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SUPREME COURT OF TEXAS FINDS INSURER’S PAYMENT OF APPRIASAL AWARD ON A REJECTED CLAIM TO HAVE NO BEARING ON DEADLINES UNDER THE PROMPT PAYMENT ACT

In *Barbara Technologies Corporation v. State Farm Lloyds*, No. 17-0640, 2019 WL 2710089 (Tex. June 28, 2019) the Supreme Court of Texas addressed the validity of an insured’s claim for violations of Texas Prompt Payment of Claim Act (“TPPCA”) where the insurer initially rejected the claim after an investigation, but later invoked the appraisal clause of the policy and paid the full appraisal award to the insured.

On October 17, 2013, Barbara Technologies Corporation (“Barbara”) claimed wind and hail storm damage to its commercial property that occurred on March 31, 2013 under an insurance policy with State Farm Lloyds (“State Farm”). Two weeks later, State Farm inspected the property and on November 13, 2013, denied coverage, reasoning that Barbara’s damages worth \$3,153.57 fell below her \$5,000 deductible. On February 21, 2014, Barbara requested a second inspection and State Farm conducted same on March 4, 2014, yet found no additional damages. On July 14, 2014, Barbara sued State Farm alleging violations of TPPCA. On January 9, 2015, State Farm invoked the policy’s appraisal provision, which allowed the parties to select their respective appraisals along with an umpire to resolve any differences between the

appraisers. Seven months after State Farm invoked the appraisal provision, on August 19, 2015, State Farm received notification of the appraisal award for the value of \$195,345.63. On August 25, 2015, State Farm paid the appraisal award. Barbara accepted the payment and amended its petition to only include the following TPPCA violation: failure to comply with statutory deadlines for acknowledging receipt of claim, investigation the claim, rejecting the claim, and paying the claim. The trial court ruled in favor of State Farm, finding no violation of TPPCA because State Farm timely paid the appraisal award. Barbara appealed, and on appeal, State Farm argued that its prompt payment of appraisal award barred any claims under TPPCA as a matter of law and that payment of the appraisal award was not an admission or adjudication of liability. The appellate court affirmed the trial court's ruling favorably for State Farm, finding that a full payment of appraisal award under the policy indeed bars the insured from recovering under TPPCA.

While the Texas Supreme Court ruled that insurer's payment of the appraisal award was not an acknowledgement of liability, the Court also found that the appraisal award was not an award of actual damages, and the insurer did not prove that Barbara is not entitled to damages under TPPCA.

According to Section 542.055 of the Texas Insurance Code ("Code"), within 15 days of receiving notice of a claim, the insurer must acknowledge receipt of the claim, begin investigation, and request from the claimant "all items, statements, and forms that the insurer reasonably believes, at that time, will be required." Furthermore, according to Section 542, 056 (a) of the Code, within 15 days of receiving the required information from insured, the insurer must give the claimant written notice of acceptance or rejection of the claim. Pursuant to Section 542.506(c), if the insurer rejects the claim, the notice to the claimant must provide reasons for the rejection. Under section 542.057(a), if the insurer accepts the claim (wholly or partially), the insurer must pay the claim no later than 5 business days after sending notice of acceptance of the claim. Also, where the insurer, after receiving the required information, delays payments for a period that exceeds the period specified by applicable statutes, or where no such period is specified, for more than 60 days, then the insurer must pay damages and other items specified in Section 542.060. Finally, Section 542.060 requires an insurer who is in violation of TPPCA to pay statutory interest and attorneys fees in addition to the amount of the claim.

Considering the aforementioned provisions of the Code, the Texas Supreme Court noted that over a year after rejecting the claim, State Farm demanded an appraisal according to the policy, which assessed the damages to be a lot higher than Barbara's deductible. The Court further noted that State Farm paid within four days after receiving the appraisal and held that prevailing under TPPCA requires Barbara to prove State Farm's liability under the policy and violation of a section of TCPPA in processing or paying the claim. Noting an absence of any language in TPPCA regarding appraisals or invocation of appraisals, the Texas Supreme Court ruled that the Legislature intentionally did not impose any deadlines for the appraisal process, yet also did not exempt the appraisal process from same. The court further ruled that where a policy lacks any time limitation for invoking the appraisal process, the party challenging timeliness

must show that it was prejudiced by the delay. The Court found that Barbara did not object the appraisal process nor complain to State Farm that its appraisal demand was untimely.

