No.

IN THE

Supreme Court of the United States

DAVID DOTSON, PETITIONER

v.

ATLANTIC SPECIALTY INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Did the court of appeals violate the federalism principle of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) when it refused to apply Louisiana's substantive law of *res judicata* which would have allowed petitioner's suit against his insurer for misrepresentation to proceed, causing a substantial variation in outcomes between State and federal litigation, influencing the choice of forum for future litigants in Louisiana seeking to hold their insurers responsible and depriving petitioner of his day in court he would otherwise enjoy in State court?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

STATEMENT OF RELATED CASES

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The published Opinion of the United States Court of Appeals for the Fifth Circuit in *Dotson v. Atlantic Specialty Insurance Company*, Court of Appeals No. 21-30314, decided and filed January 31, 2022, and reported at 24 F.4th 999 (5th Cir. 2022), affirming the district court's order granting respondent's motion for summary judgment on *res judicata* grounds, is set forth in the Appendix hereto (App. 1-10).

The unpublished Opinion of the United States District Court for the Eastern District of Louisiana in *Dotson v. Atlantic Specialty Insurance Company*, Civil Action No. 20-2274, decided and filed May 7, 2021, and reported at 2021 WL 1840423 (E.D. La. 2021), granting respondent's summary judgment motion on petitioner's bad faith claims, is set forth in the Appendix hereto (App. 11-26).

The unpublished Order of the United States Court of Appeals for the Fifth Circuit in *Dotson v. Atlantic Specialty Insurance Company*, Court of Appeals No. 21-30314, decided and filed February 28, 2022, denying petitioner's timely filed petition for rehearing or for rehearing *en banc*, is set forth in the Appendix hereto (App. 27).

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit affirming the district court's grant of summary judgment was entered on January 31, 2022; and its Order denying petitioner's

timely filed petition for rehearing or for rehearing *en banc*, was decided and filed on February 28, 2022 (App. 1-10;27).

This petition for writ of certiorari is filed within ninety (90) days of the date the Court of Appeals denied petitioner's timely filed petition for rehearing or for rehearing *en banc*. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

28 U.S.C. § 1332(a)(1) (diversity jurisdiction; amount in controversy; costs):

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
(1) citizens of different States....

La. Rev. Stat. § 22:1973 (Good faith duty; claims settlement practices; cause of action; penalties):

A. An insurer, including but not limited to a foreign line and surplus line insurer, owes to his insured a duty of good faith and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach.

B. Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer's duties imposed in Subsection A of this Section:
(1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.
(2) Failing to pay a settlement within thirty days after an agreement is reduced to writing.
(3) Denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or consent of, the insured.
(4) Misleading a claimant as to the applicable prescriptive period.
(5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause.

(6) Failing to pay claims pursuant to R.S. 22:1893 when such failure is arbitrary, capricious, or without probable cause.

C. In addition to any general or special damages to which a claimant is entitled for breach of the imposed duty, the claimant may be awarded penalties assessed against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater. Such penalties, if awarded, shall not be used by the insurer in computing either past or prospective loss experience for the purpose of setting rates or making rate filings....

La. Rev. Stat. § 22:1892(A)(1) (Payment and adjustment of claims, policies other than life and health and accident; vehicle damage claims; extension of time to respond to claims during emergency or disaster; penalties; arson-related claims suspension):

A.(1) All insurers issuing any type of contract, other than those specified in R.S. 22:1811, 1821, and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, shall pay the amount of any claim due any insured within thirty days after receipt of satisfactory proofs of loss from the insured or any party in interest....

La. Rev. Stat § 13:4231 (Res judicata)

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

(1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.

(2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.

(3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

La. Rev. Stat § 13:4232 (Exceptions to the general rule of res judicata)

A. A judgment does not bar another action by the plaintiff:
(1) When exceptional circumstances justify relief from the res judicata effect of the judgment;
(2) When the judgment dismissed the first action without prejudice;
or,
(3) When the judgment reserved the right of the plaintiff to bring another action....

