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)

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

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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

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/s/ Carl D. Rosenblum
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Mid-Continent argues: Texas law does not recognize a duty of good faith in handling third-party claims, and Texas courts – including the Texas Supreme Court in its Traver decision – have not recognized any exception to this rule. 13

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Mid-Continent argues: The jury's finding that Mid-Continent failed to promptly provide Sundown with a reasonable explanation of the settlement offer to Leopold was not supported by legally sufficient evidence. The facts and inferences point so strongly and overwhelmingly to a finding that Mid-Continent's explanation was reasonable and prompt, that no reasonable jury could have found as this jury did. 34

Sundown replies: In its efforts to undermine the jury verdict, Mid-Continent misrepresents evidence in the record and mischaracterizes Sundown's arguments. The jury's decision that Mid-Continent did not provide a prompt and reasonable explanation of the settlement offer, that Mid-Continent acted "knowingly," and that the failure was a producing cause of Sundown's damages, was fully supported by the evidence and was eminently reasonable. 34

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ARGUMENT

Mid-Continent did something terribly wrong and its actions caused damage to Sundown, as the jury found. Does Texas law provide a remedy for this wrong? If not, Louisiana law does and should apply. Further, Texas statutory law requires an insurer to give a prompt and reasonable explanation to the insured of any settlement offer. The jury found Mid-Continent didn't and that this failure damaged Sundown. The jury's finding of this fact was supported by overwhelming evidence.

Response to Mid-Continent's Statement of Facts

This appeal presents three basic issues. The first is purely legal: is there, under any circumstances, a common law bad-faith claim against an insurer in a third-party case under Texas law? The second, choice of law, is a legal issue influenced by a few undisputed facts: if Texas doesn't allow a claim, should Louisiana law apply? The final issue concerns the reversal of the jury verdict: was there insufficient evidence to support the jury's finding of a) violations of the insurance code and b) producing cause?

The disputed facts of this case center on the final issue and must be evaluated under the principles of *Brennan's Inc. v. Dickie Brennan & Co. Inc.*, 376 F.3d 356, 362 (5th Cir. 2004). These include:

- reviewing *all* of the evidence in the record;

- drawing *all* inferences in favor of the nonmoving party (Sundown);
- not making credibility determinations;
- not weighing the evidence;
- disregarding *all* evidence favorable to the moving party (Mid-Continent) that the jury is not required to believe; and
- *only* giving credence to evidence supporting the moving party (Mid-Continent) that is uncontradicted and unimpeached, at least to the extent that it comes from disinterested witnesses.

Mid-Continent's brief violates every principle of *Brennan's* by relying almost exclusively on Haltom's testimony which the jury was *not* required to believe and ignoring all testimony and evidence favorable to Sundown. Of the 149 citations to testimony in Mid-Continent's Statement of Facts, nearly 65% are to the testimony of one witness, Steve Haltom – the man who orchestrated Sundown's damages. 16% of the citations are to testimony of Paul Preston and 13% are to testimony of Chris Leopold, both of whom were adversarial to Sundown. Only 6% are to testimony of witnesses who were either disinterested or aligned with Sundown. Some of the worst instances of Mid-Continent's slanted approach are addressed below.

<u>There was no agreement at the meeting of October 7, 2005 to follow Mid-Continent's so-called strategy of "undercutting the class" by seeking out individual</u>

landowners to make side-settlements. Mid-Continent describes this critical meeting entirely through Haltom's eyes. Yet there were many other witnesses who attended this meeting and testified about it including Mary Frances Hermes, Gary Ray, Tom Hilton, Mike Chernekoff, and Paul Preston.[1]

Mid-Continent takes the position that, since Haltom testified everyone agreed with the plan to "undercut" the class by settling with key potential class members, it would be "no harm, no foul" if Mid-Continent, through Preston and later through Futrell, Lambert and others, carried out that plan without telling Sundown. But there was never any such agreement. Instead, the notion of "undercutting" the class was just one of a number of questionable ideas for handling the litigation that Preston fielded at the meeting including:

- getting the suits dismissed for nothing based on his purported relationship with plaintiff's counsel;[2]
- stipulating to class certification;[3] and
- testifying against other oil companies who had spills in the area.[4]

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[1] Mid-Continent wrongly asserts that Robin McGuire also attended this meeting. Mid-Continent Brief, p.17. He didn't. McGuire didn't even begin working for Sundown until April, 2006. R7975.

[2] R7570/7-15; R7643/11-18; R8224/24—8225/1.

[3] R8209/16-20; R7642/23—7643/10; R8224/21-23

[4] R5948/16-24.

Far from being in agreement, it was apparent that there was a marked difference of opinion between the two sets of attorneys as to how the case should be handled.[5] Notably, there was no evidence that Sundown itself endorsed the undercutting idea. As Mike Chernekoff put it, "I, for one, was skeptical. I believe Mr. Rosenblum expressed some skepticism and sarcasm. You know, we were not, I guess, putting forth a defense plan at that point. It was basically we are listening, and, frankly, I didn't necessarily agree with what they were saying."[6]

This very obvious *disagreement* on strategy was one significant motivation for confirming that neither set of attorneys would move forward without the knowledge and consent of the other until the parties made a decision on who would be lead counsel – a decision which rested upon Mid-Continent's reservation of rights letters, in process but not yet sent to Sundown. Even Preston, understood this:

> It was very clear to me, reading your [Rosenblum's] emails and whatever else I did to make my reads, that you were really not interested in us doing that [making contacts with Leopold and Slater] until the issue relative to 'is there a reservation of rights or is there not,' was at

[5] R7643/19-25.

[6] R7643/21-25. *See also* R7643/19—7644/7; R7644/16—7645/6; R7590/9-22. Sundown and Mid-Continent had already agreed that Sundown should pursue an Act of God defense. Louisiana had essentially abolished strict liability without negligence in 1996. 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). The strategies suggested by Preston seemed unrealistic, and in some cases more likely to attract claims rather than to advance the Act of God defense. R7644/8-15; R8225/2-4.

> least in your [Rosenblum's] mind or your client's mind, Sundown, our client's mind resolved.[7]

Mid-Continent's contention that Preston was hired due to his "experience" with class actions is wrong. R8107 cited for this proposition actually shows Clayton wanted Preston because Clayton was a solo practitioner and needed additional manpower to handle such significant cases. Clayton picked Preston because they "had a business relationship in the past," not due to any particular expertise in class actions. Further, Preston demonstrated he did not understand class actions when he talked about preventing landowners from "joining" the class by offering them settlements. Had a class been certified, landowners would not have had to "join" the class action – they would have been automatically included and then given the opportunity to opt out.[8]

Preston was never part of Sundown's "defense team," because he was secretly acting only for Mid-Continent. Mid-Continent asserts that "Leopold was the type of landowner that the defense team was looking for to undercut the class action."[9] But this was the furthest thing from the mind of the lawyers who were actually defending Sundown. Although Haltom testified that Preston had "only

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[7] R8063/16-21.

[8] This inaccurate view of class action law was shared by Mid-Continent which continues to promote it throughout its brief. *See, e.g.,* "The visit was designed to show landowners they would not *have to join* the *Blanchard* litigation in order to submit their claims." Mid-Continent Brief, p.39 (emphasis added).