Barbara argued that State Farm untimely paid the appraisal award, beyond the sixty-day period from receipt of the information needed. Conversely, State Farm argued that its invocation of the appraisal process was an attempt to seek additional information required to assess the claim; therefore, the time for accepting or rejecting the claim did not begin until receipt of appraisal award, which was in turn timely paid within 4 business days thereafter. The Texas Supreme Court however disagreed with State Farm, finding that its appraisal invocation was an exercise of a specific contractual right seeking dispute resolution, and not a request for additional information from the insured to assess the claim. The Court further noted that rejection of the claim by the insured constitutes an acknowledgment of obtaining all the necessary information and completing investigation; State Farm's rejection of the claim and subsequent invocation of the appraisal clause in the policy did not constitute a reopening of State Farm's investigation of the claim.

Furthermore, the Texas Supreme Court noted that TPPCA requires that when an insurer accepts a claim, then it must pay within 5 business days. However, if the insurer rejects the claim, there is no deadline imposed under TPPCA because there are no benefits owed to the insured under the policy. Barbara relied upon a Fifth Circuit Court of Appeals decision, *Higginbotham v. State Farm Mutual Automobile Insurance*, 103 F.3d 456 (5th Cir. 1997), where the Fifth Circuit found an insurer's wrongful rejection of the claim to have caused a delay in payment, finding the insurer liable for statutory damages and attorneys fees under TPPCA. The Texas Supreme Court however rejected Barbara's argument and distinguished the *Higginbotham* case by pointing out that there, the insurer was found to have wrongfully rejected the claim, whereas here, there is no judgment finding State Farm's rejection of the claim to be wrongful. However, the Texas Supreme Court also emphasized that "[n]othing in the TPPCA would excuse an insurer from liability for TPPCA damages if it was liable under the terms of the policy but delayed payment beyond the applicable statutory deadline, regardless of use of the appraisal process." Moreover, the Texas Supreme Court also held that, in order to be liable under Section 542.060 of the Code, the insurer must have completed its investigation, accepted and paid at least a part of the claim, or there must be a judgment finding it liable for the claim; where the insurer rejects the claim, it owes no benefits under the policy and is not liable for the claim. Therefore, the insurer's mere rejection of the claim, without any finding of liability or acknowledgement of same, is insufficient to violate the TPPCA. The Court explained that if the insurer were to accept a claim after rejecting it initially, or was adjudicated liable for the claim, then TPPCA deadlines would have applied.

Finally, the Court reiterated the long standing prior Texas court rulings emphasizing that the purpose of appraisal clauses is an efficient method of dispute resolution, rather than determination of liability. As such, the Texas Supreme Court found that State Farms' payment of the appraisal award was neither an admission nor a determination of liability to trigger TPPCA damages. Moreover, it also did not foreclose TPPCA damages. Because State Farm did not conclusively prove that it is not liable to Barbara's claims as a matter of law, the Texas

Supreme Court reversed the lower court's decision and denied State Farm's summary judgment. Likewise, since there had been no adjudication of State Farm's liability, the Court ruled that Barbara failed to prove its entitlement to damages under the TPPCA and, therefore, denied her motion for summary judgment as well. Barbara's argument that appraisal value constituted an award of actual damages was also rejected by the Texas Supreme Court, as the Court reasoned that a finding of liability is required for an actual damages award, while appraisal awards are methods of dispute resolution and determination of amount of loss rather than determination of liability. After denying both motions for summary judgment, the Supreme Court of Texas remanded the matter to trial court for further proceedings.

SUPREME COURT OF TEXAS BARS INSURED'S BREACH OF CONTRACT AND BAD FAITH CLAIMS AGAINST INSURER WHO PAID APPRAISAL AWARD PURSUANT TO THE INSURANCE POLICY BUT DID NOT BAR, AS A MATTER OF LAW, INSURED'S PROMPT PAYMENT CLAIM

In *Oscar Ortiz v. State Farm Lloyds*, No. 17-1048, 2019 WL 2710032 (Tex. June 29, 2019), the Supreme Court of Texas ("Texas Supreme Court") addressed the question of whether an insured may claim breach of contract, bad faith insurance practices and violations of Texas Prompt Payment of Claims Act ("TPPCA") where the insurer paid an appraisal amount for the damages claimed by the insured.

