* language only in the context of the insured's statutory causes of action.[269] Even assuming that the district court were correct, however, the flaw in its reasoning is that Sundown also satisfied its burden to show that Mid-Continent had violated a number of statutory provisions, which therefore would make the *Northwinds'* court's treatment of the *Stoker* "extreme act" language equally applicable to Sundown.[270]

The district court next turned to the facts of *Northwinds* and sought to distinguish them from Sundown's, observing that the *Northwinds* "extreme act" that gave rise to its liability was completely independent of the insured's claim for

---

[268] *Id.* at 353.

[269] *Midcon IV* at R6966.

[270] The district court also rejected *Northwinds* as inapplicable by referencing a number of subsequent Texas cases and concluding, based on them, that "the *Stoker* language is not well-established Texas law." *Midcon IV* at R6967. As previously set forth, however, none of the cases discussed by the district court discounts the existence of a *Stoker* "extreme act" claim; rather, they continue to embrace it.

the mishandling of third-party claims asserted against the insured.[271] In particular, the district court found that the "extreme act" in *Northwinds* was the insurance servicing company's act of persuading the insurance Facility to file a baseless lawsuit against the insured, which, as the district court opined, was completely unrelated to the servicing company's mishandling of the insured's worker's compensation claims. According to the district court, unlike *Northwinds*, none of the "extreme" acts of Mid-Continent upon which Sundown relied were independent of Sundown's policy claim.[272]

On the contrary, the extreme acts of Mid-Continent with respect to Leopold – the secret visit, secret investigation, secret sampling and secret offer – were independent of Sundown's policy claims in that they were unrelated to the class action lawsuits or the cleanup claim which were the only claims Sundown presented to Mid-Continent and the only claims of which Sundown was aware. The only thing that Sundown knew specifically about Leopold before learning about Mid-Continent's sampling and settlement offer was vague and indirect knowledge that "a man named Leopold may want Sundown to clean up his boathouse."[273]

---

[271] *Midcon IV* at R6970-75.

[272] *Midcon IV* at R6974-75.

[273] JX53/MC-001071.

As far as Sundown was concerned, any initial inquiries about cleanup should have been satisfied as of early 2006 when its cleanup in the Port Sulphur area was certified as complete. There was no reason to believe that anyone outside of the class action lawsuits intended to make a claim against Sundown. Leopold had not filed any sort of suit and never made any written or oral demand against Sundown when Mid-Continent took the (extreme) actions that it took encouraging Leopold to assert a "claim" that was given birth by Mid-Continent itself. Indeed, Mid-Continent had been provided the ES&H reports that clearly showed that Leopold's land was outside of the area where the Unified Command found that Sundown's oil had spilled.

Mid-Continent therefore was not acting under the policy to settle an existing "claim." Instead, Mid-Continent sought to create new claims, when it used Preston and his colleagues (counsel appointed to *defend* Sundown) to contact Leopold, inspect his property and instruct him exactly how to *make* a high-value claim that Mid-Continent would then satisfy and use as a measuring stick for other claims it hoped to create – all unbeknownst to Sundown. This creation and encouragement of new "secret" claims against its own insured was labeled by both sides' experts as contrary to standard industry claims-handling practice and ethically

unacceptable[274] – although apparently Haltom's ethical standards did not prohibit it.[275] In seeking out Leopold, Mid-Continent thus acted independently of its policy rights and obligations in a scheme to manufacture claims against Sundown outside of the existing lawsuits. Consequently, notwithstanding the district court's efforts to distinguish them, the facts in this case are in harmony – not discord – with those examined by this Court in *Northwinds*.

Four additional factors in this case bear consideration and support the conclusion that Texas would find this an appropriate case in which to "realize" the considered *dicta* of *Traver* and *Stoker*. These factors are:

First, Mid-Continent used the defense counsel it had hired to defend Sundown as a weapon against Sundown and to promote its own interests to the detriment of Sundown. In an analogous situation, the Texas Supreme Court condemned such conduct and arguably recognized a duty in a third-party context outside of *Stowers*. Specifically in *Employers Casualty Company v. Tilley*,[276] the

---

[274] R7751/17-20 (Sundown's expert testified, "[I]t is probably one of the most troubling things, and that is, as an insurance company you don't usually go out and try to invite people to make claims against the policyholder, to actually orchestrate the actual reason to start making claims settlements."); R8337/19-22 (Mid-Continent's expert agreed that it was unacceptable for an insurance company to initiate and promote claims against its own insured.)

[275] Haltom testified that Mid-Continent's duties might include a duty to seek out people to file claims against Sundown. R8208/15-17.

[276] 496 S.W.2d 552 (Tex. 1973).

attorney hired by Employers to defend its insured Tilley actively worked against Tilley in developing evidence for Employers on a coverage question. The Texas Supreme Court found this a gross violation of the public policy of Texas. Importantly, the court noted that, "It is undisputed that the work of the Employers-Tilley attorney on the coverage issue … was not on his own initiative or merely incidental to his defense of Tilley; it was at the instance and request of Employers and for its benefit against Tilley."[277] Likewise here, Preston and Yount were never off on a frolic and detour of their own. Rather, Mid-Continent knew full well what Preston and Yount were doing and encouraged and authorized their actions in writing.[278] In *Tilley*, the Texas Supreme Court remedied the damage caused by Employers conduct by prohibiting Employers from asserting its policy defenses that had been covertly developed. Here, the damage to Sundown was monetary and found by the jury to be the full amount of the cash portion of the *Blanchard* settlement -- $2 million. The remedy for Mid-Continent's conduct in this case is to enforce the jury verdict and repair the loss to Sundown that Mid-Continent caused.

Second, Mid-Continent was attempting to exhaust all of its policy limits to avoid continuing the defense of Sundown. Most states that have considered the

---

[277] *Id.* at 560.

[278] Indeed, Haltom testified that Sundown was Preston's one and only client but that Preston later turned into counsel for Mid-Continent! R8108/21-22; R8216/11-24.

issue hold that an insurer may exhaust policy limits through settlements and terminate the duty to defend, but with the caveat that the settlements must be *in good faith*.[279] Even Mid-Continent's expert agreed that an insurer should never overpay claims for the purpose of avoiding the defense of the insured.[280] Furthermore, that standard of care does not change even if the insurer has exhausted its primary limit so long as the insurer continues the defense of the insured.[281] Thus, even though Mid-Continent had, according to the district court, properly tendered its primary limits on March 22, 2006, that did not free it to waste its excess limits in extravagant and exaggerated settlements such as it proposed to

---

[279] *See e.g*., *Millers Mut. Ins. Ass'n of Illinois v. Shell Oil Co.*, 959 S.W.2d 864, 871 (Mo. Ct. App. 1997) (public policy requires the insurer to act in good faith in the interest of all insureds under the policy); *Viking Ins. Co. of Wisconsin v. Hill*, 787 P.2d 1385, 1390 (Wash. Ct. App. 1990) (insured protected from inappropriate settlements by insurer's duty of good faith); *National Beef Packing Co., L.L.C. v. Zurich American Ins. Co.*, 336 S.W.3d 181, 186 (Mo. Ct. App. 2011) (a good faith effort to settle a claim against an insured was crucial to the analysis); *Maguire v. Ohio Cas. Ins. Co.*, 602 A.2d 893, 896 (Pa. Super. Ct. 1992) (the exercise of good faith prevents an insurer from entering into a dubious release in order to quickly exhaust the limits of its liability to the insured); *Pareti v. Sentry Indemnity Company*, 536 So. 2d 417, 423 (La. 1988) (an insurer which hastily enters a questionable settlement simply to avoid further defense obligations under the policy clearly is not acting in good faith and may be held liable for damages caused to its insured). As a corollary, an insurer may not avoid the duty to defend by simply depositing policy limits in the court registry. 22 Gordon L. Ohlsson, HOLMES' APPLEMAN ON INSURANCE 2d § 136.6 (2009) and 7 Charles Alan Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 1713 (3d ed. 2001) and cases cited therein.