[9] Mid-Continent Brief, p.12.

one client," Sundown,[10] Haltom secretly used Preston as Mid-Continent's lawyer. Texas law is clear that defense counsel hired by an insurer may not act contrary to the insured's wishes, owes unqualified loyalty to the insured, and must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions.[11] Yet here Preston acted against Sundown's direct instructions not to visit the area without Carl Rosenblum, Sundown's long-standing Jones Walker attorney.[12] Further, Preston told Haltom that he knew Sundown and Rosenblum would be "unhappy" about his visit, but as "your [Mid-Continent's] counsel" his primary concern was the amount of money that Mid-Continent had at stake.[13] Haltom directed Preston to circumvent Sundown's explicit contrary instructions and thus began the process of consciously undermining Sundown's defense of the class actions.[14]

Preston was not part of the "defense team" and Sundown was not looking for landowners like Leopold. Neither Sundown nor its Jones Walker counsel agreed to such a plan, nor were they aware at the time that it was being carried out.

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[10] R8108.

[11] *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 627-28 (Tex. 1998), citing *Employers Cas. Co. v. Tilley*, 496 S.W.2d 552, 558 (Tex. 1973).

[12] CEO Gregg Allen and COO Tom Hilton. JX25 at MC-005269.

[13] JX25/MC-2568.

[14] Preston continued his representation of Mid-Continent, not Sundown, when he invited Slater and Leopold to contact Rolla Pritner at Mid-Continent to resolve their "claims." DX170.

Leopold was not told that the diesel found on his property was not Sundown's unrefined crude oil and Leopold would never have been satisfied with what Mid-Continent was offering – instead his expectations were created and then amplified by Mid-Continent's secret investigation, secret sampling and secret settlement offer. Mid-Continent again asserts the "no harm, no foul" argument by suggesting that because Futrell told Leopold that the oil on his property was diesel, there was no prejudice to Sundown by withholding the Muthig report (from both Sundown and Leopold). Leopold, however, testified that the fact that the oil was diesel meant nothing to him – it was never explained to him that diesel oil could not have come from Sundown.[15] Indeed, despite the diesel findings, Mid-Continent's environmental engineer Lambert was insisting that he would report the spill to the state as a spill from Sundown's facility.

Additionally, Mid-Continent's suggestion that it was the withdrawal of the offer, and not the making of the offer, that spurred Leopold to action rests on quicksand. In support of this, Mid-Continent cites triple hearsay.[16] But direct testimony from Leopold and correspondence from Leopold's lawyer told a different story, which the jury was entitled to believe. Mid-Continent and its agents led Leopold to believe that he had been, or was going to be, offered

[15] R6108; R6143.

[16] DX220.

$100,000.[17] He could not understand why Mid-Continent offered only $54,536.[18] Sundown had no opportunity to correct Leopold's misimpressions because Sundown was not told what was going on, and, even when it learned much later that the offer had been made, it was not given the whole truth. By the time Sundown had the complete picture (through discovery in this lawsuit) it was far too late to prevent the damage done, and Sundown did the best it could to control the problem Mid-Continent created.

Response to Mid-Continent's Argument

Point I.

Point IC.

Mid-Continent argues: The district court made no pretrial ruling in Midcon I regarding the existence of a bad-faith claim under Texas law.

Sundown replies: In Midcon I, the district court explicitly found that under Texas law an insurer could "breach the good faith duty in the processing of a claim" and therefore held that "Texas law applies and does provide a remedy for the claims Sundown asserts."

Attempting to excuse the district court's about-face on Sundown's claim for breach of the common law duty of good faith and fair dealing, Mid-Continent

[17] R6115/10-25.

[18] JX59.

argues that: (a) the district did not hold pre-trial that Texas law provides a remedy for Sundown's bad-faith claims, and (b) the district court's submission of Sundown's bad-faith claim to the jury properly followed the "preferred approach" of this Court. Neither argument is correct.

First, as specified in Midcon I, the district court addressed and ruled on Mid-Continent's motion for "summary judgment on all of Sundown's bad-faith claims."[19] Mid-Continent's request for summary judgment on all of Sundown's bad-faith claims specifically included a request for dismissal of Sundown's claim that Mid-Continent had "committed . . . common-law bad faith" by "making an unreasonable settlement offer to a third-party claimant."[20] Ruling on that motion, the district court considered and rejected the precise argument that it accepted post-verdict: that an "insurer does not owe its insured a duty of good faith and fair dealing when investigating and defending third-party . . . claims against the insured" and that the only recognized tort duty in the third party context is the *Stowers* duty.[21] In its pre-trial rejection of this argument, the district court found instead that "[i]t is possible to breach the good faith duty in the processing of a claim" under Texas law and later reemphasized that *Stoker* "does not foreclose the

[19] Midcon I, R2333 (emphasis added).

[20] Mid-Continent's summary judgment memorandum, R1835.

[21] Mid-Continent's summary judgment memorandum, R1842.

possibility that, under some circumstances, an insurer can be held liable for bad-faith handling of a claim even in the absence of coverage."[22] The district court therefore held, "Texas law applies and does provide a remedy for the claims Sundown asserts."[23] Further, the district court then carried through on its ruling by charging the jury on Sundown's common law bad-faith claims using language directly drawn from Texas Supreme Court cases.[24] Therefore, notwithstanding Mid-Continent's argument to the contrary, the record shows indisputably that the district court took a post-verdict about-face from its pre-trial ruling.

Second, the district court[25] and now Mid-Continent invoke this Court's so-called "preferred approach" in an attempt to justify submission of Sundown's bad-faith claim to the jury despite the district court's subsequent, post-verdict decision that the claim was not legally cognizable under Texas law. This reliance disregards that this Circuit's preference that district courts reserve ruling on motions for judgment as a matter of law until submission of the case to the jury has nothing to do with submission to the jury of causes of action that the law (allegedly) does not recognize. Instead, the preference relates only to a district

[22] Midcon I, R2337-38, citing *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995); Midcon I, R2355.

[23] Midcon I, R2360-61.

[24] *See* Table I, *infra* p.12, comparing the district court's charge to the jury and Texas case law.

[25] Midcon IV, R6945, n.9.

court's reservation of a ruling until after the verdict when the district court, pre-verdict, questions the sufficiency of evidence.[26] The district court's error here is even more apparent – and its effect even more prejudicial to Sundown – because the district court had the pre-trial opportunity to address directly whether Texas law recognizes a cause of action for an insurer's bad faith in handling a third-party claim against its insured and in fact did so by expressly holding that Texas law "does provide a remedy" for such a claim.[27]

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[26] *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 406 (2006); *McDaniel v. Terex USA, L.L.C.*, 2012 WL 1292778 (5th Cir. 2012); *Nichols Construction Co. v. Cessna Aircraft Co.*, 808 F.2d 340, 354, n.28 (5th Cir. 1985).

[27] Midcon I, R2360-61.

Table 1: Comparison of Jury Charge on Bad Faith with Texas Case Law	
Jury charge at R3567-68	**Texas case law**
Sundown alleges 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. Mid-Continent denies this allegation. 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.* To establish this claim, Sundown must prove by a preponderance of the evidence: (1) that *Mid-Continent consciously undermined Sundown's defense* in the Underlying Litigation, <u>and</u> that this act caused Sundown *injury independent of Sundown's policy claim*; <u>or</u> (2) that Mid-Continent *failed to conduct a reasonable investigation* of Sundown's Hurricane Katrina claim, <u>and</u> that this act cause Sundown *injury independent of Sundown's policy claim.*	"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*….. Nor should we be understood as retreating from the established principles regarding the duty of an insurer to timely investigate its insureds' claims." *Stoker*, 903 S.W.2d 338, 341 (Tex. 1995) "In *Head*, we said it was unnecessary to recognize a duty of good faith and fair dealing in the context of third-party liability insurance because the duty of reasonable care adopted in *Stowers* already offered greater protection for the insured….. We further concluded that rights granted under *Stowers* together with rights under the contract of insurance fully protected the insured against … erroneous refusal to defend a third-party liability claim….. The factual circumstances alleged in the present case are quite different from those in *Head*, however. Here, the plaintiff's allegations are not that the insurer merely refused a defense, but that *the insurer consciously undermined the insured's defense*." *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 629 (Tex. 1998) "[W]e reaffirm that an insurance company may also breach its duty of good faith and fair dealing by *failing to reasonably investigate a claim*." *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 at n. 5 (Tex. 1997)

Points IA, IB, and ID.