State Farm Lloyds ("State Farm") issued a homeowners insurance policy ("policy") to Oscar Ortiz ("Ortiz"). Ortiz then sought policy benefits claiming wind and hail damage to his home. State Farm's adjuster inspected the home and estimated the damage to be \$732.53, which was less than the \$1,000 policy deductible. Ortiz obtained an estimate from a public adjuster estimating the damages to be \$23,525.99. State Farm conducted another inspection, along with the public adjuster, and revised its estimate to \$973.94, again finding the damage to be short of the policy's deductible. Six weeks after being notified of the second inspection's results, Ortiz sued State Farm for breach of contract, violations of TPCA and statutory and common law bad faith insurance practices. Two months later, State Farm demanded an appraisal pursuant to the policy, which, in case of a disagreement as to the amount of loss, explicitly permitted both Ortiz and State Farm to select an appraiser. The policy further allowed the appraiser to select an unbiased umpire. The appraisers were to determine an agreed upon amount of loss and submit same to State Farm. In the event the appraisers failed to agree within a reasonable time, they were to submit their differences to the umpire. A written agreement by any two of the three [appraiser and umpire] as to the amount of loss was sufficient to determine the appraisal award.

After rejecting Ortiz' argument that State Farm's demand for appraisal was too late and therefore waived, the trial court granted State Farm's motion to compel appraisal, and the appraisal award was set as \$9,447.52. State Farm paid said amount within seven business days, and then moved for summary judgment, claiming that Plaintiff's claims have been resolved and must be dismissed following State Farm's payment of appraisal award. The trial court ruled in favor of State Farm and Ortiz appealed. The appellate court affirmed the trial court's decision dismissing all claims. Ortiz then appealed to the Texas Supreme Court, which affirmed the

lower courts' decision with regard to Ortiz' breach of contract and bad faith claims, yet reversed the decision with regard to Ortiz' TPPCA claim.

With regard to Ortiz' breach of contract claim, in reaching its decision, the Texas Supreme Court held that State Farm's payment of the appraisal award foreclosed liability on Ortiz' breach of contract claim, as appraisal awards are intended to resolve contractual disputes and are binding on the parties; they do not serve to establish liability. The Texas Supreme Court further rejected Ortiz' argument that where an appraisal award is higher than the amount initially offered by the insurer, then the insurer must have breached the policy. The Court instead found that State Farm complied with its obligations under the policy by following the agreed-upon procedure for appraising the loss and then paying the determined amount.

Furthermore, with regard to Ortiz' bad faith claims pursuant to the Texas Insurance Code ("Code"), Ortiz argued that State Farm wrongfully denied his claim, failed to settle his claim in good faith and failed to conduct a reasonable investigation, while also violating the common law duty of good faith and fair dealing. Ortiz argued that the discrepancy between State Farm's original estimate and the appraisal award showed that State Farm intentionally undervalued the claim. State Farm, however, argued that since Ortiz had received the benefits under the policy and had no evidence of any independent injury, Ortiz' bad faith claims were correctly dismissed. According to State Farm, Ortiz had no outstanding benefits remaining to be covered for any alleged statutory violations, since he already recovered the policy benefits. Ortiz, however, argued that he is entitled to fees and expenses [attorney's fees, costs and treble damages] incurred in pursuit of the policy benefits, in addition to the benefits, which were incurred due to State Farm's alleged unreasonable investigation. The Texas Supreme Court agreed with State Farm and emphasized that an insured may not recover policy benefits as actual damages for the insurer's statutory violation where the insured does not have the right to such benefits under the policy. The Texas Supreme Court disagreed with Ortiz, finding that according to the Code, attorney's fees or treble damages, if any, are premised upon an award of the underlying actual damages. Since the only damages Ortiz sought were the policy benefits, which had already been paid by State Farm, Ortiz' bad faith claims were correctly dismissed. The attorney's fees and costs sought by Ortiz did not, according to the Texas Supreme Court, constitute actual damages, specifically since the Code distinguishes between actual damages and fees, requiring the insured to first be entitled to the former in order to recover any fees or treble damages.