[280] R8338/3-6.

[281] R8338/7-11.

Leopold on June 2, 2006.[282] Although it appears no Texas court has considered the issue, there is no reason to believe that Texas would diverge from the majority view.

Third, Mid-Continent was defending Sundown under a reservation of rights at the time it committed the acts of bad faith. Under these circumstances, Mid-Continent lost the power it otherwise would have had to control the defense.[283] There was unanimous agreement on this point, even from Haltom.[284] Mid-Continent knew that Sundown was asserting an Act of God defense in the litigation, a strategy it purported to agree with and that was necessary to Mid-Continent's hope of reimbursing itself from the proceeds of the OPA Fund.

---

[282] In *Midcon II*, the district court asserted that these principles were inapplicable because Mid-Continent had no duty to defend under the excess policy. R1370 at R1398. Regardless of whether it had a duty to do so, it was in fact doing so at the time it made the offer to Leopold, and the offer to Leopold was motivated by a desire to exhaust excess policy limits and stop defending the case.

[283] More precisely, Texas law holds that upon issuance of a reservation of rights letter, "when the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends, the conflict of interest will prevent the insurer from conducting the defense." *Northern County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685, 688 (Tex.2004). In *Housing Authority of City of Dallas, Tex. v. Northland Ins. Co.*, 333 F. Supp. 2d 595 (N.D. Tex. 2004), the court held that where the complaint against the insured alleged "willful" misconduct and the insurer reserved rights on the ground that a willful violation would not be covered there was a disqualifying conflict of interest and the insurer lost the right to control the defense. In the case at bar, one of Mid-Continent's grounds for reserving rights was that its policy did not cover intentional acts and that the lawsuits alleged Sundown had acted intentionally. The reasoning of *Northland* is on all fours here.

[284] R6612/19 – 6613/1.

Nonetheless, Mid-Continent's secret plan of covertly seeking out landowners, creating claims separate from the *Blanchard* class action and settling them at high values and with no investigation of liability (and even in the face of concrete evidence that Sundown's oil was not involved) was a conscious undermining of Sundown's Act of God defense – a defense that Mid-Continent had no right to control.

Fourth, the district court ignored the fact that the consequences of Mid-Continent's bad faith conduct were magnified because *Blanchard* was a class action. Mid-Continent deliberately attempted to set a very high "baseline" for Leopold's property that they intended to apply in seeking out and settling other claims outside the class action.[285] In doing so, they greatly affected the ability of Sundown to resolve the class action or achieve a dismissal for nothing, as was done in the *Danos* and *Barasich* class action cases. Haltom's "calculation tape" demonstrates his awareness that his offer to Leopold was four times greater than the *Blanchard* plaintiffs' *opening* settlement demand would have yielded on a per household basis. Despite Mid-Continent's knowledge that the class actions could

[285] As demonstrated in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the commonality requirement for a class action is only satisfied when the case can generate, not common questions, but common *answers*. The answer that Mid-Continent attempted to provide to the damages question via the Leopold "baseline" was extremely dangerous to Sundown.

place Sundown in financial jeopardy,[286] Mid-Continent recklessly multiplied Sundown's exposure to approximately $38 million. Given the high stakes in class action litigation, Mid-Continent should have been on special alert to take care that its actions did not prejudice Sundown.

These factors reinforce the conclusion that in the end, the district court's after-the-verdict decision that Texas law does not provide a claim for an insurer's breach of its duty of good faith and fair dealing is simply ill-founded under the totality of the circumstances of this case. It most certainly can not withstand the proper level of scrutiny under this Court's *de novo* review. *Traver*, *Stoker* and *Northwinds* all forecast a different result, a result consistent with the district court's original holding, its jury instructions and the verdict. The judgment consistent with the jury's verdict must be reinstated.

II. Issue Two: Sundown's Alternative Louisiana Law Breach of Good Faith and Fair Dealing Claim.

A. Standard of Review.

"The standard of review at the appellate level of a district court's grant of summary judgment requires the same analysis as employed by the trial court."[287] "Legal questions raised by the grant of summary judgment are reviewed *de*

[286] DX95.

[287] *Mills*, 11 F.3d at 1301 (citing Fed. R. Civ. P. 56(c)).

novo."[288] Because the district court granted Mid-Continent's summary judgment motion on Sundown's alternative Louisiana law claims on the legal ground that they were unnecessary given that Texas law provided a remedy, this Court's standard of review is *de novo*.

B. Louisiana Law Recognizes a Cause of Action for Breach of an Insurer's Duty of Good Faith and Fair Dealing in the Context of Handling Third-Party Claims.

In Sundown's Fourth Amended Counterclaim, it asserted alternative claims under Louisiana law, including an extracontractual claim for breach of the duty of good faith and fair dealing under Louisiana law[289] based on Mid-Continent's "failure to inform Sundown regarding its contacts and settlement overtures" and its "unreasonable settlement offer to a single member of the Blanchard putative class action."[290]

In *Midcon I*, the district court granted Mid-Continent's summary judgment motion on Sundown's alternative claims under Louisiana law, including

---

[288] *Id.*

[289] In its counterclaim Sundown relied on La. R.S. 22:1220(A) which provides that an insurer owes to its insured a duty of good faith and fair dealing (including a duty to adjust claims *fairly*) and that an insurer who breaches these duties shall be liable for any damages sustained as a result of the breach. Since the filing of this counterclaim, the Louisiana legislature in Act 415 of 2008 changed the numbering scheme without changing the substance of the provision. La. R.S. 22:1220(A) is now La. R.S. 22:1973(A) and will be referred to by its currently designated number in this brief.

[290] Fourth Amended Counterclaim at Count VII, R2429 at ¶ 251.

Sundown's Louisiana breach of good faith and fair dealing claim. It held: "Because this court holds that *Texas law applies and does provide a remedy* for the claims Sundown asserts, it grants summary judgment dismissing Sundown's alternative claims brought under Louisiana law."[291] The district court's ultimate conclusion that Texas law does not provide a remedy for the breach of good faith and fair dealing claim asserted by Sundown was, therefore, a 180 degree turn from its pre-trial holding to the contrary and in retrospect the district court deprived Sundown of a recognized remedy under Louisiana law. Had the district court decided before trial that Texas law did not provide a remedy, it could have charged the jury under Louisiana law. This obvious legal error need not, however, result in a retrial because the jury's factual findings lead inevitably to the conclusion that Mid-Continent violated its duty of good faith to Sundown under Louisiana law. Those factual findings include:

- Mid-Continent consciously undermined Sundown's defense
- Mid-Continent conducted an unreasonable investigation of the oil spill
- Mid-Continent committed extreme acts against Sundown
- Mid-Continent did all of the above maliciously, fraudulently or at minimum with gross negligence.

[291] *Mid-Con* I at R2360-61 (emphasis added).

Thus, in accord with these factual findings, should this Court find that there is no remedy in the third party claims-handling context under Texas law, this Court can direct that judgment be entered in favor of Sundown under Louisiana law in the amount of $2 million (compensatory damages found by the jury) plus a $4 million statutory penalty that would be the allowable penalty under Louisiana law.[292]

Sundown's Louisiana law claim for bad faith was asserted under La. R.S. 22:1973(A), which provides that an insurer owes a duty of good faith and fair dealing to his insured and that "Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach." The statute did not create or change the duty of good faith in Louisiana, however. It merely codified a duty that had long been recognized in the jurisprudence.[293] The major change brought about by the statute as far as the insurer-insured relationship is concerned in the context of this lawsuit was the addition of a penalty provision in 22:1973(C).

Although La. R.S. 22:1973(B) sets forth a list of acts that constitute "a breach of the insurer's duties imposed in Subsection A,"[294] this Court held in

[292] La. R.S. 22:1973(C) permits a penalty of up to two times the compensatory damages.

[293] *Gourley v. Prudential Property and Cas. Ins. Co.*, 734 So. 2d 940, 945 (La. Ct. App. 1999), *writ denied*, 750 So.2d 969 (La. 1999) and cases cited therein.