Mid-Continent argues: Texas law does not recognize a duty of good faith in handling third-party claims, and Texas courts – including the Texas Supreme Court in its Traver decision – have not recognized any exception to this rule.

Sundown replies: In Traver, the Texas Supreme Court explicitly refused to limit an insurer's duty to its insured in the third-party claims-handling context to the Stowers duty under circumstances where "the insurer consciously undermined the insured's defense."

Mid-Continent argues that the Texas Supreme Court's *Traver* decision is inapplicable to Sundown's bad-faith claim because the Texas Supreme Court did not have a claim for breach of the duty of good faith before it in that case.[28] To the contrary, the Texas Supreme Court's *Traver* decision fully supports Texas law's recognition of Sundown's claim against Mid-Continent.

In *Traver*, the Texas Supreme Court relied on *Maryland Ins. Co. v. Head Indus. Coatings & Servs.*[29] when it initially noted that the court of appeals in its *Traver* decision had held "that an insurer owes no duty of good faith to its insured in the context of a third-party liability claim."[30] The Texas Supreme Court relied

[28] Sundown acknowledged this point in its original brief at p.62.

[29] 938 S.W.2d 27, 28 (Tex. 1996).

[30] *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 627 (Tex. 1998).

on its *Head* decision because, in it, the court had limited an insurer's duty of good faith in the third-party context exclusively to the insurer's *Stowers* duty, reasoning that "an insured is fully protected against his insurer's refusal to defend or mishandling of a third-party claim by his contractual and *Stowers* rights."[31]

After noting the court of appeals' recognition of the *Head* limitation, the Texas Supreme Court then expressly rejected application of that limitation to circumstances in which the insured's allegations are "that the insurer consciously undermined the insured's defense."[32] As the court emphasized: "The factual circumstances in the present case are quite different from those in *Head*, however."[33] "Here, the plaintiff's allegations are not that the insurer merely refused a defense, but that the insurer consciously undermined the insured's defense."[34] The Texas Supreme Court then remanded the case to the trial court "to allow Traver to pursue any remaining claims that he pled or might plead against State Farm."[35]

In other words, the Texas Supreme Court in *Traver* stated that an insurer in fact owes a tort duty beyond the *Stowers* duty to its insured and that the insurer

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[31] *Head*, 938 S.W.2d at 28-29.

[32] 980 S.W.2d at 629.

[33] *Id.*

[34] *Id.*

[35] *Id.*

breaches that duty if it consciously undermines its insured's defense. Whether labeled a duty of good faith or otherwise, the court recognized a tort duty and concluded that the limitation recognized in *Head* does not apply when an insurer consciously undermines its insured's defense. *Traver* fully supports recognition of a cause of action for Mid-Continent's breach of its tort duty owed to Sundown and fully supports the jury's verdict arising from the jury's decision that Mid-Continent consciously undermined Sundown's defense of the *Blanchard* class action. The judgment consistent with the jury's verdict should be reinstated.

Points IE and IF.

Mid-Continent argues: No court has recognized a common law claim for breach of the duty of good faith based on Stoker's extreme act language.

Sundown replies: The Texas Supreme Court has consistently reiterated the possibility of a Stoker "extreme act" claim, and, under the Erie doctrine, this "considered dicta" of the Texas Supreme Court must be followed to determine Texas law.

Mid-Continent's argument that no court has recognized a claim for breach of an insurer's duty of good faith based on *Stoker*'s extreme act language ignores that, in no case following *Stoker*, has any court disclaimed that *Stoker* affords a cause of action for an "extreme act" of an insurer in breach of its obligation of good faith in the context of an insurer's handling of a third-party claim. Instead, the Texas

Supreme Court has itself at least twice reaffirmed the possibility of a *Stoker* extreme act claim under appropriate circumstances, most recently in 2005 in *Progressive Cnty. Mut. Ins. Co. v. Boyd*[36] and before that in 2001 in *American Motorists Ins. Co. v. Fodge*.[37] Mid-Continent's contention that more than 15 years have passed since *Stoker* without a court applying it disregards that the Texas Supreme Court keeps repeating that such a claim may exist under the right set of facts. Indeed, in this case, both before and during trial, the district court recognized the existence of a *Stoker* extreme act claim, holding that Texas law afforded such a claim and then following through at trial by instructing the jury on it accordingly.

Mid-Continent's contention also disregards that, in this Court's *de novo* review of the district court's decision on state law, the Court, in the absence of a dispositive Texas Supreme Court decision, must look not only to other Texas case law, but to dicta as well to make its *Erie* court determination of Texas law.[38] And, given that the Texas Supreme Court has consistently repeated its *Stoker* "extreme act" language, it cannot be ignored.[39] Instead, "[u]nder diversity jurisdiction,

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[36] 177 S.W.3d 919, 922 (Tex. 2005).

[37] 63 S.W.3d 801, 804 (Tex. 2001).

[38] *Paz v. Brush Engineered Materials, Inc.*, 555 F.3d 383, 392 (5th Cir. 2009).

[39] *See Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1023 (5th Cir. 1982); *Doucet v. Middleton*, 328 F.2d 97, 101 (5th Cir. 1964).

considered dictum stating how an issue is to be resolved is evidence" the Court "must consider in determining the most likely result to be reached by a [Texas] court faced with this issue."[40] Mid-Continent's effort to have this Court dismiss *Stoker*'s extreme act language as unbinding therefore fails to recognize the Court's *Erie* obligation to follow this considered dicta of the Texas Supreme Court.

Point IG.

Mid-Continent argues: This Court's Northwinds decision did not apply the Stoker language to a claim for breach of the duty of good faith, and, regardless, Northwinds is distinguishable because Mid-Continent's extreme acts with Leopold relate to Mid-Continent's mishandling of the Blanchard class action.

Sundown replies: Northwinds fully supports recognition of Sundown's bad-faith claim arising from Mid-Continent's extreme conduct in its secret dealings with Leopold.

While Mid-Continent acknowledges that this Court in *Northwinds* "recognized a recovery under the *Stoker* language," it then argues that *Northwinds* does not apply to Sundown's claim because *Northwinds* applied *Stoker* only to statutory bad-faith claims. The insured in *Northwinds* proceeded only on its statutory claims simply because its action was against an insurance servicing

[40] *Thomas v. Hoffman-LaRoche, Inc.*, 949 F.2d 806, 812 (5th Cir. 1992).

company and an earlier Texas appellate court decision had held that a cause of action for breach of good faith does not exist against an insurance servicing company.[41] Nothing in *Northwinds* suggests that the Court's recognition of a *Stoker* extreme act claim, or as the Court put it, the "*Stoker* standard,"[42] is inapplicable to an insured's bad-faith claim against its insurer. Moreover, here, Sundown not only satisfied its burden to show Mid-Continent's breach of its good faith duty, it also, just like the insured in *Northwinds*, satisfied its burden to show that Mid-Continent violated a number of statutory provisions. Thus, there is no valid reason to support rejection of the application of the "*Stoker* standard" to Sundown's extreme act claim against Mid-Continent.

