Docket No. _____

In the

Supreme Court of the United States

Scott M. Seidel, *Petitioner*,

v.

Century Surety Company, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

Jane Doe, at 18 and recently her high school's valedictorian, was raped in a lonely motel room after she passed out from drinking alcohol at Pastzaios Pizza, Inc. (PPI). She was in that motel room because the alcohol had left her in and out of consciousness, making her a vulnerable target. She was in that vulnerable state because PPI failed in its duties to her, including by permitting her to be served alcohol and permitting her attacker to remove her from the premises while barely conscious. PPI, like thousands of bars and restaurants that serve alcohol in Texas, purchased "Dram Shop" insurance coverage, in this case from Century. Century denied coverage, thereby forcing PPI's bankruptcy, and the Texas state court ultimately awarded Doe almost $20 million in damages. The Fifth Circuit, acting *sua sponte*, held that there was no coverage because PPI committed the crime of serving alcohol to a minor—an issue not addressed below and not even a basis on which Century denied coverage. To get there, the Fifth Circuit, already known as an "insurer friendly" venue, found that PPI committed a crime. It so found without any evidence or trial, instead "imputing" a crime, in violation of the Trustee's due process rights and in contradiction of the actual facts as determined by the Texas court. Imputation, not evidence, now governs the question of whether a crime has been committed.

Accordingly, the questions presented are:

1. Where there was no trial on the question of whether PPI committed a crime, the courts be-

low instead implying and imputing this fact, should this Court vacate the judgment below on fundamental and constitutional principles of due process?

2. Where a state court has ruled by final judgment as to the facts of an underlying tort case, do those facts control in a subsequent federal court declaratory judgment action, and should this Court vacate the judgment below because the Fifth Circuit found new and different facts instead of following the facts as actually and previously determined by the state court?

PARTIES TO PROCEEDING

The parties to the judgment under review are the following:

Scott M. Seidel, Trustee

Century Surety Company

Jane Doe (an assumed name)

Pastazios Pizza, Inc. (defunct and bankrupt)

Ajredin "Dani" Deari (the rapist)

CORPORATE DISCLOSURE STATEMENT

Petitioner Scott M. Seidel is a natural person. To the extent relevant, Pastazios Pizza, Inc. was a Texas corporation owned by Ajredin "Dani" Deari.

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This Petition involves an affirmance by the United States Court of Appeals for the Fifth Circuit, affirming (albeit on different grounds) a final summary judgment of the United States District Court for the Northern District of Texas, Dallas Division.

With respect to the judgment under review, the Fifth Circuit's opinion is published at *Century Surety Co. v. Seidel*, 893 F.3d 328 (5th Cir. June 25, 2018). The panel's October 1, 2018 order denying rehearing and denying rehearing *en banc* is not published. The District Court's opinion granting summary judgment and its final summary judgment in favor of Century is available online at https://www.govinfo.gov/content/pkg/USCOURTS-txnd-3_13-cv-02553/pdf/USCOURTS-txnd-3_13-cv-02553-0.pdf.

With respect to the judgment of the Texas state court regarding the negligence of PPI, the state court's judgment and its findings of fact and conclusions of law in support of the judgment are not published.

All the foregoing opinions have been reproduced in the appendix to this petition.

JURISDICTION

The United States District Court for the Northern District of Texas, Dallas Division, had diversity jurisdiction of the original proceeding under 28 U.S.C. § 1332.

The U.S. Court of Appeals for the Fifth Circuit had jurisdiction to decide the appeal below under 28 U.S.C. § 1291.

This Court has jurisdiction review the judgment of the U.S. Court of Appeals for the Fifth Circuit under 28 U.S.C. § 1254.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. 5.

* * *

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. 14.

STATEMENT OF THE CASE

This Petition arises out of a diversity action Century Surety Company (Century) commenced against its insured, Pastazios Pizza, Inc. (PPI) in the Northern District of Texas. Later, after PPI filed for bankruptcy, Scott M. Seidel (the Trustee) was appointed trustee, and he substituted into the action for PPI. Century sought declarations to the effect that it had no duty to defend or to indemnify PPI under the policy it sold PPI, while the Trustee sought the opposite declaratory relief, together with damages for Century's bad faith refusal to defend or to indemnify its insured.