[294] Although (B)(1) (misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue) applies here, neither (B)(1) nor any

Stanley v. Trinchard,[295] that the listing in Subsection B is not an exclusive list of the ways in which an insurer can breach its duty of good faith to its insured and found instead that the listing in Subsection B is exclusive only to bad faith claims made by a non-insured third party against the insurer. Indeed, two actions outside of the Subsection B listing that the *Stanley* court specifically recognized could be a breach of the duty of good faith are: (a) an insurer's settlement of the litigation for policy limits without negotiating a full release for the insured; and (b) an insurer's misrepresentation of policy terms and limits and nondisclosure of essential information about the settlement.[296]

Looking to the Louisiana Supreme Court, there is sound precedent that Mid-Continent's actions constitute bad faith in the eyes of Louisiana law. In *Roberie v. Southern Farm Bureau Cas. Ins. Co.*,[297] the Louisiana Supreme Court found an insurer in bad faith by failing to keep its insured informed of settlement negotiations. The court explained:

> We agree with the Court of Appeal that there was no bad faith on the part of the Insurance Company in not

---

of the other enumerated instances is paragraph B encompass the full scope of Mid-Continent's bad faith actions in their interaction with Leopold.

[295] 500 F.3d 411, 427 (5th Cir. 2007).

[296] *Stanley* at 429-30 (citing *Pareti v. Sentry Indem. Co.*, 536 So.2d 417 (La. 1988)).

[297] 194 So. 2d 713 (La. 1967).

> compromising the claims filed against it in the Pitre case. . . . However, the insured, Roberie, was kept in the dark; he was never apprised of the offers of compromise nor warned of his potential liability; he was ignored. He needed information and advice on the point of his potential liability, which he was not given by his representative, his insurer. A conflict of interest arose between the insurer and the insured. The insurer failed to discharge its duty towards its insured, thereby precluding any decisive action on his part. We find that the actions of [the insurer] towards Roberie were more than negligent; they were in bad faith and in utter disregard of Roberie's natural desire to protect himself from financial loss.[298]

Similarly, in *Pareti v. Sentry Indem. Co.*, 536 So. 2d 417 (La. 1988), the Louisiana Supreme Court discussed the parameters of the insurer's duty of good faith when paying out limits and terminating a defense in words that uncannily parallel Mid-Continent's conduct here:

> The concern that in some cases an insurer might attempt to circumvent its duty to defend the insured by making an "early escape" from the litigation is a valid one. However, in order to safeguard against the risk that insurance companies will enter inappropriate settlements in some cases, it is not necessary for us to void an unambiguous contractual provision. Instead, the protection afforded to insureds against this contingency is that in every case, the insurance company is held to a high fiduciary duty to discharge its policy obligations to its insured in good faith-including the duty to defend the insured against covered claims and to consider the interests of the insured in every settlement..

[298] *Roberie* at 716.

> When multiple claims are filed against the insured that have the potential for exceeding the insurer's policy limits, the insurer must act in good faith and with due regard for the insured's best interest in considering whether to settle one or more of the claims. *An insurer which hastily enters a questionable settlement simply to avoid further defense obligations under the policy clearly is not acting in good faith and may be held liable for damages caused to its insured.*[299]

And in addition:

> Further, any payment of the policy limits which does not release the insured from a pending claim (*e.g.*, unilateral tender of policy limits to the court, the claimant or the insured), even if sufficient to terminate the duty to defend under the wording of the policy involved, raises serious questions as to whether the insurer has discharged its policy obligations in good faith.[300]

These examples fully support Sundown's alternative Louisiana law claim under the facts found by the jury.[301]

Had the district court determined before trial that Texas law did not afford a remedy (instead of changing its view after trial was completed) and that Louisiana

---

[299] 536 So. 2d at 423 (citations omitted and emphasis added).

[300] *Id.* at 424.

[301] *See also Lafauci v. Jenkins*, (La. Ct. App. 2003), 844 So. 2d 19, *writ denied*, 842 So. 2d 403 (La. 2003) (statute supplements and complements the existing duty of a liability insurer to its insured, which includes the duty to act in good faith and to deal fairly in handling claims).

law did, it would have found a conflict and applied Texas choice of law analysis.[302] For choice of law analysis, Texas employs the Restatement's "most significant relationship" test.[303] Moreover, Texas law's requirement that a choice of law determination must be done on an issue by issue basis[304] allows for the outcome that the law of different states can govern separate claims in the same suit.[305] Indeed, the laws of several states may apply to given issues in this action because it concerns an Oklahoma insurer and a Texas insured, both doing business in Louisiana, and, further, centers on Louisiana, where the oil spill occurred, where the *Blanchard* case was filed, where the offending secret visits, investigation, sampling, and offer occurred, and where the damages were sustained (Sundown's payment of the $2 million cash portion of the *Blanchard* settlement).

The starting point for Texas choice-of-law analysis is the general rule of § 6 of the ALI Restatement (Second) of Conflict of Laws. It states:

---

[302] In diversity cases, federal courts must apply the choice of law rules of the forum state. *Klaxon v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496 (1941); *Spence v. Glock, Ges. mbH.*, 227 F.3d 308, 311 (5th Cir. 2000).

[303] *Spence*, 227 F.3d at 311.

[304] *Id.*, n. 6.

[305] *See Deep Marine Technology, Inc. v. Conmaco/Rector, L.P.*, 515 F. Supp. 2d 760, 769 (S.D. Tex. 2007); *Scottsdale Ins. Co. v. National Emergency Services, Inc.*, 175 S.W.3d 284, 291 (Tex. Ct. App. 2004), *review denied* (2 pets.) (2004); *SnyderGeneral Corp. v. Great American Ins. Co.*, 928 F.Supp. 674 (N.D. Tex. 1996), *aff'd*, 133 F.3d 373 (5th Cir. 1998).

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> > (a) the needs of the interstate and international systems,
> >
> > (b) the relevant policies of the forum,
> >
> > (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> >
> > (d) the protection of justified expectations,
> >
> > (e) the basic policies underlying the particular field of law,
> >
> > (f) certainty, predictability and uniformity of result, and
> >
> > (g) ease in the determination and application of the law to be applied.

Under the Restatement factors set forth in § 6(2), the first step is to identify the interested states. The interested states in this instance are Texas and Louisiana given the insured's Texas citizenship and that this dispute centers mostly on events and property located in Louisiana.

Of the factors set forth in the Restatement § 6,[306] the policies of Louisiana, as an interested state, and of Texas, the forum, are particularly relevant to this

---

[306] Comment c to the Restatement § 6 underscores that "Varying weight will be given to a particular factor, or to a group of factors, in different areas of choice

inquiry. Viewing Louisiana first, its law evidences a strong public policy to protect the insured from bad faith actions taken by the insurer, including bad faith settlements and/or failure to keep the insured apprised of settlement negotiations.[307] This policy requires an insurer not only to consider carefully its insured's interests when handling and settling claims but also extends to an insurer's duty to keep its insured reasonably informed about settlement negotiations so that the insured may take reasonable steps to protect its own financial interest.[308] Indeed, Louisiana views the insurer as having a fiduciary relationship to its insured, while Texas rejects the "fiduciary" label and states only that the insurer and the insured have a "special relationship."[309]

Like Louisiana, Texas has a significant interest in matters related to violations of its insurance laws. In enacting the Texas Insurance Code, particularly the Unfair Claims Settlement Practices portion of it, the Texas Legislature has

---

of law." Certain of the Restatement factors are not of particular relevance to the choice of law inquiry here, such as the needs of the interstate system and the ease in determination and application of the law to be applied, as this Court should be able to apply Louisiana law just as easily as it applies Texas law.

[307] *Holtzclaw v. Falco, Inc.*, 355 So.2d 1279, 1283-84 (La. 1977).

[308] *Id.*; *Roberie v. Southern Farm Bureau Cas. Ins. Co.*, 194 So.2d 713, 715 (La. 1967).