Mid-Continent's second argument against application of *Northwinds* is that Mid-Continent's secret visit, secret sampling and secret settlement offer to Leopold all related to Sundown's *Blanchard* class action claim, while the injury to the insured in *Northwinds* was independent of the insurance servicing company's mishandling of the insured's workers' compensation claims. The fundamental problem with Mid-Continent's argument is that it is based purely on Mid-Continent's after-the-fact justifications for its covert dealings with Leopold. And

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[41] *Northwinds Abatement, Inc. v. Employers Ins. of Wausau*, 69 F.3d 1304, 1311-12 (5th Cir. 1996).

[42] *Northwinds Abatement, Inc. v. Employers Ins. of Wausau*, 258 F.3d 345, 353 (5th Cir. 2001).

none of Mid-Continent's "evidence" that purportedly ties its secretive actions with Leopold to the *Blanchard* class action addresses the fact that, at the time Mid-Continent engaged in its covert conduct with Leopold, it was not acting under Sundown's policy to settle an existing claim because Leopold had not made one. Like *Northwinds*, Mid-Continent's extreme acts with Leopold giving rise to its liability were completely independent of Sundown's policy claims, which at the relevant time were limited to Sundown's cleanup claim and the *Blanchard*, *Danos* and *Barasich* class action suits.

Point II.

Mid-Continent argues: An insurer's attempt to exercise its contractual right to settle a claim is not "extreme conduct."

Sundown replies: Mid-Continent's contractual discretion to settle claims and suits did not grant it authority to seek out claimants nor to manufacture claims against its insured; such is "extreme conduct".

Mid-Continent relies on *Wayne Duddlesten, Inc. v. Highland Ins. Co.*,[43] *Kreit v. St. Paul Fire & Marine Ins. Co.*,[44] and *Methodist Hosp. v. Zurich Am. Ins. Co.*,[45] to support its argument that its conduct with respect to Leopold cannot be

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[43] 110 S.W.3d 85 (Tex.App. 2003).

[44] 2006 WL 322587 (S.D. Tex. 2006).

[45] 329 S.W.3d 310 (Tex.App. 2009).

considered "extreme" because under the policy's terms it had discretion to settle claims, whether meritorious or not. None of the authorities upon which Mid-Continent relies are apposite here because, in each of them, the insurers' settlement overtures were in response to existing claims or pending lawsuits.[46] In stark contrast to the circumstances in which the insurers exercised their authority to settle in those cases, Mid-Continent unilaterally and secretly contacted Leopold, conducted sampling on his property and made him a settlement offer, all without Leopold having made any sort of formal claim against Sundown.[47] Mid-Continent therefore cannot hide behind its contractual discretion to settle claims to shield its extreme conduct, because its secretive actions were not taken for purposes of settling an existing claim.

In its original brief, Sundown posited that four factors heighten Mid-Continent's culpability and that the presence of these factors makes Mid-Continent's secretive conduct particularly "extreme." Addressing Sundown's four factors, Mid-Continent first argues that Sundown failed to show it was harmed by the secret visit. This is based in part on the erroneous premise that Sundown agreed with the strategy of trying to settle cases piecemeal and creating claims outside of the existing class actions – an idea that Preston proposed and that was

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[46] *See Duddlesten*, 110 S.W.3d at 89, *Kreit*, 2006 WL 322587 at *1 and *Methodist*, 329 S.W.3d at 513-14.

[47] *See, e.g.*, JX53; R958/9.

secretly adopted, promoted, and carried out by Mid-Continent. Although Preston testified that he really couldn't tell whether Sundown's oil was on Leopold's property[48] and he couldn't tell whether Slater's property was damaged or not,[49] the day after the visit, Preston wrote to Haltom secretly recommending "an aggressive evaluation and settlement strategy," characterizing Leopold and Slater as landowners who were "not part of the class actions."[50] Then, on November 14, 2005, after Sundown had rejected his representation, Preston secretly e-mailed Slater and Leopold telling them that if they "remain[ed] interested in resolving [their] claims against Sundown" he could arrange for an inspection by Mid-Continent's expert Luther Holloway which was "a step in the right direction" toward resolving their claims.[51] Two days later, he secretly wrote again to Slater and Leopold telling them (finally) that he would "no longer be involved in this case," but they could contact Rolla Pritner at Mid-Continent to resolve their "claims against Sundown."[52] Haltom was copied with Preston's correspondence and asked Preston to continue representing Mid-Continent even if he could not

[48] R8046/11-14.

[49] R8048/9-13.

[50] JX30.

[51] JX36.

[52] DX170.

represent Sundown.[53] None of this was revealed to Sundown which had no idea that Mid-Continent was actively trying to settle with a) Leopold whose property was not within the Coast Guard zones; and b) Slater, who was Sundown's landlord, and whom everyone had agreed was to be contacted only by Rosenblum. Unquestionably, Preston's visit was the starting point for Mid-Continent's scheme to create, promote, and settle claims with Leopold, Slater, and others, all without telling Sundown.

Second, Mid-Continent argues that there was no evidence that the settlement offer was an attempt to exhaust policy limits to avoid defending Sundown. To the contrary, there was solid evidence from which the jury could infer this intent. In October 2005, Mid-Continent told Sundown in writing that it would defend Sundown under the excess policy.[54] In March 2006, Mid-Continent told its reinsurers in writing that it would not withdraw the defense when it tendered the primary policy limit.[55] At that time, Haltom had "reasonable knowledge" that the cleanup exceeded the *primary* limit,[56] but he had no way of knowing whether the cleanup even approached the *excess* limit. Thus, Mid-Continent had no

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[53] DX169.

[54] DX109, DX114, DX117.

[55] DX203 (Haltom recites conversation with Fred Thompson of Aon Re that Mid-Continent would tender its primary limits, but would continue to defend, possibly appointing counsel of its own choosing "in order to conserve costs.").

[56] *Id*.

justification for paying out the excess limits (mostly the reinsurers' money) when it made the offer to Leopold. Indeed, Mid-Continent continued to defend the case until it tendered its excess limit in August 2006, and it only tendered the excess limit when it had received documentation from Sundown in July 2006 of total cleanup costs in excess of $5.4 million.

Having built up Leopold's expectations through continuous contacts and secret sampling of his property without accurately informing Leopold of the results, Mid-Continent submitted the excessive and prejudicial offer to Leopold on June 2, 2006 and said nothing about it to Sundown at the time or at the face-to-face meeting with Sundown on June 16th, even though the parties specifically discussed the risks of "neighboritis" at that meeting. Haltom's calculation tape[57] shows that Haltom knew that his offer to Leopold was four times the average per-class-member settlement figure in the *Blanchard* plaintiffs' counsel's $9.5 million opening demand,[58] a demand which Mid-Continent had in hand on May 25, 2006 before it made the prejudicial offer to Leopold.[59]

Mid-Continent's extreme conduct was all part of a conscious plan to use Leopold as a baseline that, from Haltom's point of view on June 2, 2006, would

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[57] DX277.

[58] DX240.

[59] DX241.

quickly exhaust the excess policy. He set the baseline high, expecting Leopold to accept and advertise his settlement to other putative class members. Had Haltom's plan worked, Leopold's neighbors would have expected similar offers, and Mid-Continent could have exhausted its excess limits in no time, leaving Sundown to face nearly 2000 uncompensated class members. Mid-Continent's only concern was to pay out its excess limits and stop paying for Sundown's defense.