STATEMENT

On January 19, 2015, petitioner David Dotson ("petitioner") while operating a tow truck owned by his employer in Orleans Parish, Louisiana, was struck and injured by a pickup truck driven by John Price and insured by State Farm Mutual Automobile Insurance Company ("State Farm"). Petitioner filed a petition for damages in the Civil District Court for Orleans Parish against Price and State Farm. On August 24, 2017, he settled with both for $15,000 which was the limit of the State Farm policy.

Because petitioner's damages exceeded the State Farm policy's limit, on November 3, 2017, he named as additional defendants not only his own uninsured and underinsured motorist insurer (Progressive Direct Insurance Company or "Progressive") but also his employer's uninsured and underinsured motorist insurer, respondent Atlantic Specialty Insurance Company ("respondent" or "ASIC"), asserting claims against both for uninsured motorist coverage "("UM coverage"). Progressive removed the matter to the federal district court for the Eastern District of Louisiana on grounds of diversity pursuant to 28 U.S.C. § 1446(a) & (c).

On May 31, 2018, the federal district court, Morgan, J., set deadlines for prosecuting this litigation. The deadline for amending the pleadings was set for July 2, 2018, and trial was scheduled for the week of June 24, 2019. The Scheduling Order was accompanied by a cover page entitled "Notice To Counsel" which provided in relevant part:

> The deadlines set forth herein are not "suggestions" but *firm deadlines* which will be strictly enforced. The Court will not grant motions (whether opposed or unopposed) to continue these deadlines....(emphasis supplied).

On November 14, 2018, ASIC responded to petitioner's discovery requests by representing repeatedly that its policy included "a $100,000.00 per accident UM limit." Although petitioner requested it, ASIC did not provide a full un-redacted copy of the insurance policy. Instead, it proffered only a description of the policy, using the policy number and dates. ASIC's failure to document this asserted UM coverage limit concerned petitioner but he had no reason to disbelieve its assertion that its UM policy limit was "$100,000.00 per accident."

It was not until March of 2019 that petitioner began to suspect that ASIC's description of its UM coverage might be inaccurate and that its UM policy limit for this accident instead might be $1,000,000.00. In response to his further requests for a copy of the policy and related papers in order to resolve this issue, ASIC in March of 2019 provided waiver forms associated with the policy it issued to petitioner's employer, waivers it contended reduced its UM coverage for petitioner under the policy from $1,000,000.000 to $100,000.00 per accident pursuant to Louisiana law. Petitioner believed these claimed waivers did not comply with Louisiana statutes and as a result could not, as ASIC argued, reduce its UM coverage from $1,000,000.000 to $100,000.00.

Thus on April 19, 2019, two months before the scheduled trial, after discovery was closed and ten months after the deadline for amending his petition had passed, petitioner was forced to bring a motion for summary judgment in order to define the limits of ASIC's UM policy coverage. He challenged ASIC's claim that its policy provided only $100,000.00 in coverage inasmuch as the UM coverage waiver that his employer executed did not comply with Louisiana law. ASIC opposed the motion and on April 23, 2019, it adduced the affidavit of its employee Elizabeth Wisniewski who averred that "[t]his policy includes a Louisiana Uninsured Motorist Coverage—Bodily Injury Endorsement, which limits the amount of UM coverage to $100,000 per each accident."

Thus by April 23, 2019, long after the trial court's firm deadline to amend his petition, just two months prior to trial—and *over four years after the accident which gave rise to this lawsuit between these parties*—petitioner became fully aware of ASIC's bad faith in misrepresenting its UM coverage in the form of the Wisniewski affidavit. Any attempt at this point to amend his petition to add a bad faith claim under La. Rev. Stat. § 22:1973B(1) would run afoul of the district court's firm prohibitory deadline for doing so and would have substantially delayed the resolution of the case. In fact, ASIC produced the complete UM policy only when ordered to do so by the district court at the final pretrial conference.