[309] *Theriot v. Midland Risk Ins. Co.*, 694 So.2d 184, 187 (La. 1997) (fiduciary relationship in Louisiana law); *Herrin v. Medical Protective Co.*, 89 S.W.3d 301, 308 (Tex. App. 2002) (special relationship in Texas law).

expressed the policy that Texas citizens be protected from unfair or deceptive acts and practices by insurance companies.[310]

The cause of action that we are concerned with here, however, is not one under the Texas Insurance Code, but rather a *common* law cause of action for breach of the duty of good faith and fair dealing. The Texas Supreme Court recognized such a free-standing duty, independent of statutory basis, in *Arnold v. National County Mut. Fire Ins. Co*.[311] (and, as initially correctly determined by the district court, in *Traver* and *Stoker* as well). As the court in *Arnold* set forth, "a special relationship arises out of the parties' unequal bargaining power and the nature of insurance contracts which would allow unscrupulous insurers to take advantage of their insureds' misfortunes in bargaining for settlement or resolution of claims," and, accordingly, "[a] cause of action for breach of the duty of good faith and fair dealing is stated when it is alleged that there is no reasonable basis for denial of a claim or delay in payment or a failure on the part of the insurer to determine whether there is any reasonable basis for the denial or delay."[312]

---

[310] *Scottsdale Ins. Co. v. National Emergency Services, Inc.*, 175 S.W.3d 284, 297 (Tex. Ct. App. 2004), *review denied* (2 pets.) (2004).

[311] 725 S.W.2d 165, 167 (Tex. 1987).

[312] *Id.*

In 1996, the Texas Supreme Court, in *Maryland Ins. Co. v. Head Indus. Coatings and Services, Inc.*,[313] explained that it had limited the duty of the insurer in the third-party context to the *Stowers* duty because that duty is based on a negligence ("due care") standard, not a higher "no reasonable basis" standard. The year following the *Head* case, the Texas Supreme Court in *Universe Life Ins. Co. v. Giles*,[314] further explained why it had restricted the tort of bad faith to the first-party context: "We did so because the cause of action *would impose a higher burden upon an insured* alleging an injury resulting from an insurer's failure to settle a third-party's claim than the insured faces in a cause of action under *G.A. Stowers Furniture Co. v. American Indem. Co*., 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved)."[315]

Accordingly, the Texas jurisprudential limitation of common law bad faith to first party claims (accepting that it is so limited and that, as the district court found, the Texas Supreme Court's pronouncements in *Traver* and *Stoker* are purely unbinding *dicta*) is not founded on any desire to protect insurance companies from claims other than *Stowers*. Instead, it is founded upon a belief that *Stowers* provides "full protection" to the insured if the insurer mishandles a claim, that any

---

[313] 938 S.W.2d 27 (Tex. 1996)

[314] 950 S.W.2d 48 (Tex. 1997).

[315] *Id*. at 54, n. 2 (emphasis added).

other duty would be simply unnecessary, and that, because bad faith requires a higher burden of proof from an insured (no reasonable basis) than does the *Stowers* negligence standard (failure to exercise reasonable case), it would be harmful to an insured (by imposing a higher burden) to even allow such claims.

Therefore, accepting the district court's view, while both Louisiana and Texas have a policy of protecting the insured from an insurer's abuse of its superior position, Louisiana's approach is more vigorous than Texas's approach. Louisiana interprets the good faith duties to the insured broadly. And Texas law, at least under the district court's narrow view of it, bases its restriction on the perception that the insured has all the protection it needs under *Stowers*. As a result, application of the Texas rule as interpreted by the district court does not advance Texas's underlying policy of protecting the insured; application of Louisiana's case law, as adopted, supplemented and complemented by La. R.S. 22:1973(A), does.

When comparing the interests of two states, the Comment f to § 6 states, "In general, it is fitting that the state whose interests are most deeply affected should have its local law applied." And, "The content of the relevant local law rule of a state may be significant in determining whether this state is the state with the dominant interest. So, for example, application of a state's statute or common law rule which would absolve the defendant from liability could hardly be justified on

the basis of this state's interest in the welfare of the injured plaintiff." Application of the district court's post-trial interpretation of the Texas common law rule "apparently" absolves Mid-Continent of liability and does not promote Texas's interest in the welfare of the "injured" insured, Sundown. Since the rationale behind the Texas rule is to protect the insured by applying the lowest standard of proof to the insured, and not to protect insurers such as Mid-Continent, Texas law does not have a strong interest in superseding Louisiana law here. Because Louisiana's law would protect the insured in this instance, Louisiana's interests would be most deeply affected if its law were not applied.

Additionally, Comment h to § 6 illuminates the factor of "basic policies underlying particular field of law." It states: "This factor is of particular importance in situations where the policies of the interested states are largely the same but where there are nevertheless minor differences between their relevant local law rules. In such instances, there is good reason for the court to apply the local law of that state which will best achieve the basic policy, or policies, underlying the particular field of law involved." Again, if Louisiana and Texas have the same basic policy of protecting the insured, which should be undisputed here, Louisiana achieves that objective better in this situation than the Texas common law rule.

As demonstrated, Louisiana law evidences a strong public policy to protect the insured from bad faith actions taken by the insurer, including bad faith settlements and/or failure to keep the insured apprised of settlement negotiations. Moreover, Texas law also evidences an interest in protecting the welfare of an injured insured. Because Louisiana law would protect the insured under the circumstances of this case, (assuming that the district court is correct that Texas law does not which, again, is strenuously disputed by Sundown), Louisiana's interests would be most deeply affected if its law were not applied. Under the "most significant relationship" test, the choice of Louisiana law prevails, and the district court should therefore have applied Louisiana law to Sundown's breach of the duty of good faith and fair dealing claim, once it decided to do its about-face.

Because the jury's factual findings that resulted in its award to Sundown for Mid-Continent's breach of its duty of good faith and fair dealing Texas claim fully support the jury's award against Mid-Continent for that breach under Louisiana law, this Court – even assuming it finds no fault with the district court's Texas law conclusion – should reinstate the jury's verdict in favor of Sundown on its breach of good faith and fair dealing claim by application of Louisiana law. In addition to all of the factors discussed above, again, Louisiana is the state where the spill occurred, where *Blanchard* was filed, where Mid-Continent's secret visits, investigation, sampling, and offer occurred, and where the damages were sustained

(Sundown's payment of the $2 million cash portion of the *Blanchard* settlement). Under these circumstances, logic dictates that another trial in this six-year-old matter, where the parties have already expended extensive effort and funds and obtained a jury's findings on the facts, is unnecessary. If Texas does not provide a remedy, the Court should apply Louisiana law and direct that a judgment be entered for Sundown for $2 million in compensatory damages and $4 million in penalty damages for Mid-Continent's bad faith claims-handling.

III. Issues Three and Four: The District Court Impermissibly Usurped the Jury's Role in Its Post-Trial Second Guessing of the Jury's Findings on Sundown's Statutory Claims.

A. Standard of Review.

The "standard of review with respect to a *jury verdict* is *especially deferential*," and the Court reviews "*de novo* the district court's ruling on a motion for judgment as a matter of law."[316] Indeed, a district court has authority to grant a motion for judgment as a matter of law *only if*:

> the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict . . . . On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment

[316] *Brown v. Bryan County, OK*, 219 F.3d 450, 456 (5th Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001) (citations omitted; emphasis added).

> might reach different conclusions, the motions should be denied . . . .[317]

Further, "the appellate court applies the same standard to review the verdict that the district court used in passing on the motion" for judgment as a matter of law.[318] And, "in due deference to the jury's determination, a verdict must be upheld unless 'there is no legally sufficient evidentiary basis for a reasonable jury to find' as the jury did."[319] As this Court has set forth:

> A jury may draw reasonable inferences from the evidence, and those inferences may constitute sufficient proof to support a verdict. On appeal, *we are bound to view the evidence and all reasonable inferences in the light most favorable to the jury's determination*. Even though we might have reached a different conclusion if we had been the trier of fact, *we are not free to reweigh the evidence or to reevaluate credibility of witnesses. We must not substitute for the jury's reasonable inferences other inferences that we may regard as more reasonable*.[320]

With respect to the review of a jury's finding on causation, this Court has stated: "we are constitutionally required under the Seventh Amendment to adopt a

---

[317] *Id.* (quoting *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc), *overruled on other grounds*, *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc)).