The fact that Mid-Continent's plan did not succeed, because it was forced to withdraw offer and later find another way to exhaust the excess limits, does not detract from the extreme nature of Mid-Continent's conduct. Nor does it mean that Sundown was not harmed both by the making of the secret offer and by Mid-Continent's failure to reasonably and promptly explain the offer once it was made. The derailing of Mid-Continent's plan by Sundown's insistence that the offer be withdrawn only mitigated Sundown's damage from a potential $38,000,000[60] to the $2,000,000 that it ultimately incurred. The jury was on solid footing under the *Brennan's* standard in finding as much in its jury verdict.

Third, Mid-Continent continues to turn a blind eye to the principle that once it issued a reservation of rights letter, asserting a reservation that its appointed defense counsel could influence (the intentional act exclusion), it lost the right to control the defense. In fact there *were* contentions in the class actions of

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[60] *I.e.*, four times the *Blanchard* plaintiffs' settlement demand. DX277.

intentional acts and Mid-Continent referenced the intentional act exclusion in all of its reservation of rights letters including the *Blanchard* letter.[61] Mid-Continent knew that Sundown was asserting an Act of God defense, and, by generating claims and making exorbitant settlement offers, Mid-Continent consciously undermined that defense, all without telling Sundown what it was doing.

Fourth and last, Mid-Continent argues that the effects of its conduct were not magnified because *Blanchard* was a class action. It is simple common sense that bad-faith conduct in a one-plaintiff case has less damage potential for the defendant than the same case in which there are thousands of plaintiffs and there is a danger that the effects of an unjustified settlement offer will spread to all of the others via "neighboritis." Indeed, both Haltom and Corley recognized this.

Point IJ.

Mid-Continent argues: The district court correctly concluded that no reasonable jury could have found that the Leopold settlement offer caused Sundown $2 million in increased settlement costs.

Sundown replies: It was more than reasonable for the jury to find that, absent Mid-Continent's settlement offer, Sundown could have settled Blanchard with an agreement to remediate only, particularly given that Sundown paid nothing in the two other class action suits.

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[61] *E.g.,* JX15 at MC003289; DX116 at 2 ("expected or intended injury").

Mid-Continent's argument that there was no support in the record that its conduct damaged Sundown at all ignores the testimony of Gregg Allen and Robin McGuire on that subject, and the fact that the other class actions against Sundown were dismissed for nothing. Mid-Continent also ignores the fact that Sundown's primary focus from the day the spill occurred was to clean up every trace of its oil and that, even though the Coast Guard had signed off on the cleanup of its facility and the surrounding areas, a major pillar of Sundown's class settlement in *Blanchard* consisted of an agreement to remediate any Sundown oil found on a class member's property. It was more than reasonable for the jury to conclude that it was only because Mid-Continent had established a high expectation of monetary compensation that Sundown had to add a monetary payment of $2 million to class members on top of its agreement to remediate. When, as required under the *Brennan's* standard, all inferences in Sundown's favor are drawn and the testimony of Gregg Allen and Robin McGuire is properly considered, the jury's verdict falls squarely within the realm of reason.

Point II.

Point IIA.

Mid-Continent argues: Article 21.42 mandates Texas Law.

Sundown replies: Article 21.42 applies only to contract-based claims. It is inapplicable to Sundown's extracontractual non-statutory bad-faith claim.

Mid-Continent's statement that "Sundown does not argue that article 21.42 was an erroneous basis for the granting of summary judgment and the application of Texas law"[62] is misleading. The district court did not apply (or even mention) Article 21.42 when it decided in *Midcon I* that Texas law and not Louisiana law should apply. Instead, the district court simply held that because Texas law "does provide a remedy for the claims Sundown asserts,"[63] Sundown's Louisiana law bad-faith claims should be dismissed.

Article 21.42 by its own terms states that, if certain conditions are met, contracts of insurance are governed by Texas law. It says nothing about extracontractual claims. Extracontractual bad-faith claims, whether under Texas or Louisiana law, are independent of policy claims and are considered tort claims, not contract claims.[64] Sundown agrees that Texas law applies to its breach of contract claims and to its specific statutory claims under the Texas Insurance Code. But as

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[62] Mid-Continent Brief, p.50.

[63] R2360-61.

[64] *Stoker*, 903 S.W.2d at 340-41 ("We accept the premise of the argument that a policy claim is independent of a bad faith claim."); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 17 (Tex. 1994) ("The threshold of bad faith is reached when a breach of contract is accompanied by an independent tort."); *Viles v. Security Nat. Ins. Co.*, 788 S.W.2d 566, 567 (Tex. 1990) ("[A] breach of the duty of good faith and fair dealing will give rise to a cause of action in tort that is separate from any cause of action for breach of the underlying insurance contract.").

Louisiana law agrees. *Wegener v. Lafayette Ins. Co.*, 60 So.3d 1220, 1229 (La. 2011) (La. R.S. 22:1220 imposes duties upon insurers that are "separate and distinct from the duties mentioned in the contract of insurance."); *Manuel v. Louisiana Sheriff's Risk Management Fund*, 664 So.2d 81, 84 (La. 1995) ("[T]he subject matter of the statute is unrelated to that of the contract.").

to its extracontractual common law bad-faith claim, if Texas law does not provide a remedy, Louisiana law should apply.

Mid-Continent's argument that endorsements to the policy indicate the parties' intent to apply Texas law fails for a similar reason. These endorsements only show that the parties intended Texas law to apply to the insurance contract, not that either party intended to apply the law of any particular state to tortious wrongdoing independent of the policy.

Point IIB.

Mid-Continent argues: Sundown ignores contacts in applying Section 6.

Sundown replies: Mid-Continent fails entirely to address Section 6. Further, because the issue is the tort of bad faith, not breach of contract, Section 145 contacts, not Section 188 contacts, apply. Mid-Continent inadequately addresses Section 145.

Mid-Continent completely omits any discussion of the most basic rule for Texas choice-of-law analysis, §6 of the Restatement. Thus, Mid-Continent avoids any analysis of the policies of Texas, the policies of Louisiana, and the basic policies underlying the field of insurance bad faith – all of which favor application of Louisiana law.

Instead, Mid-Continent skips directly to the issue of contacts, and then focuses primarily on the wrong section: §188 applies only to contract issues and is

thus entirely irrelevant to Sundown's non-statutory bad-faith claim for the reasons just discussed.

Mid-Continent gives only a brief nod to §145, which addresses tort issues, and even there misses the mark. Of the four contact factors listed in §145, only factor d – the place where the relationship between the parties is centered – arguably falls in the Texas column. Factors a and b (where the injury occurred and where the conduct occurred) distinctly favor Louisiana, while factor c (the location of the parties) is evenly split between Texas and Oklahoma.

Mid-Continent seeks to insert Texas into factors a and b by asserting, without any basis in or citation to the record, that "The plan to visit Leopold's property *was proposed in Texas* and approved in Oklahoma."[65] This is wrong. Preston devised the plan to visit Leopold's property from his Louisiana office and outlined it in an e-mail to Haltom.[66] Haltom then approved the plan. More importantly, Mid-Continent designed the plan to take place in Louisiana and implemented it in Louisiana.

The value of the §145 factors is not equal. The most important factors for extracontractual nonstatutory bad faith in this case are factors a and b: where the injury occurred and where the conduct took place. The fact that one party was

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[65] Mid-Continent Brief, pp.55-56 (emphasis added).