Finally, with regard to Ortiz' TPPCA claim, State Farm argued that its payment of the appraisal award barred Ortiz' recovery. Even though the lower court agreed with State Farm, the Texas Supreme Court reversed the lower court's ruling, finding that in light of its recent decision *Barbara Technologies Corporation v. State Farm Lloyds*, No. 17-0640, 2019 WL 2710089 (Tex. June 28, 2019), the insurer's payment of appraisal award does not, as a matter of law, preclude the insured's TPPCA claims.

SAN ANTONIO COURT OF APPEALS DISMISSES INSURED'S BREACH OF CONTRACT CLAIM WHERE POLICY LANGUAGE GAVE DISCRETION TO THE INSURER; FINDS THAT A *STOWERS* CLAIM NEED NOT ALWAYS REQUIRE AN EXCESS JUDGEMENT

In *In Re Farmers Texas County Mutual Insurance Company*, No. 04-19-00180-CV, 2019 WL 2605630 (Tex. App. –San Antonio June 26, 2019, no pet. h.), the San Antonio Court of Appeals addressed the issue of whether an insured had a breach of contract claim against the insurer where the insurer failed to timely designate expert witnesses and failed to accept a settlement offer within policy limits while knowing the risk of an excess judgment, and whether an insured had a *Stowers* claim against the insurer where the lawsuit settled before trial and the insured partially contributed to the settlement amount because of insurer's refusal to pay the sum.

Cassandra Longoria ("Longoria") was sued by Gary Gibson following a motor vehicle accident in 2016. Gibson sought \$1 million in damages. Longoria's insurance policy with Farmers Texas County Mutual Insurance Company ("Farmers") carried a limit of \$500,000. Gibson designated expert witnesses, however Farmer's attorneys, representing Longoria, failed to designate expert witnesses. Two years later, following mediation, Gibson sent a *Stowers* demand to Farmers stating Gibson will accept \$350,000. Farmers, however, rejected and offered to only pay \$250,000. Although Gibson withdrew his demand, Longoria's personal counsel and Gibson recommenced settlement negotiations. Gibson again demanded \$350,000, while Farmers maintained its position to only pay \$250,000. To avoid trial, Longoria agreed to pay the remaining balance of \$100,000 out of pocket, thereby settling the lawsuit. Longoria subsequently brought claims of breach of contract and negligent failure to settle against Farmers. Farmers moved to dismiss both claims in trial court, yet the trial court denied Farmers' motions. Farmers then sought mandamus relief in San Antonio Court of Appeals, alleging abuse of discretion by trial courts. The San Antonio Court of Appeals granted mandamus relief on Longoria's breach of contract claim, however denied same on Longoria's negligent failure to settle claim.

With regard to her breach of contract claim, Longoria argued that Farmer's breached the policy by failing to defend the lawsuit by not timely designating expert witnesses on issues of damage and causation and by failing to accept a settlement offer within policy limits despite knowing that failure to designate an expert witness placed Longoria at a substantial risk of facing a verdict that exceeded her policy limits. Farmers argued that it had no contractual duty to pay damages or to defend instead of settle the lawsuit. Agreeing with Farmers, the San Antonio Court of Appeals noted that the policy provided discretion to Farmers as it specifically stated that "we [Farmers] will settle or defend, as we consider appropriate, any claim or suit asking for ... damages." The policy, therefore, did not contractually obligate Farmers to pay any specific amount, as Farmers was only required to "settle or defend, as ... [Farmers] consider[ed] appropriate." Noting that it need only consider the allegations in a pleading when presented with motions to dismiss, the Court of Appeals noted that Longoria failed to allege any damages for which she became responsible due to Farmer's failure to designate expert witnesses. Since

Farmers fulfilled its obligation to “settle or defend” under the policy, there was no legal or factual basis for Longoria’s breach of contract claim.

Finally, with regard to Longoria’s negligent failure to settle claim, the San Antonio Court of Appeals acknowledged that it was presented with an unprecedented scenario where an insured [Longoria] was alleging a *Stowers* cause of action against the insurer [Farmers] where the underlying lawsuit had settled before trial and Farmers had refused to pay the entire settlement amount. Farmers argued that since the underlying lawsuit settled before trial, there would never be a final judgment in excess of policy limits against Longoria, and therefore she had no claim because a negligent failure to settle claim required that the failure to settle to lead to an excess judgement. Holding that mandamus relief may be granted where a factually new scenario involves a clearly established principle of law, the San Antonio Court of Appeals ruled that the principle relied upon by Farmers, namely that a *Stowers* cause of action always requires an excess judgement, is not a clearly established one in Texas, finding that viability of Longoria’s negligent failure to settle the claim has not been clearly rejected under Texas law. Therefore, the Court denied mandamus relief for Farmers on Longoria’s negligent failure to settle claim.