I. The Rape.

The coverage issues arose because PPI, which owned and operated a pizza restaurant that also served beer and wine, over-served alcohol to Doe, who sat as a PPI patron with Ajredin "Dani" Deari (Deari) and his friend for several hours of drinking. Deari owned PPI, but was not on duty at the time and was not acting in the furtherance of any corporate business, as expressly found by the state court, there instead being a manager on duty. After Doe became extremely intoxicated and did not want to go home to her parents' house in such a state, Deari and his friend rented her a motel room nearby. After Deari's friend departed, Deari went back to the motel room and raped Doe. In addition to the violent rape, Deari transmitted incurable herpes to Doe, which will affect her for the rest of her life.

II. The State Court Judgment.

Doe later filed suit against PPI, Deari, and others in Texas district court in Dallas, Texas. Against PPI, Doe asserted negligence claims, premises liability claims, and claims under the Texas Dram Shop laws.

PPI sought a defense from Century, which Century refused. Unable to continue paying attorney's fees to defend itself, PPI filed Chapter 11 bankruptcy. The United States Bankruptcy Court for the Northern District of Texas confirmed a Chapter 11 plan for PPI, pursuant to which the Trustee was appointed as the trustee of the estate for the benefit of all creditors, including potentially Doe.

Both the Trustee and Deari defended against Doe's claims in the state court. Ultimately, after a contested trial on the merits, which included deeply painful, humiliating, and traumatic evidence and testimony, the state court found for Doe on all counts. Calling it the "most offensive facts that I've heard since I've been a judge," the state court awarded almost $20 million to Doe against PPI, including punitive damages. Century refused to indemnify against this judgment, instead commencing almost one year of additional litigation in the Texas state appellate courts in a late attempt to appeal against the judgment, during which process the Texas appellate court and supreme court denied all relief. The state court's judgment therefore remains a final, non-appealable judgment against PPI and, therefore, against the bankruptcy estate.

III. The District Court Grants Summary Judgment by Resorting to Imputations and Implications.

After extensive litigation and proceedings before the District Court, the District Court, by memorandum opinion, concluded that Century did not have a duty to defend or to indemnify PPI against the claims made by Doe. It therefore denied the Trustee all relief and entered a final judgment in favor of Century.

While admittedly permissible, the District Court acted *sua sponte*: having originally denied Century's motions for summary judgment and motion to dismiss, the District Court *sua sponte* abated the proceedings on the eve of trial while it reconsidered the issues, suddenly now agreeing with Century on the very same issues which the District Court previously held were not appropriate for summary judgment.

The District Court's opinion hinged on the imputation of Deari's conduct to PPI. Namely, the District Court concluded that Deari was PPI's vice-principal, even though Doe did not plead this and the State Court found literally the opposite, and that his actions and intentions were therefore the actions and intentions of PPI itself. Imputing Deari's intentions to PPI, the District Court concluded that the intentional acts exclusion in the policy was triggered, since Deari intended the harm to Doe. Consequently, according to the District Court's logic, any time that an owner, officer, director, or manager of a corporation is concerned, his or her actions and intentions become the actions and intentions of the

corporation—in complete disregard of a century of Texas law on the corporate shield.

With respect to the Dram Shop coverage purchased by PPI, the District Court concluded that the coverage did not apply because liquor, in addition to beer, was provided to Doe (liquor not being PPI's product) and because Flunitrazepam (a "date rape" drug usually called Rohypnol) was administered to Doe—even though the State Court found no such thing.

The District Court did not address or rule on whether the criminal acts exclusion in the policy applied so as to defeat coverage.

IV. The Fifth Circuit Affirms on Alternate Grounds.

Both the Trustee and Doe appealed. The Trustee's points were simple: (i) the District Court could not apply vice-principal liability because the Texas state court expressly made findings precluding that doctrine, and because Doe did not plead the requisite facts; and (ii) the Texas state court did not find that Rohypnol was administered to Doe. These simple facts—that the District Court found facts that were **not** found by the Texas state court and were actually at odds with the Texas state court's judgment—are in addition to the legal principles involved with the District Court's opinion.

The Fifth Circuit affirmed the District Court, but on different grounds. Indeed, it affirmed on grounds not decided by the District Court, on an issue that was barely raised and briefed, and that was never

argued. Thus, just as the Trustee lost *sua sponte* before the District Court on one issue, and he then lost *sua sponte* before the Fifth Circuit on a *different* issue.