[318] *Denton v. Morgan*, 136 F.3d 1038, 1044 (5th Cir. 1998).

[319] *Id.* (quoting *Hiltgen v. Sumrall*, 47 F.3d 695, 700 (5th Cir. 1995)) (additional citations omitted).

[320] *Id.* (quoting *Rideau v. Parkem Indus. Servs., Inc.*, 917 F.2d 892, 897 (5th Cir. 1990)) (emphasis added).

view of the case that makes the jury's answers consistent."[321] The district court here failed utterly to accord the jury's verdict the due deference to which it was entitled and, in so failing, impermissibly usurped the jury's fact-finding and evidence-weighing role. Again, application of this proper standard of review requires that the judgment consistent with the jury's verdict be reinstated.

B. Issue Three: The District Court Improperly Reweighed the Evidence with Respect to Sundown's Statutory Claim for Unfair Settlement Practices Based on Mid-Continent's Failure to Provide a Prompt and Reasonable Explanation for Its Settlement Offer to Leopold.

The jury expressly found that Mid-Continent had engaged in statutory unfair settlement practices by its failure to provide a prompt and reasonable explanation for its offer to settle with Leopold and that Mid-Continent had done so "knowingly." Based on its finding that Mid-Continent had failed to provide a prompt and reasonable explanation for its settlement offer "knowingly," the jury awarded additional statutorily-available damages[322] to Sundown in the amount of $1.75 million. In connection with the failure to provide a reasonable explanation unfair settlement practice ground, the district court originally entered judgment in accordance with the jury's verdict but then granted Mid-Continent's post-trial

---

[321] *Hiltgen*, 47 F.3d at 701 (citations omitted).

[322] The jury's compensatory damage award to Sundown of $2 million was based upon both its finding of common law bad faith and its findings that Mid-Continent had engaged in *five* separate grounds of statutory unfair settlement practices.

motion for judgment as a matter of law, concluding that "a reasonable jury could only have found that [Mid-Continent's] July 10, 2006 letter was a reasonable explanation *of the basis in the policy*, in relation to the facts or applicable law, for Mid-Continent's offer to Leopold."[323] The language of the July 10, 2006 letter to which the district court referred read simply:

> In addition, based on the findings of no contamination to the property of Mr. Leopold other than some oil residue on some of the debris, we have extended an offer of $54,536.00 to Mr. Leopold. We have not had a response.[324]

This letter was not a prompt explanation of the offer. It was not a reasonable explanation of the offer (even on its face it was nonsensical). And it said nothing about its connection to "the policy." The district court's use of these two sentences as evidence, in its eyes, of a "prompt and reasonable explanation" is clearly a usurpation of the jury's role.

The district court made a blatant factual error when it discussed the letter of July 10, 2006 and labeled it as prompt, reasonable and tied to the basis in the policy. Specifically, *the district court stated that the "Futrell Estimate" was attached to the letter.*[325] *It was not.* As can be plainly seen by the July 10, 2006

---

[323] *Midcon IV* at R7015 (emphasis original).

[324] DX266.

[325] *Midcon IV* at R7008 (1st paragraph). The district court repeated this erroneous statement at R7015-16.

letter which was introduced into evidence as DX266, there were no attachments at all to the letter. Thus, the only content of the July 10, 2006 letter relating to or "explaining" the settlement were the two lines quoted above.

The district court made a second blatant factual error when it stated that "By email, Haltom explained to Chernekoff that the Futrell estimate was based on a proposal of Greco Construction and Haltom sent the Greco Construction proposal to Sundown on July 26, 2006."[326] While the district court was correct that Haltom sent an e-mail to Chernekoff on July 26, 2006, that e-mail, DX289, shows that the only item attached to it was a "Contractor's Invoice" from Greco in the amount of $98,560. According to this document, the invoice was sent to Futrell for work that had already been performed and completed in a workmanlike manner for *the agreed sum* of $98,560. Contrary to the district court's characterization, this e-mail did not explain how this document – which was an invoice and not a proposal – was related to the $54,536 offer. Instead the e-mail merely stated: "Here is the only document Dana Futrell could find regarding the Leopold estimate."[327]

---

[326] *Id.*

[327] Although not a decent explanation of the Leopold settlement offer, the Greco Invoice could explain Leopold's testimony that he had been given a verbal settlement offer of approximately $100,000 *before* he received the written offer of $54,536. R6121/11-25; R6122/1-10; R6125/3 – 6126/20.

Although perhaps of lesser significance, the statement in Dees' letter of August 9, 2006, which the district court also relied on,[328] that "An offer was made to Mr. Leopold on June 2 by Steve Haltom based upon the estimate for clean-up provided by Lambert Engineers and Futrell Adjusting" was also incorrect. Lambert Engineers never provided any estimate for clean-up.

The district court also cited Mid-Continent's argument that the Muthig Report allegedly confirmed the validity of the Leopold offer because it indicated slight oil staining eight to ten feet above ground level. However, the Muthig Report was never provided to Sundown as any part of the explanation for the Leopold offer, so it could not have made the explanation reasonable. Moreover, the existence of slight oil staining, if indeed that's what the staining was (it was never tested to determine whether it was diesel as was found on the nearby soil, oil or some other substance), would not prove that any of the oil came from Sundown. Muthig didn't claim the staining came from Sundown, nor did anyone else. There were better explanations of the source of the staining, such as diesel found in the soil as well as other spills and sources of oil in the area as acknowledged by several witnesses.[329] Some of these sources, such as the diesel, may have come

---

[328] *Midcon IV* at R7008 (second paragraph).

[329] *E.g.*, R5933/25 – 5934/14. Mid-Continent itself knew about "other releases in the same vicinity." JX8/MC-003494.

from within the Leopold property itself.[330] Again, the Unified Command found Leopold's property was outside the area where Sundown's oil spilled.

Thus, the factual basis behind the district court's conclusion that the explanation was reasonable is not supported, and is in fact affirmatively disproven, by the record evidence.[331] But even if there had been accurate attachments and even if Haltom had explained how the Greco "Contractor's Invoice" morphed into a settlement offer of $54,536, the explanation would not have been reasonable.

Not prompt. First, Texas law requires that an insurer notify the insured in writing of an offer to settle a claim within ten days after the date the offer was made.[332] The district court noted in *Midcon I* that Mid-Continent conceded the letter violated this rule because Haltom *sent* the letter 38 days after the offer was

---

[330] PX101/SELP-25192-25194.

[331] Sundown also objects to the district court's implication that perhaps no offer was made at all when it stated: "Leopold also stated that he was 'pretty sure' that his attorney (Wanek) had informed him that the $54,000 offer was withdrawn. Leopold confirmed that there was no offer in his mind to be withdrawn, and that '[i]t's all just a bunch of hearsay. Oral – oral offers.' Tr. 4A:93." R7018. This type of selective recitation of testimony only emphasizes that the district court invaded the province of the jury by picking out that which would support its view and ignoring everything else. While the district court's quotes are accurate, Leopold also testified elsewhere that he did receive the $54,000 offer (and indeed a $100,000 verbal offer), *e.g.* 6133/25 – 6134/8 and R6154/25 – 6155/4, the offer itself was introduced into evidence, JX58, and Mid-Continent admitted making the offer.