<p>SOUTHERN DISTRICT OF TEXAS DECLINES TO EXTEND EMPLOYMENT STATUS UNDER WORKERS COMPENSATION ACT BEYOND WORKERS COMPENSATION CONTEXT</p>
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In *Maxim Crane Works, L.P. v. Zurich American Insurance Company*, No. H-18-3667, 2019 WL 2524244, (S.D. Tex., June, 19, 2019), the Southern District of Texas addressed the issue of whether a party’s employee status under the Texas Workers Compensation Act may be imported to the Texas Anti-Indemnity Statute to trigger the Statute’s employee exception and whether a lower tiered subcontractor may be deemed an employer of the employee of a higher tiered contractor where the lower tiered subcontractor enrolled in a workers compensation program provided by the higher tiered contractor. Furthermore, the Southern District also considered whether an additional insured had standing to seek reimbursement for settlement amount and defense costs from an insurer under one policy where the additional insured had assigned its right to the insurer to bring such claims under another policy.

Skanska USA Building, Inc. (“Skanska”) constructed an office campus in 2013 as a general contractor in Houston. Skanska hired Berkel & Company (“Berkel”) as a subcontractor for said project. Skanska’s contractor-controlled insurance program included worker’s compensation coverage and Skanska required subcontractors, including Berkel, to enroll in the program for coverage. As such, Berkel obtained coverage from August 2013 to October 2013. Berkel also maintained a commercial general liability policy with Zurich American Insurance Company (“Zurich”) from August 2013 to August 2014 (“Berkel Policy”). Berkel leased a crane from Maxim Crane Works, L.P. (“Maxim”) pursuant to a lease agreement. Said lease agreement required Maxim to be covered as an additional insured under the Berkel policy, even though Maxim had its own policy with Zurich (“Maxim Policy”). However, Maxim did not enroll in Skanska’s contractor-controlled insurance program. One of Berkel’s employees overtaxed the crane leased from Maxim, as a result of which part of the crane fell and injured the project

superintendent, Tyler Lee (“Lee”), and a Skanska employee. Lee received worker’s compensation benefits through Skanska’s contractor-controlled insurance program.

Lee sued several defendants including Berkel and Maxim in state court in 2014 for negligence and other state law claims. Maxim sought additional insured coverage from Zurich under the Berkel Policy, however Zurich denied coverage. Maxim also brought a cross claim against Berkel for breach of contract, claiming Berkel was required to defend and indemnify Maxim. Lee was awarded \$35 million in damages, 90 % of which were allocated to Berkel and 10% to Maxim. Maxim settled with Lee for \$3,444,300.60, which Zurich paid under the Maxim Policy. Maxim then reimbursed Zurich for \$3,000,000 of the settlement costs, as per the Maxim Policy’s deductible. In addition, Zurich paid Maxim’s defense costs under the Maxim Policy and Maxim again reimbursed Zurich for \$824,839.38 for defense costs. Maxim moved for entry of judgment against Berkel in its cross action, however, in July 2015, the trial court found that Maxim was not entitled to reimbursement of its defense costs and expenses from Berkel. Upon Berkel’s objections, the court amended its final judgment to state “Maxim’s motions for entry of judgment is denied, and Maxim takes nothing on its claims against Berkel.” Two months later, in September 2015, Berkel appealed and in 2018, the Texas court of appeals reversed the judgment against Berkel and found that since Berkel and Skanska were covered under the contractor-controlled insurance program, Skanska was Berkel’s statutory employee under the Texas Worker’s Compensation Act (“Workers Compensation Act”), and Lee, being Skanska’s actual employee was Berkel’s co-employee. Since Skanska was immune from lawsuit under the Act’s exclusive-remedy provision, Berkel as “co-employee” was also immune. Maxim appealed the state court judgment, and the appellate court found that Maxim did not preserve error as to its issues regarding the applicability of the Texas Anti-Indemnity Statute, after which the Texas Supreme Court denied review. Maxim then demanded that Zurich cover its defense and settlement costs under the Berkel Policy, while Zurich denied coverage to Maxim, arguing that the Texas Anti-Indemnity Statute barred coverage for Maxim as an additional insured under the Berkel Policy.