The Fifth Circuit's opinion is straightforward: (i) given that PPI served alcohol to a minor, which fact is not in dispute; (ii) it committed a crime under Texas law; (iii) meaning that the criminal acts exclusion in the Policy was triggered; and (iv) which exclusion controlled over the separately purchased Dram Shop liability coverage. To supply the necessary *mens rea* required by the Texas criminal statute—serving alcohol to a minor is not a strict liability crime—the Fifth Circuit imputed Deari's knowledge and intent to PPI as had the District Court before it, based on vice-principal liability.

Doe sought a rehearing from the panel, while the Trustee sought a rehearing *en banc*. The panel denied both requests.

V. The Result.

The result is that the Trustee lost *sua sponte* on an issue that had never been tried, on which there was no evidence, on which there was no argument, and which relied exclusively on imputations and inferences instead of evidence. The result is that the Fifth Circuit has found that PPI committed a crime, even though PPI was not charged with a crime and was not criminally prosecuted or convicted. The result is that imputation and inference has been substituted for evidence, and that the facts as actually determined by the State Court were ignored by two different federal courts. The Trustee acknowledges

that a jury might ultimately find the same facts as the Fifth Circuit implied, but a jury just as well might find for the Trustee that there was no criminal *mens rea* or criminal negligence. But that is the point—the Trustee is entitled to present his case and evidence to a jury, and the final judgment of the State Court is entitled to respect in federal court. Due process and federalism demand it.

REASONS FOR GRANTING THE PETITION

I. The Legal and Societal Importance of the Issues, and the Error and Prejudice Occasioned by the Ruling Below, Merit this Court's Review.

The state law contractual interpretation issues involved in this case would not normally merit *certiorari*. The issues on which the Trustee seeks this Court's review, however, stem from the United States Constitution, the proper role of the federal judiciary, and the need to protect and vindicate due process rights. If an appellate court can proclaim someone guilty of a crime without evidence or trial, then that is a new day indeed for the federal courts. If an appellate court can substitute its judgment for the laws of a state, then the *Erie* Doctrine has no meaning. *See Erie R.R. v. Tompkins*, 204 U.S. 64 (1938). If an appellate court can ignore the facts as actually determined by a state court upon a trial on the merits, then what respect should anyone have for final judgments? And, if an appellate court can do all of the foregoing *sua sponte*, trial courts may as well not exist at all. The Fifth Circuit "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a

lower court, as to call for an exercise of this Court's supervisory power." U.S. Sup. Ct. R. 10(a). Moreover, this case may be one where a summary disposition would be appropriate. *See, e.g.*, *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999) ("[A] summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law.").

Not only the magnitude of the due process violation, but also the magnitude of the issue, and its societal importance, warrants this Court's review. Dram Shop insurance coverage provides critical protection not only to purveyors of alcohol, but to customers, third parties, and the public at large. Insurers such as Century make money from selling such coverage. Such coverage provides assurances to the public, landlords, employees, governmental agencies, and a whole host of businesses that protection will be in place if a dram shop violates its legal obligations. The ruling from the Fifth Circuit below—a circuit already known to be "insurer friendly"—threatens to substantially write Dram Shop coverage out of thousands of Texas insurance policies. Its ruling, denying coverage because PPI committed an alleged crime when it served alcohol to a minor, thereby triggering a standard criminal acts exclusion, denies precisely the coverage of an overriding endorsement that was separately purchased *and paid for* by PPI. Indeed, if Dram Shop coverage is excluded through a standard criminal acts exclusion, yet any violation of the Dram Shop laws is potentially a criminal act, then, contrary to the expectations of the hospitality industry and its clients all over the State of Texas, there may actually be no Dram Shop cov-

erage. And, since virtually any tort is also a potential crime, at least in the State of Texas, then coverage for virtually any tort can be denied based on an allegation of criminality—even without a criminal trial, evidence, or criminal judgment, as the Fifth Circuit did here.

But this is not an insurance coverage case. Nor is it a case that affects the unique rights of the discrete parties involved. Rather, it is a case of fundamental due process and fairness, the *Erie* Doctrine, and a case that indirectly adjudicates and alters the legal rights of virtually any insured selling alcohol in Texas. In its rush to find for the insurer, the Fifth Circuit—acting *sua sponte* on an issue not tried or decided by the District Court—held that PPI committed a crime. The Fifth Circuit did so without a trial, without evidence, without argument, and without an opportunity to defend against the allegations. It did so in complete contravention of Texas law. Employing "imputations" in place of evidence and trial, and ignoring the actual and binding fact findings of the Texas state court, the Fifth Circuit simply concluded that PPI committed a crime when it served alcohol to a minor, even though the necessary *mens rea* was not pled, argued, evidenced, or proven in any court, ever. It is this finding of a criminal act without any trial, in complete disregard of due process, that merits this Court's intervention pursuant to its supervisory powers and to ensure that fundamental rights are preserved and that justice is done.