[332] Tex. Ins. Code § 542.153.

made.[333] Haltom admitted that he realized he violated the law because he simply "overlooked it."[334] Second, even were ten days not the rule, Haltom's failure to disclose the offer at the meeting of June 16th, 14 days after the offer was made, was clearly not "prompt." Instead, Haltom misled Sundown at the meeting by agreeing on behalf of Mid-Continent that no offers should be made at that time and saying nothing about the fact that an offer had already been made.[335] Third, despite the fact that Haltom was in communication by e-mail with Chernekoff in June and July, 2006, he sent the letter of July 10, 2006 by regular mail with the result that Chernekoff did not see the letter until July 21, 49 days after the offer was made.[336] Further, even though the letter was dated July 10, 2006, there was no proof that it was actually put in the mail on that date.[337] The jury was entitled to believe that Haltom delayed as long as possible sending this letter and did it in a

---

[333] *Midcon I* at R2325.

[334] R6638/12-17.

[335] R6632/8-11.

[336] R7691/14-15.

[337] While most of the correspondence in evidence was by e-mail, when Mid-Continent sent correspondence by regular mail, there is proof in a number of instances that the correspondence was not mailed on the date displayed on the letter. For example, the reservation of rights letters for the lawsuits were dated October 6, 2005 by Mid-Continent and sent certified mail, but they were only postmarked October 13th and were not received by Sundown until October 18th. *See* DX109, DX110, DX111.

way that can only be described as "sneaky," because he knew that he shouldn't have made it and he was afraid of the consequences when Sundown found out. The delay in revealing the offer was obviously a strong point of contention at trial and the suggestion that the explanation was prompt because it came "a little more than one month" after the offer[338] is wrong, particularly in light of the fact that the district court had already held the offer was late as a matter of law.

Not reasonable. The letter was unreasonable on its face. It is nonsensical and inherently contradictory to make an offer when there is a finding of "no contamination to the property of Mr. Leopold other than some oil residue on some of the debris."

- First, Sundown knew based on the discussion at the June 16th meeting that the sampling of Leopold's property turned up only diesel oil – oil which Mid-Continent acknowledged could not have come from Sundown.[339] McGuire's question to Haltom upon receiving notice of the offer aptly demonstrates how incomprehensible the offer was:

  > And then I said, Mr. Haltom, I can't believe you would do this, here -- I mean, what in the world would possess you to make a $54,000 offer to somebody that you've already tested their land and you found no Sundown oil on it. I mean, what would possess you to do that.

---

[338] *Midcon IV* at R7014.

[339] N. 83, *supra*.

And he said I don't know.[340]

- Second, even if Leopold's hurricane debris had oil residue on it, and even if that oil came from Sundown (which was *not* stated in the letter and of which there was no evidence), the debris resulting from Katrina's storm surge was going to have to be removed regardless of whether there was oil residue on it.[341] Further, the jury had viewed a videotape of Leopold's property taken by Luther Holloway showing the mess that remained of the Dollar Store and the boat shed and the extent of what Haltom termed "oil residue."[342] The jury also knew that government agencies were removing all debris for free and that Leopold's debris was eventually removed for free. The jury was entitled to reach the conclusion that there was little oil residue on the debris, especially compared to the overall destruction, that the residue was not from Sundown, and that an offer of over $54,000 to remove the debris was completely unreasonable and unjustified.
- Third, the explanation was a lie. Haltom was not responding to a legitimate claim when he made the offer. Mid-Continent had created

[340] R6373/24 – R6374/7. Haltom admitted that McGuire's account of their conversation was accurate. R8165/9-12.

[341] R6230/17 – 6231/8.

[342] PX96.

the Leopold claim and inflated the claim to set a baseline for other "claimants" it intended to seek out and similarly encourage. Mid-Continent's motivation was to create enough high value claims so that it could quickly exhaust its policy limits and stop paying defense costs, regardless of the effect on Sundown. There was plenty of evidence of this and the jury was entitled to believe that Haltom's letter was not the true explanation of why the offer was made. Thus, even if the letter had been facially reasonable, the letter was a falsehood and, Sundown submits, a falsehood can never be "reasonable."

No explanation of the basis in the policy. Finally, although the district court emphasized this phrase in his finding that Mid-Continent had not violated section TEXAS INS. CODE § 541.060(a)(3) as the jury found, Haltom's letter did not provide any explanation of "the basis in the policy, in relation to the facts or applicable law" for the offer. The policy is never mentioned *at all*.

Finally, although not the basis of the district court's reversal of the jury verdict on this point, it is significant that the follow-up explanation of the offer made by Mid-Continent's counsel Dees on August 9, 2006, was nothing short of bizarre. The letter claimed that Mid-Continent learned of Leopold's existence in the October, 2005 meeting and that "[a]t the conclusion of that meeting, all in

attendance agreed that Mid-Continent should contact Mr. Leopold and investigate his claim as Mid-Continent has the right and duty to do under its policy of insurance with Eland."[343] This was completely false as Leopold's name was never mentioned at the meeting,[344] and it was uncontested that it was Yount who contacted Leopold[345] without Sundown's knowledge.

The district court did not find *insufficient* evidence to support Sundown's statutory bad faith claim but instead simply ignored everything but the July 10th letter, invading the exclusive province of the jury by "re-weighing" the evidence. It was the jury's role to decide whether the July 10, 2006 letter (or any other evidence, for that matter) provided a prompt and reasonable explanation for the Leopold offer, not the district court's. The district court therefore improperly disregarded the cardinal rule it had earlier recognized with respect to the consideration of a motion for judgment as a matter of law: ""the court may not make credibility determinations or weigh the evidence, as those are jury

---

[343] DX295/SELP-31843.

[344] Haltom testified in his deposition that Leopold's name was not mentioned at the meeting, but attempted disavow that testimony at trial saying he didn't remember – another blow to his credibility. R8228/23 – 8230/8

[345] R6487/22 – 6488/12.

functions.'"[346] The district court therefore effectively denied Sundown of its choice to have a jury trial.

Having erroneously characterized the July 10, 2006 letter as a "prompt and reasonable" explanation, the district court concluded that "it follows that a reasonable jury could not have found that Mid-Continent knowingly failed" to provide a reasonable explanation, thus striking the jury's additional $1.75 million award to Sundown.[347] Under this Court's standard of review, the district court's usurpation must be remedied.

In a related holding, the district court also erred in *Midcon I* when it granted Mid-Continent's partial summary judgment on the improper and erroneous conclusion that Sundown lacked evidence to show that it suffered damages based on Mid-Continent's failure to provide Sundown with ten-day timely notice of Mid-Continent's Leopold settlement offer pursuant to TEXAS INS. CODE § 542.153. This erroneous finding related solely to Sundown's breach of contract claim and not to its bad faith claim which is at issue on this appeal. Nonetheless, to the extent the district court made a factual finding which might spill over to the bad faith claim, Sundown asserts that finding was clearly wrong and includes it under

---

[346] *Midcon IV* at R6938 (quoting *Brennan's Inc. v. Dickie Brennan & Co.*, 376 F.3d 356, 362 (5th Cir. 2004)).

[347] *Midcon IV* at R7042.

the umbrella of this assignment of error. The same evidence that supports the jury's finding that Sundown suffered damages related to Mid-Continent's breach of its statutory duty to provide a prompt and reasonable explanation of the Leopold offer, supports a finding that Sundown suffered damages based on Mid-Continent's untimely notice of the offer.[348] Again, the district court improperly invaded the jury's province in this regard.

Thus, there was no legitimate justification for the offer to Leopold and the jury's verdict consistent therewith should be reinstituted.

C. Issue Four: The District Court Improperly Usurped The Jury's Role By Second Guessing The Jury's Finding On Producing Cause.

The district court attacked the jury's determination on the statutory bad faith of Mid-Continent on yet another ground. As to the violation of § 541.060(a)(3) (no prompt reasonable explanation of settlement offer) the district court alternatively concluded that "the evidence was legally insufficient for a reasonable jury to have found that this failure was a producing cause of the increased cost of the *Blanchard* settlement."[349] Additionally, as to the violation of § 541.060(a)(1) (misrepresentation of material facts or policy provisions), while the district court held that there was legally sufficient evidence for a reasonable jury to find that

[348] *See* discussion of producing cause under Issue Four, *infra*.

[349] R7021.