Subsequently, Maxim sued Zurich in state court claiming breach of contract and seeking declaratory judgment for reimbursement for Maxim’s defense costs, a \$3.5 million judgment and other costs under the Berkel policy. Zurich removed the case to the Southern District, and both parties moved for summary judgment. Zurich argued that Maxim lacks standing to assert claims against Zurich because the Maxim Policy’s deductible endorsement assigns Zurich the same claims that Maxim asserted against Zurich, and that said endorsement requires Maxim to reimburse Zurich for all defense costs, including the initial \$3 million of any settlement or judgment. Zurich further argued that assignment under the deductible endorsement included claims against Berkel and Berkel’s insurer, Zurich. Zurich specifically pointed to language in the deductible endorsement where Maxim assigned the right to recover “sums that are reimbursable under this endorsement and any Deductible Amount from anyone liable for the injury or damages.” As such, Zurich argued that Maxim has assigned the rights in such way that only Zurich may pursue Maxims’ claims against Zurich, and since Zurich, the assignee of Maxim’s claims, had not authorized Maxim to pursue the claims against Zurich, Maxims had no standing to bring said claims. Maxim, however, argued that the deductible endorsement

distinguishes “reimbursable” from “reimbursed” while outlining the process for allocations recoveries between Zurich and Maxim. According to Maxim, it already reimbursed Zurich for the settlement and defense costs in Lee’s lawsuit, and now sought the same amount under the Berkel Policy. Despite admitting that it assigned Zurich the right to recover “reimbursable” amounts, Maxim argued that Maxim did not assign Zurich the right to recover amounts that Maxim actually already reimbursed to Zurich.

The Southern District agreed with Maxim’s interpretation, finding that the deductible endorsement gave Zurich the exclusive right to recover “reimbursable” costs and not costs that had already been reimbursed. The court noted that Maxim correctly pointed out that the deductible endorsement suggested a distinction between reimbursed and reimbursable costs by stating that the amounts recovered apply “to reduce the Deductible Amount reimbursed or reimbursable” by Maxim. As such, the Court found that the logical interpretation of the Maxim Policy allowed Zurich to recover “reimbursable” amounts but did not assign Zurich the right to recover from other sources the amounts Maxim has already reimbursed to Zurich. Although the court acknowledged the ambiguity in the Maxim Policy as to whether only Zurich may pursue claims for reimbursable funds, following the long-standing rule of ambiguities being construed in favor of the insured, the Southern District ruled that the deductible endorsement does not specifically bar Maxim’s standing to pursue its reimbursement claims against Zurich under the Berkel Policy, and since the Maxim Policy did not assign Maxim’s rights exclusively to Zurich, Maxim may pursue its reimbursement claims against Zurich.

With regard to the Texas Anti-Indemnity Statute, the Southern District noted that same applies to the lease agreement between Berkel and Maxim. The Court further noted that Lee’s lawsuit alleged that Maxim was liable for its own negligence, not for any of Berkel’s negligence. As such, the Statute barred any additional insured coverage for Maxim to the extent Maxim sought additional insured coverage for its own negligence under the Berkel Policy. Maxim argued that the Statute should be liberally interpreted, allowing broad indemnification, and that indemnification for personal injury to employees protected by workers compensation was one of the exceptions in the Statute (“Employee Exception”). As per the Employee Exception to Texas Anti-Indemnity Statute, prohibition against indemnification for indemnitee’s negligence does not apply to a construction contract that requires indemnification against a claim for bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier. Maxim argued that the Employee Exception applied to Lees’ claim against Maxim, since Maxim was an additional insured under the Berkel Policy, covering injuries to Berkel’s employees caused by Maxim’s negligence, and since Berkel was Lee’s statutory employer, the Berkel policy covered Maxim’s defense and settlement with Lee. Zurich, however, argued that Berkel was only deemed Lee’s “coemployee” and not his employer, and the Employee Exception was inapplicable.