[66] JX25.

located in Texas and another in Oklahoma or that arguably their relationship was centered in Texas has little or nothing to do with the wrong that Mid-Continent did and the harm that befell Sundown as a result. Regardless of the parties' locations, Mid-Continent committed the tort in Louisiana, and Sundown paid the $2 million settlement in Louisiana. Louisiana has the strongest interest in applying its law to wrongs committed within its borders which it deems to be bad faith. Neither Texas nor Oklahoma has a comparable interest.

Point IIC.

Mid-Continent argues: Louisiana law does not recognize a remedy when an insurer, acting in bad faith, injures its insured in the course of handling a third-party claim. Therefore, Texas and Louisiana law do not conflict.

Sundown replies: Louisiana law does grant a remedy to an insured who is injured as a result of bad-faith third-party claims handling by its insurer. Therefore, if Texas law does not recognize such a claim, a true conflict exists.

The district court never conducted a choice-of-law analysis because it held pre-trial that Texas law recognized a cause of action for damage caused by an insurer's bad-faith handling of third-party claims – accordingly, no conflict analysis was necessary. When the district court changed its mind after the trial and held that Texas law did *not* recognize such a cause of action, a confounding situation arose. The jury had already been charged under a legal theory that the

district court now said didn't exist. And a post-trial choice-of-law analysis could not retrospectively correct that error. Accordingly, none was conducted, all to Sundown's prejudice.

Mid-Continent now asserts that there was never any conflict to begin with and thus no choice-of-law analysis was necessary because (quite the opposite of what the district court originally held and on which it instructed the jury) *neither* Texas *nor* Louisiana law recognize such a cause of action.[67] Mid-Continent is wrong. Louisiana has long recognized a broad duty of good faith owed by an insurer to its insured. That duty encompasses not only first-party claims, but also any bad-faith handling of third-party claims that causes damage to the insured.

As noted in Sundown's original brief, La. R.S. 22:1220 (now 22:1973) neither invented nor limited an insurer's duty of good faith. It merely codified a pre-existing jurisprudentially-described duty in extremely broad terms. Mid-Continent fails entirely to address the broad duty described in La. R.S. 22:1220. Neither the statute nor the jurisprudence limits the insurer's duty to first-party claims-handling. Indeed, the statute expanded the duty of good faith to include a duty of good faith to third parties in some instances, and added statutory penalties to the tort damages that were already available to insureds under existing law. Accordingly, it makes no sense to suggest that Louisiana law allows a remedy to

[67] Mid-Continent Brief, pp.56-59.

an insured only for damages caused by an insurer's bad-faith handling of a first-party claim, but not for bad-faith handling of a third-party claim. Louisiana law makes no such distinction.

Sundown has cited several cases in its original brief for the propositions that the duty of good faith includes a) a duty to keep the insured advised of settlement negotiations (*Roberie*);[68] b) a duty not to enter into inappropriate settlements and to consider the interests of the insured in every settlement (*Pareti*);[69] and c) a duty when multiple claims are presented to act in the insured's best interest in considering whether to settle one or more of the claims (*Pareti*). Mid-Continent violated each of these duties and caused Sundown damage as a result.

Mid-Continent's argument that these cases do not apply seems to spring from the premise that unless it acted in exactly the same way, under exactly the same circumstances, and caused exactly the same damage as one of these cases, it

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[68] *Roberie v. Southern Farm Bureau Cas. Ins. Co.*, 194 So.2d 713 (La. 1967). Mid-Continent also claims that *Roberie* presented a *Stowers* situation. It did not. *Roberie* was a bad faith case. The court specifically found that the insurance company breached no duty in refusing the plaintiff's settlement demand (as it would had to have done to incur *Stowers* liability) and trying the case. Its liability was based on its breach of the duty of good faith and fair dealing by failing to keep the insured advised of settlement negotiations, thus depriving the insured of the opportunity to protect his own financial interest in whatever manner he chose.

Stowers liability does not require bad faith; it merely requires negligence – a lack of ordinary care. *American Physicians Ins. Exchange v. Garcia*, 876 S.W.2d 842, 848 (Tex. 1994). *See also St. Paul Fire and Marine Ins. Co. v. Convalescent Services, Inc.*, 193 F.3d 340, 344 (5th Cir. 1999).

[69] *Pareti v. Sentry Indemnity Co.*, 536 So.2d 417 (La. 1988).

could not be liable under Louisiana law. Thus, Mid-Continent argues that because it only failed to advise Sundown of offers it *made*, instead of settlement offers it *received*, *Roberie* does not apply;[70] and similarly, because it didn't actually *pay* a settlement, but merely *made a settlement offer*, *Pareti* doesn't apply.[71] Accepting Mid-Continent's argument would allow an insurer to avoid Louisiana bad-faith liability merely by devising new and slightly different ways of committing bad faith or by causing different types of damages to its insured.

Essentially, Louisiana law requires proof of the following elements in a tort case: duty; breach of duty; causation; and damages.[72] Mid-Continent owed a duty of good faith to Sundown. It breached that duty. Its breach caused Sundown damages. The jury confirmed each of these points in its verdict, with its finding that Mid-Continent's bad-faith offer to Leopold caused Sundown to incur the additional monetary portion of the *Blanchard* settlement of $2 million. Superimposing Louisiana law on the factual findings of the jury leads to the conclusion that had the jury been charged with Louisiana law, it would have reached the same decision that it did under the charge given. Accordingly and alternatively, if it is determined now that Texas law does not provide a remedy,

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[70] Mid-Continent Brief, pp.58-59.

[71] Mid-Continent Brief, pp.57-58.

[72] *Detraz v. Lee*, 950 So.2d 557, 565 (La. 2007) (causation is subdivided into cause-in-fact and legal cause).

there exists a clear conflict and Louisiana law should be applied to allow Sundown a remedy for Mid-Continent's bad-faith conduct.

Point III.

Mid-Continent argues: The jury's finding that Mid-Continent failed to promptly provide Sundown with a reasonable explanation of the settlement offer to Leopold was not supported by legally sufficient evidence. The facts and inferences point so strongly and overwhelmingly to a finding that Mid-Continent's explanation was reasonable and prompt, that no reasonable jury could have found as this jury did.

Sundown replies: In its efforts to undermine the jury verdict, Mid-Continent misrepresents evidence in the record and mischaracterizes Sundown's arguments. The jury's decision that Mid-Continent did not provide a prompt and reasonable explanation of the settlement offer, that Mid-Continent acted "knowingly," and that the failure was a producing cause of Sundown's damages, was fully supported by the evidence and was eminently reasonable.

The letter of July 10, 2006 was not
a reasonable explanation of the basis for the offer

Mid-Continent argues that Haltom's explanation of Mid-Continent's settlement offer to Leopold was reasonable and that any reasonable insurer in the same circumstances would have provided a similar explanation. Haltom's explanation, a single sentence, was on its face unreasonable. He stated 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.[73]

The jury acted well within reason in finding that this terse explanation did not satisfy Mid-Continent's statutory obligation to provide a reasonable explanation of the basis for its offer.

The letter states that there is <u>no contamination</u> of Mr. Leopold's property except for oil residue on some of the debris. Even if Mid-Continent had had proof that the oil residue on the debris came from Sundown, which it did not, and even if Haltom had explained that the offer was premised on the cost of hauling off the debris, which he did not, the explanation was, as the jury correctly concluded, not reasonable. The debris created by Hurricane Katrina had to be removed in order for the residents of Port Sulphur to resume their normal lives, regardless of whether "some of the debris" had oil residue on it. Further, the July 10 letter provided no explanation for the $54,536.00 amount nor why debris removal would be so expensive. Haltom's *post hoc* explanation at trial that Leopold's debris required special handling lacked foundation and was not part of the original explanation. In fact, as the jury learned, the debris in Port Sulphur, including Leopold's debris, was hauled away by governmental authorities *for free*.[74] Again,

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[73] DX266.