On June 19, 2019, the district court, Morgan, J., granted petitioner's motion for summary judgment (App. 12). She held that the waiver relied upon by ASIC was invalid under Louisiana law and, as a result,

the limit of ASIC's UM coverage for petitioner had *not* been reduced to $100,000 per accident, as it argued (*Id.*). See *Dotson v. Price*, 399 F. Supp. 3d 617, 619 (E.D. La. 2019).

Less than two weeks before trial, petitioner and ASIC were able to reach a settlement compromise. On July 11, 2019, the district judge entered a dismissal as to all parties subject to reopening within sixty days if the settlement was not consummated (*Id.*). On August 20, 2019, petitioner signed a "Receipt, Release, Defense, and Indemnity Agreement" in favor of ASIC (*Id.*). The settlement agreement limited petitioner's release to "all claims" against ASIC "arising out of the incident" that petitioner actually asserted or was required to assert in the filed action (App. 3;15). The parties' settlement agreement defined "the incident" as

> the incident on or about January19, 2015, in which **CLAIMANT** contends he was injured as a result of an auto accident involving JOHN PRICE and which occurred eastbound on Interstate 10 as he was approaching the overhead left exit ramp to US 90 and Claiborne in New Orleans, Parish of Orleans, State of Louisiana, and which is the subject-matter of the **LAWSUIT** defined herein below.

On September 24, 2019, a stipulation of dismissal with prejudice entered (App. 3;12-13).

Nine months later, on April 1, 2020, petitioner brought this civil action in Civil District Court for Orleans Parish against ASIC seeking penalties and damages for its misrepresentations and bad faith

insurance practices in the prior suit (App. 3;13). He claimed that ASIC violated La. Rev. Stat. § 22:1973B(1) when during the prior litigation, it breached its affirmative duty under this statute to act in good faith by misrepresenting the coverage limit for its UM policy in the sworn affidavit of its employee Elizabeth Wisniewski (*Id.*). As petitioner asserted, ASIC's misrepresentation led him to believe "that his claim was limited to a coverage of $100,000 until very late into the litigation," bad faith conduct and unfair dealing by ASIC which precluded him from fully developing all of his claims (App. 3).

On August 17, 2020, ASIC removed the matter to the federal district court for the Eastern District of Louisiana on grounds of diversity pursuant to 28 U.S.C. § 1446(a) & (c) (App. 3;13).On February 11, 2021, ASIC moved for summary judgment arguing that petitioner's claims were barred by the doctrine of *res judicata* based as they were on the final judgment of dismissal entered in the prior action between them in the same court (*Id.*).

On May 7, 2021, the district court issued its Order and Reasons granting ASIC's motion for summary judgment (App. 11-26). It first determined that petitioner and ASIC agreed in the prior action to release "all claims" by petitioner against ASIC, a term which they expressly agreed encompassed "any and all past, present, and future claims, demands,...actions, liabilities, causes of action, or suits at law, in equity, in civil law, in common law, in tort, in contract or of whatever kind or nature, asserted or required to be asserted in the **LAWSUIT** arising out of the **INCIDENT**" (App. 15) (emphasis in original). Moreover,

the term specifically included any suits for injury as well as any other damages required to be asserted in the prior lawsuit arising out of the "incident" (*Id.*).

Because all the other elements of *res judicata* were satisfied here, i.e., the same parties, a court of competent jurisdiction and a final judgment on the merits, the district judge focused on petitioner's argument that his present bad faith claim against ASIC was *not* the subject matter of the earlier action and therefore was not actually litigated in the prior suit (App. 15-16). Applying federal common law, the motion judge employed the "transactional test," one which asks only whether the two actions are based on the "same nucleus of operative facts" (App. 17;25 quoting *Test Masters Educational Services, Inc. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005)).