Mid-Continent made at least some misrepresentations,[350] it again concluded that a reasonable jury could not have found that any misrepresentation was a producing cause of the increased cost of the *Blanchard* settlement.[351] Again, the district court's decision to overturn the jury's "producing cause" finding in each instance invaded the exclusive province of the jury and effectively denied Sundown of its right to a jury trial.

Under Texas law, "producing cause" is not synonymous with "proximate cause."[352] "A producing cause is an efficient, exciting, or contributing cause, which in a natural sequence, produced the injuries or damages complained of, if any."[353] There may be more than one producing cause, and, unlike proximate cause, "foreseeability is not an element of producing cause."[354] While there is no foreseeability requirement to satisfy the producing cause standard, there still must be a showing of cause in fact, which "requires evidence that allows the *fact finder*

---

[350] R6983 – 6988.

[351] R6996.

[352] *See, e.g., Gabriel v. Lovewell*, 164 S.W.3d 835, 844 (Tex. App. 2005) ("producing cause requires a lesser burden than proximate cause because it does not require foreseeability.").

[353] *Id.* (citation and internal quotations omitted).

[354] *Id.; Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 801 (Tex. 1995).

to reasonably infer that the damages are a result of the defendant's conduct."[355] "In other words, there must be evidence to show that the defendant's conduct was a substantial factor in bring[ing] about the injury."[356] Further, "causation may be established by circumstantial or direct evidence," and "the plaintiff need not exclude every other possibility."[357] Rather, "All that is required is proof of a causal connection beyond the point of conjecture or mere possibility."[358] Given the lack of a foreseeability requirement, an insurer "faces a substantially heavier burden" when it challenges a jury's finding of "producing cause" for statutory violations of the insurance code.[359]

---

[355] *2 Fat Guys Inv., Inc. v. Klaver*, 928 S.W.2d 268, 272 (Tex. App. 1996) (emphasis added).

[356] *Id.* (citation omitted).

[357] *Gabriel*, 164 S.W.3d at 844.

[358] *Id.*

[359] *State Farm Lloyds v. Fitzgerald*, 2000 WL 1125217 (Tex. App. 2000) (opinion withdrawn from publication); *see Ortiz v. Flintkote Co.*, 761 S.W.2d 531, 534-535 (Tex. App. 1988), *writ denied*, (1989) (reversing the trial court's granting of a motion notwithstanding the verdict on the jury's "producing cause" finding because the "evidence, considered in the light most favorable to the jury finding, is ample and is much more than a scintilla" even though there was some "producing cause" evidence that was "contrary to the verdict."); *see also Penn-America Ins. Co. v. Zertuche*, 770 F. Supp. 2d 832, 844 (W.D. Tex. 2011) ("Under the Texas definition of producing cause, any alleged misrepresentations [by the insurer] about Zertuche's insurable interest would be a producing cause of his damages.")

Sundown faced three class actions following Katrina. Two of those cases were successfully defended by Sundown and dismissed without Sundown's paying a penny. The only case that Sundown paid money to settle was the *Blanchard* case – the sole case subjected to Mid-Continent's spurious "investigation" (really a creation of new claims).[360] The jury could easily have concluded that it was Mid-Continent's conduct that infused the *Blanchard* case with a settlement value it would not otherwise have had and that, had Mid-Continent not interfered, the *Blanchard* case would also have been dismissed without payment or, at most, under a settlement based on Sundown's agreement to pay for remediation of its oil, without a separate cash payment. Mid-Continent encouraged Slater and Leopold to assert claims against Sundown outside of the *Blanchard* case and ultimately made an overblown offer to Leopold. Leopold had an inflated view of his claim because he thought that Lambert's testing (paid for by Mid-Continent) showed that Sundown's oil was on his property and he was never told otherwise. Leopold stated that had he known the true facts he might have felt differently about Sundown.[361] Leopold also testified that Futrell's conduct was part of the reason he became a *Blanchard* class representative.[362] His expectations were raised by Mid-

[360] R6636/9-22.

[361] N. 209, *supra*.

[362] R6151/10-13.

Continent, all to Sundown's prejudice. Subsequently, he became frustrated by his treatment by Mid-Continent's emissary Futrell and when the settlement offer was withdrawn, he joined forces with the *Blanchard* suit becoming a class representative. As a result, the entire *Blanchard* case was infected with "neighboritis."

In fact, Leopold's claim should have had no value. Leopold's property was not within the Coast Guard zones and Mid-Continent's own testing showed that any contamination of Leopold's soil could not have come from Sundown's Facility. These factors meant nothing to Mid-Continent, however, because Mid-Continent's so-called investigation was focused only on damages which were the key to paying its limits and escaping the defense. Mid-Continent conducted *no* investigation of liability.[363] Lacking evidence that any oil on Leopold's property came from Sundown, the "baseline" should have been zero.[364] Instead, Haltom set

[363] Futrell testified that in a typical case an adjuster would not enter into settlement negotiations before having a good idea that the insured did something wrong, R6224/18-22, but he was only asked to get together numbers to pay to Leopold, R6217/19 – 6218/14. He never made a determination of whether Sundown had any liability. R7909/3-17. Additionally, Holloway was not asked to make any determination of liability. R7896/9-10. Pritner had never approved a settlement where the insured had no liability, R7878/12-14, and would have made some determination on liability before making any offer. R7898/24 – 7899/6. Terry Shutts gave the same testimony. R7935/1-5 and R7935/12-14. Even Haltom admitted that one part of the investigation is supposed to be to determine liability and that if it wasn't Sundown's oil there was no liability. R6611/23 – 6612/10.

[364] N. 186, *supra*.

a value of over $50,000 on Leopold's claim, the effect of which was vividly illustrated in the following testimony:

> Q. Well, let me ask you this. You knew that there were 696 households that were participants in this class, didn't you?
>
> A. I heard that, yes, ma'am.
>
> Q. And you made an offer to Mr. Leopold of over $50,000. Right?
>
> A. Yes, I did.
>
> Q. And you were looking for other landowners to settle with without telling Sundown or Jones Walker. Right?
>
> A. I was looking to settle the claims, yes, ma'am.
>
> Q. So if you settled 20 households at $50,000 a claim, that would quickly add up to a million dollars, wouldn't it?
>
> A. Yes.
>
> Q. And then that would leave Sundown exposed to 676 other claimants in the class, wouldn't it?
>
> A. Yes, it would.
>
> Q. In fact, that is only households, isn't it, Mr. Haltom?
>
> A. What is?
>
> Q. The 696 -- You recall from the settlement demand letter they said there were 696 households, but in fact several thousand people.
>
> A. Yes.

Q. So wouldn't it be more to the benefit of Sundown to prove that this was not Sundown's oil on those people's property?

A. To prove that it was not Sundown's?

Q. Yes.

A. It may have been, yes.

Q. And then there would be no liability on Sundown at all –

A. That would be correct.

Q. – in these lawsuits?

A. That would be correct.[365]

The jury found that both the lack of a prompt explanation of the settlement offer *and* Mid-Continent's many misrepresentations were producing causes of the $2 million cash portion of the *Blanchard* settlement. Both McGuire and Allen testified that the actions of Mid-Continent grossly inflated the expectations of the *Blanchard* plaintiffs and were the reason they were unable to get the case dismissed without payment (as in *Barasich* and *Danos*) and had to settle for $2 million cash, plus an agreement to remediate any Sundown oil found on the class members' property – the best they could do under the circumstances.[366] The jury

[365] R8249/1 – 8250/9.