Indeed, the Fifth Circuit's published, results-oriented opinion, has fundamentally changed the law. Now, where a Texas insured is sued for Dram

Shop violations, or for gross negligence (thus encompassing many torts), an insurer can deny defense and indemnity because Dram Shop violations are *per se* criminal, or because allegations of gross negligence are equivalent to criminal negligence, thereby triggering the criminal acts exclusion found in nearly all commercial liability policies: imputations take the place of facts and evidence. The result is all the more absurd here because it was an *appellate* court, not in the business of deciding the facts and acting *sua sponte*, that decided the actual facts of what happened. Worse, those imputed "facts" contradict the actual facts determined by the Texas state court.

II. The Fifth Circuit Violated the Trustee's Due Process Rights and Ignored Texas Law.

It is fundamental that, where a decision turns on a question of disputed fact, due process requires a fair trial with a fair and reasonable opportunity to present evidence and examine witnesses. *See Goldberg v. Kelly*, 397 U.S. 254, 268 (1970); *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). This is particularly true if one is accused of a crime. *See In re Oliver*, 333 U.S. 257, 272 (1948); *cf. In re Winship*, 397 U.S. 358, 375 (1970) ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error."); *Brinegar v. United States*, 338 U.S. 160, 174 (1949) ("Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the com-

mon-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."). Determining facts by "imputation" is fundamentally incompatible with these basic rights.

Here, the Fifth Circuit decided that PPI committed a crime by serving alcohol to a minor (importantly, the Fifth Circuit did not find that the rape itself was PPI's crime). The *fact* that PPI served alcohol to a minor, or permitted alcohol to be served to a minor, is not in dispute. As to whether this is a crime, however, it is not conclusive, as the crime PPI was found guilty of by the Fifth Circuit has a *mens rea* element. As the Texas state court found, it was Deari who went inside, took the beer from PPI, and gave the beer to Doe. PPI thus did not sell or "give" alcohol to Doe. *See* TEX. ALCO. BEV. CODE ANN. § 106.06(a). Nevertheless, according to the Fifth Circuit, PPI is guilty.

Instead, and at most, PPI could have committed the crime of making alcohol available to a minor. This, however, requires a finding of "criminal negligence." *See id*. Even if any of the alternative provisions of the statute apply, Texas law mandates a *mens rea* requirement if the statute does not expressly provide one, the minimum of which is criminal negligence. *See* TEX. PEN. CODE ANN. § 6.02(a)-(b). Criminal negligence is far more serious than simple negligence. *See* TEX. PEN. CODE ANN. § 6.03(d).

Despite PPI not even having been charged with a crime, it has nevertheless been found guilty of one by the Fifth Circuit, without any actual trial. The criminal statute here requires proof beyond a reasonable doubt. Nevertheless, the Fifth Circuit reasoned that, since the state court awarded punitive damages, it must have found gross negligence. Civil gross negligence being the equivalent of criminal negligence, the Fifth Circuit then concluded that the state court necessarily found that PPI committed a crime by serving alcohol to Doe, a minor. Thus, a finding of gross negligence in a civil matter equals, to the Fifth Circuit, a finding that a crime has been committed—an unprecedented result, to say the least.

To arrive at that result, the Fifth Circuit makes several distressing and legally unsupported jumps between criminal and civil jurisprudence. Upon analysis of the Texas statutes and law, the opinion is specious. More to the point that warrants this Court's review, however, the opinion tramples upon the due process rights of the Trustee and, by extension, of any insured accused of gross negligence or any other tort that could, hypothetically, be a crime.

In Texas, the facts as actually determined in an underlying liability trial control the duty to indemnify. *See, e.g., Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821 (1997). If there are facts that are necessary to coverage that were not determined in the underlying trial, then a limited trial on those facts is appropriate. *See, e.g., American Intern. Specialty Lines Ins. Co. v. Res-Care Inc.*, 529 F.3d 649, 656 (5th Cir. 2008). "We resolve doubts about an exclusion in favor of the insured." *Hartford Cas. Ins.*

Co. v. DP Engineering LLC, 827 F.3d 423, 427 (5th Cir. 2016). The coverage court cannot simply decide the facts necessary to coverage short of a trial, at least where the facts are disputed. *See id*. And, if the facts as determined control, then certainly the coverage court cannot find a fact that is actually at odds with the facts as determined in the underlying trial.