The district court concluded that under federal common law, both actions arose out of the same nucleus of operative facts, i.e., petitioner's damages in the 2015 accident and ASIC's failure to pay under its UM policy (App. 17-18). Thus regardless of whether the issue of ASIC's bad faith was actually litigated, petitioner "was required to bring his bad faith claim in the 2017 Action and is precluded from raising it in his 2020 Action under the principles of *res judicata*" (App. 18).

Even if Louisiana law of *res judicata* applied, the motion judge reached the same conclusion (App. 18-20).She relied on La. Rev. Stat. § 13:4231, the codification of its *res judicata* principles, and the State Law Institute's Comment e. to the statute (App. 18-19). The Comment provides that a plaintiff must assert all his claims arising out of the transaction or occurrence

giving rise to the prior suit (App. 19). With claims that emerge or which a plaintiff becomes aware of before trial, they "may be asserted through an amended or supplemental petition, and these claims will relate back to the original filing if they arise out of the transaction or occurrence set forth in the original petition... [or] he may seek a reservation in the judgment of the right to bring another action" (*Id.*).

The motion judge also cited decisions by an intermediate State appellate court as well as a sister federal district court in Louisiana that a bad faith claim associated with an insurer's alleged failure to provide UM coverage is intertwined with and centers around the same set of operative facts as the accident itself and therefore arose out of the same transaction or occurrence (App. 19-20). Thus petitioner's attempt now to bring a bad faith suit against ASIC after an adjudication of the underlying UM claim is subject to dismissal under the doctrine of *res judicata* (App. 20).

Nor did the district court see any exceptional circumstances relieving petitioner of this result (App. 20-21). See La. Rev. Stat § 13:4232A(1) (exceptions to the general rule of *res judicata*). According to the judge, petitioner was on notice during the prior litigation of all the facts surrounding ASIC's alleged bad faith conduct; he "did not seek leave to amend his complaint to include the bad faith claim or a continuance to investigate the viability of such a claim" after being granted summary judgment on June 19, 2019, on the coverage issue; and he did not seek such permission to amend before filing the stipulation of dismissal on September 24, 2019 (App. 21-22).

Petitioner appealed and on January 31, 2022, the court of appeals unanimously affirmed the district court's grant of summary judgment (App. 1-10). The Panel, clarifying that Louisiana law applied, identified the five elements contained in State law to determine the preclusive effect, if any, which the judgment in petitioner's prior suit has on his present suit against ASIC for its bad faith conduct (App. 5-6). Since it was undisputed that the first four elements were satisfied, it focused on the last element, the issue of whether petitioner's present action arises out of the same "transaction or occurrence that was the subject matter of" the earlier action (App. 6 citing *Chevron U.S.A., Inc. v. State*, 993 So.2d 187, 194 (La. 2008)).

The Panel agreed with the district court that petitioner's two actions are intertwined with and center around the same set of operative facts, i.e., petitioner's damages resulting from the accident, the coverage to which he was entitled under ASIC's policy, and ASIC's response to petitioner's claim for coverage (App. 6-7). Because "Louisiana courts have found similar types of bad faith claims are factually intertwined with the underlying contract claim" for coverage, petitioner's bad faith claim could have been raised in the prior suit and his present suit is therefore barred by *res judicata* even if Louisiana's bad faith statutes impose duties which are separate and distinct from its duties under the insurance contract to provide coverage (App. 6-8).

Finally, the Panel rejected petitioner's assertion that "exceptional circumstances" existed under La. Rev. Stat § 13:4232A(1) to prevent the application of *res judicata* (App. 8-9). It ruled that this exception applies only where "complex procedural situations,"

"unanticipated quirks in the system," or unanticipated decisions beyond the control of litigants prevent a party from presenting his claim in the earlier suit (App. 8). But here petitioner was on notice during the previous action of all the facts giving rise to the bad faith claim and "did not attempt to amend his pleadings to include such claim" (App. 9).

On February 28, 2022, the court of appeals denied petitioner's timely filed petition for rehearing or for rehearing *en banc* (App. 27).