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

under the *Brennan's* standard, the district court erred in overturning the jury's reasonable and supported verdict.

Second, when viewed in the light of Haltom's statements at the June 16, 2006 meeting between Mid-Continent and Sundown, Haltom's one-sentence explanation of the offer appears even more unreasonable. At that meeting, Haltom agreed without prompting that:

- Hurricane Katrina damaged the properties, not Sundown;[75]
- No settlement offers were appropriate at that time; and
- Making settlement offers could cause "neighboritis" to Sundown's detriment.[76]

Given these statements by Haltom, it was perfectly reasonable for the jury to reject – as wholly unreasonable – Mid-Continent's "explanation" to Sundown of its Leopold settlement offer.

Finally, on July 21, 2006 Haltom told McGuire that he "didn't know" what possessed him to make the offer, a statement he admitted in his trial testimony.[77] All of this is more than sufficient evidence to support the jury's verdict.

<u>Mid-Continent's letter did not explain the basis in the policy for the offer</u>

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[75] R6631/7-12.

[76] R6631/19 – R6632/4; DX71 at SELP-15494-95.

[77] R6373/24 – R6374/7 and R8165/9-12.

Mid-Continent next argues that in order to be reasonable the letter need only have shown the "basis in the policy" for the offer and then asserts that the reference to oil residue on the debris somehow invoked the pollution endorsement.[78] But the letter says nothing about policy provisions, much less anything about the policy's pollution endorsement. It only contains a statement that the offer was made because some of Leopold's debris had oil residue on it.

Mid-Continent's explanation was not prompt

Mid-Continent also asserts that its explanation was "prompt" because Sundown received the "estimate" (presumably Futrell's undated letter to Haltom setting forth an "adjusted offer") on July 10, 2006 at the latest. In support of this assertion, Mid-Continent cites Joint Exhibit 58 and states, "Haltom sent the estimate via email to one of Sundown's lawyers."[79] However, Joint Exhibit 58 is a June 2, 2006 e-mail to *Leopold's lawyer*, Peter Wanek, *not* an e-mail to *Sundown's lawyers*.[80]

Mid-Continent likewise strains credulity by declaring that the letter was not only *written* by Haltom on July 10, but was also *received* by Sundown on July 10. The letter was sent by regular mail (not e-mail) and there was affirmative

[78] Mid-Continent brief, p.61.

[79] Mid-Continent brief, p.61.

[80] JX58 shows the addressee was pwanek@mcsalaw.com. Leopold hired Peter Wanek after Haltom told Futrell to "Let Chris [Leopold] know that if we make any offer we are in violation of the code of ethics." DX233 (e-mail of 5/8/2006).

testimony that it was not received at Jones Walker until July 21, 2006,[81] 49 days after the offer was made and 35 days after the June 16th meeting where Haltom agreed that no offers should be made. The jury concluded logically that Haltom realized he had done something very bad and therefore not only delayed writing the confessional letter, but also delayed mailing the letter as long as possible.[82]

Greco's "Contractor's Invoice" sent later
did nothing to clarify the basis for the offer

Mid-Continent also mischaracterizes Sundown's argument concerning the Greco Construction "proposal." Mid-Continent devotes several pages of its brief to explaining that Greco never actually performed the work and that, although the document was entitled "Contractor's Invoice," it was really simply a proposal.

Those arguments are unnecessary and misplaced. Sundown has never contended that Greco Construction performed the work.[83] Sundown simply pointed out that attaching a document entitled "Contractor's Invoice" to a one-line e-mail stating "Here is the only document Dana Futrell could find regarding the Leopold estimate," did nothing to illuminate the obscurity of the July 10th letter. There was no explanation of how the "Contractor's Invoice" related to the offer of

[81] R7691/14-15.

[82] This was also supported by Mid-Continent's past practices. Compare dates on Mid-Continent's reservation of rights letters (October 6th) with their postmarks (October 13th) and dates of Sundown's receipt (October 18th). DX109, DX110, DX111.

[83] Government authorities, not Greco, removed Leopold's debris.

$54,536 to Leopold. There was no explanation that the document was a proposal and not an actual invoice. Providing the Greco document to Mike Chernekoff on July 26, 2006 did not transform the letter of July 10, 2006 into a reasonable explanation. Further, the suggestion that Dana Futrell's explanation in trial testimony four years later could remedy the original inadequate and unreasonable explanation in the letter of July 10, 2006[84] defies logic.

The evidence at trial showed that, in July 2006 Sundown did not understand why the offer was made and thus attempted to discover more about it by asking Haltom to produce all documents concerning the offer.[85] Sundown attempted to understand and get clarification of the rationale for the offer because Haltom's explanation made no sense. In its assessment of Mid-Continent's breach of its statutory duty to provide a prompt and reasonable explanation, the jury was entitled to consider Sundown's questioning of the basis for the offer after it learned of it and was equally entitled to consider Mid-Continent's acts of concealment in response. Nonetheless, the district court dismissed the fact that Mid-Continent failed to produce the Muthig report to Sundown by stating that the statute only obligates an insurer to provide a reasonable explanation for the basis in the policy,

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[84] Mid-Continent's Brief, pp.62-63.

[85] Mid-Continent blatantly misstates this as a request by Sundown "to produce everything related to Sundown's claim." Mid-Continent Brief, p.63. The claim for which information was requested was not Sundown's claim but was Leopold's claim instigated by Mid-Continent.

in relation to the applicable facts or law, for the offer, and does not "require that the insurer provide everything the insured requests."[86] Certainly, and regardless of the district court's post-verdict opinion of its reasonableness, the jury was entitled to reject the bare-boned July 10th letter as failing to provide a reasonable explanation of the policy basis for the Leopold settlement offer, and, just as certainly, the jury could reasonably rely on Mid-Continent's failure to provide Sundown with the Muthig report as further evidence that Mid-Continent had in fact violated its statutory duty to provide a reasonable explanation to Sundown. As reflected by the jury's verdict, both the single-sentence July 10th letter itself and Sundown's various efforts to better understand it after Sundown eventually received it adequately demonstrated Mid-Continent's failure to meet its statutory duties. And, as the jury rightly concluded, Mid-Continent's deliberate concealment of the Muthig report (which contained information directly related to Leopold's claim and which would have exculpated Sundown and been extremely useful to its defense) was knowing bad-faith conduct on Mid-Continent's part that caused harm to Sundown.

<u>Sundown repeatedly asserted that, in addition to being unreasonable, Mid-Continent's explanation was not prompt.</u>

[86] R7016.

Mid-Continent argues that the district court correctly assumed that Mid-Continent's offer was "prompt"[87] and contends that promptness "was not a contested issue in the district court."[88] This is wrong. Sundown asserted lack of promptness at many junctures in the litigation.

First, Sundown specifically alleged in its pleadings that Mid-Continent violated TEX. INS. CODE §541.060(a)(3) which requires an insurer to *promptly* provide a reasonable explanation for the insurer's offer of a compromise settlement of a claim.[89] Sundown also alleged that Mid-Continent violated TEX. INS. CODE §542.153 by its failure to inform Sundown of its offer to settle within ten days, and that it was damaged and prejudiced in its ability to reach a reasonable settlement because of this breach.[90]

Next, Sundown developed testimony from Leopold that, had Sundown been able to provide him with a full and prompt explanation of the circumstances of the offer (including the Muthig report), his animosity towards Sundown would have been tempered and he could have acted differently.[91] Lacking critical information

[87] The district court stated the explanation followed the offer by a little more than one month. The offer actually was not received by Sundown until July 21, which makes the delay closer to two months than one month and far in excess of the 10-day statutory requirement.