Simply put, the issue of whether PPI acted with criminal negligence, a necessary element of the crime, was never tried before the Texas state court, and the state court never made a finding on this issue. The Trustee was entitled to due process on this issue. But, the Fifth Circuit simply equated gross negligence with criminal negligence, thereby assuming and imputing the criminal *mens rea*. Even if the coverage court is permitted to rely on imputed facts—a position the Trustee does not agree with but that this Court need not decide—the coverage court certainly cannot impute a fact that is at odds with an actual finding of fact from the liability court. Otherwise, the facts as actually determined would not control.

In this respect, the Fifth Circuit found three facts which are expressly at odds with the actual findings of the Texas state court, and it is from these facts that the circuit made its imputation.

First, the circuit concluded that Deari's mental state was imputed to PPI through the vice-principal liability doctrine. That doctrine requires that Deari have been acting within the course and scope of his duties and his employment. *See Bennett v. Reynolds,*

315 S.W.3d 867, 884-85 (Tex. 2010); *Hammerly Oaks Inc. v. Edwards*, 958 S.W.2d 387, 391 (Tex. 1997). Equally as important, Texas law imputes an individual's *mens rea* to a corporation only if the individual was acting within the scope of his employment. *See* TEX. PEN. CODE ANN. § 7.22(a). There is no common law exception. *See Giesberg v. State*, 984 S.W.2d 245, 248 (Tex. Crim. App. 1998). The Texas state court found was that Deari "was not acting in the course and scope of his employment" and that he "was not acting in fulfillment of any of his duties." Findings of Fact and Conclusions of Law ¶ 22. The Fifth Circuit ignored this actual finding of the State Court to arrive at a contrary deemed fact.

Second, the Fifth Circuit concluded that the Texas state court found PPI grossly negligent in permitting alcohol to be given to Doe. This is not what the state court found. It found gross negligence only for PPI's failure to take reasonable steps to protect its invitee from the acts of third parties and failing to render aid. Its findings related to the provision of alcohol were limited to simple negligence. The Fifth Circuit could not impute the finding of criminal negligence from the finding of gross negligence when the finding of gross negligence was not related to the provision of alcohol to a minor.

Third, the Fifth Circuit concluded that all of Doe's damages resulted from the provision of alcohol to her, thus avoiding the potential of a trial to determine which damages may be covered and which may be excluded depending on whether they result from a crime. The Texas state court made no such finding, however. Rather, the state court found that

all of her injuries resulted from PPI's violation of "Section 2.02(b)" of the Alcoholic Beverages Code. This section prohibits the serving of alcohol to an obviously intoxicated person. *See* TEX. ALCO. BEV. CODE ANN. § 2.02(b). It does not address the provision of alcohol to a minor. And, the serving of alcohol to an obviously intoxicated person is a crime only if the provider "sells" the alcohol. *See id*. at § 101.63. PPI did not sell Doe any alcohol, so PPI did not and could not commit the crime of serving an obviously intoxicated person. The Fifth Circuit either erred in its analysis of the actual findings of the state court, or it ignored them, in concluding that all of Doe's damages resulted from the implied crime of serving alcohol to a minor.

The Fifth Circuit therefore erred: first, by resorting to imputation in the first place in order to satisfy an element of a criminal statute, as opposed to evidence and a trial; and second, if imputation was permitted, by failing to apply the facts as actually determined by the State Court which facts, if so applied, would have left unanswered the *mens rea* question for consideration in the coverage action and trial.

But there is a bigger danger that results from what the Fifth Circuit has done, one that should be of concern to all insureds. The Fifth Circuit's opinion has no limits. It rests on the proposition that a standard criminal acts exclusion found almost universally in commercial general insurance policies, was satisfied through imputation, which defeated coverage even in the face of separately negotiated and purchased endorsements. Thus, when a tort is

potentially a crime, there is no coverage. Every Dram Shop violation is potentially a crime. In Texas, almost every tort is potentially a crime. Or, if a plaintiff seeks a finding of gross negligence, one may necessarily forfeit coverage based on the argument that gross negligence imputes criminal *mens rea.* This means that either punitive damages or gross negligence must not be pled or awarded to preserve coverage, or that even those policies that expressly cover Dram Shop liability, gross negligence, and punitive damages, like the policy here, are illusionary. Either way, the result turns the language of the insurance policy (and Texas law) on its head.