The Southern District agreed with Zurich and focused on the legislative intent for interpreting the Employee Exception. The Southern District noted that it is undisputed that Lee was Skanska’s employee in 2013, and noted that the appellate court found that Berkel was Lee’s coemployee and Skanska’s employee under the Worker’s Compensation Act, and therefore, Berkel was immune from lawsuit. However, the appellate court did not state that Berkel was

Lee's employer or "coemployer" with Skanska. The Southern District considered the definitions of the terms "employer" and "employee" under the Worker's Compensation Act, and concluded that under said definitions, Lee was neither Berkel's employee nor was Berkel Lee's employer, noting that there is no evidence that Lee worked for Berkel, was trained by Berkel or had any contract with Berkel.

Maxim also relied upon *Austin Bridge & Road, LP v. Suarez*, 556 S.W.3d 363, (Tex. App.—Houston [1st Dist.] 2018, pet. filed). Maxim argued that the *Austin Bridge* court used the terms "co-employer" and "co-employee" interchangeably and granted the exclusive remedy defense under the Worker's Compensation Act. The Southern District, however, disagreed with Maxim's interpretation, finding that the *Austin Bridge* court's determination that Austin Bridge was "a deemed co-employee/Co-employer" did not make these two terms interchangeable and focused on the actual contractual relationship between the parties. The Court reasoned that Lee, the injured employee, was not the employee of a lower tiered subcontracted [Berkel]. Instead, Lee was employed by Skanska, the general contractor. Skanska subcontracted with Berkel, and the subcontract required Berkel to enroll in Skanska's contractor-controlled insurance program. Since Berkel enrolled, the Court found that Berkel may be deemed Skanska's employee under the Worker's Compensation Act, and that statutory status led the appellate court to consider Berkel a "coemployee" of Lee. However, the Southern District noted that there was no authority supporting the contention that a lower-tiered subcontractor is deemed to be the statutory employer of a high-tiered contractor's employee, as Maxim argued.

Furthermore, the Southern District ruled that even if Berkel was deemed a "coemployer" of Lee, the court noted that Maxim did not present any authority supporting its contention that such status should be "imported" to the Anti-Indemnity Statute to trigger the Employee Exception. The Court noted that the Worker's Compensation Act specifically states that a general contractor shall be the employer of a subcontractor under certain circumstances, yet also specifically limits the "employer" status "for purposes of the workers' compensation laws," which further supports a finding that the terms "coemployer" and "coemployee" only apply in the worker's compensation context.

Finally, the Southern District addressed the Worker's Compensation Exception to the Anti-Indemnity Statute, pursuant to which agreements that affect "the benefits and protections under the worker's compensation laws of" Texas are excluded. Maxim argued that the Worker's Compensation Exception required Zurich to provide coverage for Maxim's claims and was an independent basis for showing that the Worker's Compensation Act did not exclude Maxim's additional insured coverage under Berkel's policy. Since Lee and Berkel received benefits and protections of the Act, Maxim argued that it was also entitled to full indemnification. Conversely, Zurich argued that the Workers Compensation Exception did not apply since it only applied to benefits and protections under the Workers Compensation Act, and Maxim had failed to show same.

The Southern District acknowledged the novelty of the aforementioned issue due to "lack of legislative history, case law, and secondary source discussing the Anti-Indemnity Statute,"

and that Zurich and Maxim's arguments for interpretation of the Statute were "largely unsupported." The Court held that any party that was seeking to void the Anti-Indemnity Statute based on the Worker's Compensation Exception must identify "some preexisting worker's compensation benefit or protection under Texas law and explain how making the indemnification agreement void would affect that benefit or protection." Here, Maxim failed to identify any such preexisting benefit or protection that would be affected by the Anti-Indemnity Statute. The court ruled that applying the Statute to forego Zurich's duty to indemnify Maxim will have no effect on any benefit or protection under the Worker's Compensation Act. Lee already received worker's compensation benefits and Maxim failed to show how a ruling for Zurich will affect same. Therefore, the Southern District found that the Worker's Compensation Exception did not apply to Maxim's claims for coverage under the Berkel Policy and the Anti-Indemnity Statute precluded Maxim's additional insured coverage under the Berkel Policy, granting summary judgment in favor of Zurich.

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