[88] Mid-Continent Brief, p.65.

[89] R2423, ¶224.

[90] R2422, ¶¶217-18.

[91] R6143/25—6144/17; R6145/15-25.

and being under an erroneous impression, Leopold signed up as a *Blanchard* class representative and spread the word against Sundown.

Next, Sundown specifically argued to the district court concerning the jury charge that there was a complete failure of explanation and that "*any explanation that was given was not prompt.*"[92] The district court acknowledged Sundown's assertion of lack of promptness stating, "I follow what you're saying on this."[93]

Finally, in Sundown's opposition to Mid-Continent's post trial motions, Sundown went into great detail about its efforts to obtain an explanation of the settlement offer which extended well into August 2006. Sundown concluded this argument by stating:

> The refusal to give Sundown a *prompt* and complete explanation of what had gone on *prevented Sundown from even attempting to rectify the situation before* Leopold spread the word about Sundown and contacted the Blanchard attorneys to serve as a named class representative. At that point the damage was done.[94]

Mid-Continent references the district court's holding in Midcon I that Mid-Continent's failure to advise of the settlement within ten days did not cause injury to Sundown. This holding related to Sundown's breach of contract claim and the ten-day notice requirement of TEX. INS. CODE §542.153. Sundown has not

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[92] R6801.

[93] *Id.*

[94] R4304 (emphasis added).

appealed its breach of contract claim. However, if it bears any relevance to the current appeal, Sundown has asserted that "to the extent the district court made a factual finding which might spill over to the bad-faith claim, … that finding was clearly wrong and … it [is included] under the umbrella of this assignment of error."[95] TEX. INS. CODE §542.153 *supports* Sundown's argument on promptness, because it indicates that any delay of more than 10 days cannot be prompt as a matter of law.

Finally, even if it might be argued that the delay of more than 10 days was merely an "oversight" by Haltom, there can be no excuse for Haltom's failure to reveal the offer on June 16th at the face-to-face meeting between Mid-Continent and Sundown. Despite extended discussion at that meeting about settlement, and the importance of making no settlement offers at that point to avoid neighboritis, Haltom never mentioned that he'd *already* made a settlement offer to Leopold two weeks earlier.[96] The jury's determination that Mid-Continent's decision to wait to reveal the offer only weeks later accurately assessed that Mid-Continent's explanation was, by no means, prompt. In fact, the delay constituted continued deliberate concealment of the offer and unquestionably harmed Sundown.

<u>The evidence supports the jury's finding of producing cause</u>

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[95] Sundown Brief, pp.103-04.

[96] R6632/8-11.

In its final argument, Mid-Continent contends that even if it failed to give a prompt, reasonable explanation of the Leopold offer, Sundown did not prove that this was a producing cause of the $2 million component of the *Blanchard* settlement. The *Blanchard* settlement had two parts: a court-approved remediation component where Sundown promised to pay to remediate any property where its oil remained; and a monetary component of a $2 million payment to all class members regardless of whether they could prove their property was contaminated with Sundown's oil.[97] Mid-Continent ignores the testimony of Robin McGuire and Gregg Allen that because of Mid-Continent's settlement offer to Leopold and Sundown's inability to diffuse its effect (due to lack of a reasonable and prompt explanation) the settlement had to include the $2 million cash component. The jury obviously credited this testimony because it awarded Sundown precisely $2 million in compensatory damages, the amount attributable to the *Blanchard* settlement's monetary component. Under *Brennan's*, it was improper for the district court to second guess the jury's finding.

Further supporting the finding of producing cause was the undisputed fact that two other class actions, *Barasich* and *Danos*, were dismissed without any payment by Sundown, in contrast to the *Blanchard* case. Mid-Continent implies

[97] *See* JX96, MC011429-30 (Court-approved remediation plan, in Settlement Agreement) and JX98, MC011509 (Class Notice setting forth benefits of settlement).

that Sundown paid nothing in those suits because other defendants whose spills were larger than Sundown's spill settled the cases – an implication which is untrue and not supported by any record evidence. Mid-Continent contends that in order to prevail on this argument Sundown should have produced evidence that those suits were dismissed without payment by the co-defendants.

Mid-Continent's arguments twist the burden of proof. Sundown proved that it had been sued in three class actions and in only one, *Blanchard*, did it have to pay anything. The burden then shifted to Mid-Continent to prove – if it could – that the "real" reason Sundown made no payment in *Barasich* and *Danos* was that co-defendants settled those suits. Mid-Continent did not and could not do this because in fact, *none* of the defendants in *Barasich* or *Danos* paid a penny to have those suits dismissed.

Mid-Continent also completely overlooks Sundown's relatively relaxed "producing cause" burden, which is less stringent than the burden to show proximate cause because "foreseeability is not an element."[98] It requires only a showing of "a causal connection beyond the point of conjecture or mere possibility," and may be established "by circumstantial or direct evidence" that "need not exclude every other possibility."[99] Mid-Continent would have this Court

[98] *Gabriel v. Lovewell*, 164 S.W.3d 835, 844 (Tex.App. 2005).

[99] *Id.*

disregard the evidence supporting the jury's determination that Sundown met its relatively lenient "producing cause" standard of proof and ignore the district court's improper usurpation of the jury's role. The jury correctly found an adequate causal connection between Mid-Continent's actions in violation of its statutory duties and Sundown's damages.[100]

<u>A falsehood can never be a reasonable explanation</u>

Mid-Continent also fails to oppose Sundown's argument that a false explanation, no mater how reasonable-sounding, can never be a reasonable explanation. For example, if A and B have an intersectional collision and each says he had the green light, then both explanations *sound* reasonable. But if B is lying and knows that A had the green light, then B's explanation is not reasonable because it is not true. Mid-Continent failed to disclose the real reason for its settlement offer – a desire to quickly expend its policy limits (including excess policy limits) to avoid continuing paying for Sundown's defense.[101] Any deliberately false explanation given by Mid-Continent, no matter how reasonable-sounding, could not be reasonable.

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[100] *See Ortiz v. Flintkote Co.*, 761 S.W.2d 531, 534-535 (Tex.App. 1988, *writ denied*, 1989) and *Penn-America Ins. Co. v. Zertuche*, 770 F. Supp. 2d 832, 844 (W.D. Tex. 2011).

[101] See discussion *supra* at pp.22-24 and DX277. Mid-Continent's conduct must be evaluated in the light of the facts known and perceived by it at the time it made the offer.

Overturning the jury verdict on the ground that no reasonable jury could have decided as this jury did was an extreme and unjustified measure, contrary to the *Brennan's* standards. Upon review of all the evidence, and drawing all reasonable inferences in favor of Sundown, the evidence strongly supported the jury verdict. The district court improperly reweighed the evidence in granting Mid-Continent's post-trial motions and ignored substantial evidence supporting Sundown's position. Mid-Continent makes no viable argument to the contrary.

CONCLUSION

Sundown has suffered a great injustice. Sundown asks this Court to reverse the judgment of the district court and order reinstatement of judgment based upon the jury verdict.

CERTIFICATE OF SERVICE

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

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Dated: May 29, 2012