III. The Fifth Circuit Violated the *Erie* Doctrine.

Where, as here, a federal court adjudicates a state-law cause of action, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). The Fifth Circuit normally adheres to that rule. *See e.g.*, *Bear Ranch, L.L.C. v. Heartbrand Beef, Inc.*, 885 F.3d 794, 804, (5th Cir. 2018). But not so here, in deciding that a garden variety criminal acts exclusion controls over a subsequently purchased and paid for endorsement.

Indeed, in explaining its reasoning, the Fifth Circuit noted that there is a "trend among courts to find that there is no threshold coverage" for providing alcohol to a minor. Opinion at fn. 3. In support of this surprising statement, the circuit cited no Texas cases. The *Erie* Doctrine, of course, demands otherwise,

and coverage determinations are not made *ad populum* or with resort to trends. It is no substitute for the rule of law or for due process for an appellate court to cite a debatable trend to override Texas law and the actual language of the contract. The Trustee understands that it is not normally the role of this Court to adjudicate contract disputes. It is, however, the role of the Fifth Circuit to apply Texas law, as opposed to arguable trends from other states, and it is the role of this Court to remind the Fifth Circuit to do so.

It is not just this case that is involved for, in the words of one scholarly article summarizing recent Fifth Circuit opinions on Texas insurance coverage issues:

> The purpose of this paper is not to criticize the Fifth Circuit, but to criticize certain opinions in which the court has either not engaged in traditional insurance contract construction or superseded the rules of construction with the Court's own interpretation of the terms at issue. An insured is in a precarious spot if he or she cannot rely upon the court's employment of well-settled rules of insurance contract construction and interpretation. Further, because the court is often dealing with standard policies, if a contract term or phrase is interpreted carelessly or without giving appropriate deference to the established rules of insurance contract construction, there can be a significant and unfortunate impact upon how future claims are interpreted, handled, and

> finally decided by the courts. Many of these rules of construction and interpretation, especially the rule that ambiguity is to be resolved in favor of the insured, were adopted to protect the insured. Insureds cannot afford the erosion of these fundamental rules.

Jeffrey E. Dahl, An Unwillingness to Live with Ambiguity, J. of Tex. Consumer L., *available at* http://www.jtexconsumerlaw.com/V8N3pdf/V8N3courtreview.pdf.

Texas law is clear that a subsequent endorsement overrides an exclusion. *See Mesa Operating Co. v. Cal. Union Ins. Co.*, 986 S.W.2d. 749, 754 (Tex. App. 1999); *INA of Tex. v. Leonard*, 714 S.W.2d 414, 416 (Tex. App. – San Antonio 1986). Texas law is equally clear that an exception to an exclusion, as is the case here with respect to the liquor liability endorsement (excepting from the criminal acts exclusion liability for the service of alcohol), adds coverage. See *Lamar Homes Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 11-12 (Tex. 2007). This is in addition to numerous cases holding that any doubt or ambiguity must be resolved in favor of the insured and against the exclusion, and that the policy must be read as a whole so as to not render any provision meaningless. *See, e.g., RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015).

The Fifth Circuit could not have reached the result that it did without ignoring these precepts. To conclude that a standard criminal acts exclusion controlled over a separately purchased, separately paid for, and subsequent endorsement adding coverage

for the violation of any liquor law or statute—"any" of course including criminal as well as civil—reads the liquor liability endorsement out of the policy. It renders the coverage illusory. It resolves doubts against coverage. It resolves any ambiguity in favor of the insurer. It provides a windfall to the insurer, who has made money by selling added coverage, while hurting the interests of the consumer. The Trustee submits that this result would never have been obtained had the coverage issue been decided in Texas state courts according to these bedrock Texas law principles. It is this portion of the opinion that is perhaps the most dangerous, for if an insurer can rely on a standard exclusion over a subsequent endorsement, then just about any covered action can and will be excluded.

CONCLUSION

The proceedings below call out for the Court to exercise its supervisory power, lest imputation and inference take the place of evidence, lest appellate judges acting *sua sponte* take the place of factfinders, and lest final judgments of state courts lose their meaning in our legal system.

Dated this 2d day of January, 2019.

Respectfully submitted,

s/Davor Rukavina
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