[366] The district court also erred when it stated that it was Sundown's position that Sundown would have settled the case for $1 million. R6943, R6978. In fact the district court prohibited Sundown from asserting this position or adducing any

could have believed, as did McGuire and Allen, that Sundown could have resolved the *Blanchard* suit, by settlement or judgment, under, at worst, an agreement to remediate any Sundown oil found on the class members' property. The lack of a prompt and reasonable explanation of the offer prevented Sundown from taking measures to mute the effect of the offer immediately after it was made, and the myriad misrepresentations by Mid-Continent led up to the settlement offer, which, at least as to the cash portion, would never have been made without the misrepresentations. Mid-Continent affirmatively represented to Sundown that it would cooperate and coordinate with Sundown and, when a single deviation from this course was brought to Chernekoff's attention, Mid-Continent, through Haltom, promised it would not happen again – specifically stating he would not send anyone down without notice to Sundown.[367] Had Mid-Continent been honest with Sundown and told Sundown that it was contacting Leopold to set a baseline for other settlements, Sundown could have addressed Mid-Continent's ill-conceived, prejudicial plan at the outset, pointing out that Leopold's property was not within the Coast Guard zones, stressing that under Louisiana law negligence would have

---

testimony on it in granting Mid-Continent's motion in limine during the pretrial conference. This argument and oral ruling appears at RS(1)4108/20 – 4116/5.

[367] *See discussion* accompanying ns. 60-63, *supra*.

to be proven before Sundown could be held liable, and explaining that setting a baseline through Leopold was not likely to lead to a positive resolution.

Had Mid-Continent been in good faith, it would not have gone forward with the visit, the investigation, the sampling and the offer all behind Sundown's back. At the very least, if Mid-Continent had been open about its plans and Sundown been unable to dissuade Mid-Continent from that course, Sundown could have participated by 1) ensuring that Futrell understood who Sundown was and the potential consequences to Sundown of only giving Leopold a number without conducting any investigation of whether the oil was Sundown's; 2) ensuring that sampling was done by a more qualified individual than Lambert; 3) ensuring that Leopold was told that if the oil (such as it was – "residue" in Haltom's parlance) was not Sundown's, Sundown would have no responsibility to clean up his property; 4) ensuring that the results of the sampling were conveyed in full to Leopold and that he was informed that what little was found could not possibly be Sundown's oil because Sundown did not have diesel in its tanks; 5) ensuring that Sundown had full access to all documents concerning the investigation, including Muthig's opinions and report contemporaneously, rather than years after the fact.

It is inconceivable that Mid-Continent would ever have gone forward with making an offer, if Mid-Continent had forthrightly included Sundown in its plans and actions instead of withholding all of this critical information. More likely, as

the jury found, Mid-Continent's actions were undertaken in secret because Mid-Continent never intended to settle legitimate claims, but rather intended to create and encourage new claims to exhaust policy limits. Mid-Continent did not tell Sundown about any of it because it *didn't want to be stopped and it knew that what it was doing was wrong according to all standards of insurance claims-handling*.

Accordingly, the jury found that Mid-Continent not only acted fraudulently, maliciously, or at minimum with gross negligence (essentially without care for the consequences to Sundown) in many of its actions, but also that the lack of a prompt and reasonable explanation of the Leopold offer was deliberate, that it was done "knowingly." And under Texas law a misrepresentation can occur not only through affirmative misrepresentations of material fact (which Mid-Continent clearly made saying it would cooperate and coordinate with Sundown) but also through failing to state material facts or stating such facts in a misleading way.[368]

In a similar vein, even if Sundown had merely received a prompt and *reasonable* explanation of the offer to Leopold without having had previous knowledge of Mid-Continent's secret dealings, it could have become involved and explained to Leopold that its crude oil was not involved. This was apparent from Lambert's findings which showed that the oil was diesel. Sundown could have corrected Leopold's views at an early stage if it had received information about the

---

[368] TEXAS INS. CODE § 541.061.

offer within 10 days of when it was made – even if it had never seen the Muthig report. Leopold did not seek out class counsel and become a class representative in *Blanchard* for several months after the offer. Mid-Continent's argument that it was only the *withdrawal* of the offer that caused the problem, resembles the proverbial tail wagging the dog. Obviously if Mid-Continent had actually *paid* the settlement to Leopold the value of the *Blanchard* case would have skyrocketed because Leopold had promised Mid-Continent that he would tell all his neighbors about how well he had been treated by them. Only by insisting that the offer be withdrawn was Sundown able to in any way minimize the damage that Mid-Continent had done. The jury's determination that the failure of Mid-Continent to promptly and reasonably explain its offer cost Sundown $2 million is supported by reasonable inferences from the concrete evidence.

Given all the evidence the jury had before it, it is plain that the district court omitted any consideration of Sundown's relatively light "producing cause" burden and likewise seems to have completely disregarded Mid-Continent's substantially heavy burden to show that the jury's causation determination was supported by no more than a scintilla of evidence. In the end, this evidence is more than sufficient to satisfy the Texas "producing cause" standard of proof, and the jury's acceptance of it as adequate proof of causation was more than reasonable. The district court, not the jury, acted outside the bounds of reason in its decision to disregard this

more than ample evidence. Accordingly, under this Court's standard of review and the high level of deference to be accorded a jury's finding of factual causation, Sundown urges this Court to reinstate the jury's verdict.

CONCLUSION

Sundown respectfully asks this Court to do the following:

1) Reverse the district court's holding that Texas law does not provide a cause of action in the third-party claims-handling context and reinstate the jury verdict that Mid-Continent violated its Texas common law duty of good faith and fair dealing as well as the jury's award to Sundown of $2 million in compensatory damages for this breach and an additional $4.7 million in punitive damages for fraudulent, malicious or grossly negligent conduct.

2) As an alternative, if the Court affirms the district court's holding that Texas law does not provide a common law cause of action for bad faith in the third-party claims-handling context, reverse the district court's holding in *Midcon I* that Louisiana law does not apply, and direct entry of judgment under Louisiana law in the amount of $2 million compensatory damages and a penalty of $4 million (the maximum under Louisiana law); and in the further alternative, reverse the district court's holding that Louisiana law does not apply and remand the case for a jury trial under Louisiana law on the "common law" bad faith claim only.

3) Reverse the district court's holding that Mid-Continent provided a prompt and reasonable explanation for the basis in its policy of the

Leopold offer and reinstate the jury verdict in which the jury found that Mid-Continent did *not* provide such an explanation and "knowingly" committed this violation of the Texas Insurance Code.

4) Reverse the district court's holding that neither of the two statutory violations that the jury found were a producing cause of Sundown's damages and reinstate the jury verdict including the award of $2 million in compensatory damages (the same compensatory damages awarded for the common law bad faith claim, not to be awarded twice) and $1.75 million in additional statutorily allowable damages for a knowing violation.

Respectfully submitted,

/s/ Carl D. Rosenblum

CARL D. ROSENBLUM (Texas Bar No. 24045167; Louisiana Bar No. 2083)
MADELEINE FISCHER (Texas Bar No. 00785452; Louisiana Bar No. 5575)
ALIDA C. HAINKEL (Louisiana Bar No. 24114)
Jones, Walker, Waechter, Poitevent,
Carrère & Denègre, L.L.P.
201 St. Charles Avenue, 51st Floor
New Orleans, Louisiana 70170-5100
Telephone: (504) 582-8000
Facsimile: (504) 589-8296
Email: crosenblum@joneswalker.com
Email: mfischer@joneswalker.com
Email: ahainkel@joneswalker.com

CERTIFICATE OF SERVICE

This is to certify that a copy of this Principal Brief of Appellants has this day been served upon the following individuals via the Court's CM/ECF filing system:

LEVON G. HOVNATANIAN
E-mail: Hovnatanian@mdjwlaw.com
CHRISTOPHER W. MARTIN
E-mail: martin@mdjwlaw.com
ROBERT G. DEES
E-mail: dees@mdjwlaw.com
ETHAN D. CARLYLE
E-mail: Carlyle@mdjwlaw.com

New Orleans, Louisiana, this 26th day of January, 2012.

/s/ Carl D. Rosenblum
CARL D. ROSENBLUM

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

☒ this brief contains **20,628** words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), or

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

☒ this brief has been prepared in a proportionally spaced typeface using **MS Word 2003 word processing program in 14 font size, Times New Roman**, or

☐ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

/s/ Carl D. Rosenblum
CARL D. ROSENBLUM

Attorney for Appellants, Eland Energy, Inc. and Sundown Energy LP

Dated: January 26, 2012