REASONS FOR GRANTING THE PETITION

The Panel Violated The Federalism Principle Of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) When It Refused To Apply Louisiana's Substantive Law Of *Res Judicata*, Law Which Would Have Allowed Petitioner's Suit Against His Insurer For Misrepresentation To Proceed, Causing Substantial Variation In Outcomes Between State And Federal Litigation, Influencing The Choice Of Forum For Future Litigants In Louisiana Seeking To Hold Their Insurers Responsible And Depriving Petitioner Of His Day In Court He Would Otherwise Enjoy In State Court.

If the Panel's reading of substantive State law in this diversity action is correct, then under Louisiana law, a UM insurance carrier once sued may repeatedly misrepresent to the insured the extent of its coverage for the accident, stringing him along with false information— even in the form of an affidavit—long after the time has elapsed for amending his complaint to allege such bad faith conduct, denying him access to the policy itself until ordered to do so by the court just

prior to trial. Then after settlement is reached, the insurer can successfully defend against petitioner's subsequent suit based on its deceit by raising *res judicata* as a bar even though petitioner—because of the insurer's unfair and deceptive conduct in the prior suit—became aware of its deceit only after the time for amending his complaint had expired.

According to the Panel, this result is justified under Louisiana law because the plaintiff failed to exercise proper oversight and preparation, as if he himself is responsible for being duped by ASIC's bad faith, deceptive conduct which was exposed only at the eleventh hour in the prior suit when it was finally forced to produce its UM policy whose coverage it repeatedly misrepresented. Petitioner was then obligated, the Panel says, to seek to amend his complaint weeks before trial despite violating the trial court's prohibitory timelines for doing so.As a result, he is now forever barred by *res judicata* from having his day in court to recover penalties and damages for ASIC's deceitful conduct.

But this is *not* the substantive law of Louisiana. Instead, Louisiana statutory and decisional law hold that where the insurance carrier itself creates the circumstances whereby a cause of action against it for bad faith conduct arises after the plaintiff's opportunity for amending his complaint has expired and where his awareness of the deceit was itself delayed due to the insurer's unfair and deceptive conduct, exceptional circumstances exist which make it inequitable for *res judicata* to bar the subsequent action. In such an event, substantive State law as a matter of fundamental fairness provides petitioner with his "day in court" in

order to prove his misrepresentation claim against ASIC. See *Guidry v. State Farm Mutual Automobile Insurance Co.*, 326 So.3d 1224 (Mem) (La. 2021); *Brouillard v. Aetna Cas. & Sur. Co.*, 657 So.2d 231, 233 (La. App. 1995); La. Rev. Stat § 13:4232A(1) (exceptions to the general rule of *res judicata*).

The Panel, ignoring this body of law, blamed petitioner for not timely raising ASIC's bad faith conduct in his first suit because he "had simply failed to assert a right or claim for damages through oversight or lack of proper preparation" (App. 8 quoting *Spear v. Prudential Prop. & Cas. Ins. Co.*, 727 So.2d 640, 643 (La. App. 1999)). As it ruled, even though Dotson was on notice of all the facts which gave raise to his present claims of bad faith conduct by ASIC during the pendency of the prior action, "he did not attempt to amend his pleadings to include such a claim" (App. 9). Yet petitioner was *not* "on notice" of ASIC's misrepresentation of its UM coverage until the Wisniewski affidavit of April 23, 2019, ten months after the trial court's firm deadline to amend his petition had passed, just two months before trial—and *over four years* after the accident which gave rise to this lawsuit between these parties. Indeed, ASIC produced its complete UM policy only when ordered to do so by the district court at the final pretrial conference.

Any attempt by petitioner to amend his complaint to add a claim of misrepresentation under La. Rev. Stat. § 22:1973B(1) just prior to trial would have had to overcome the trial judge's firm prohibitory deadline for doing so and would have substantially delayed the settlement of petitioner's underlying claims which were on the cusp of resolution. It was the

convoluted circumstances *created by ASIC itself* by unfairly concealing the true extent of its UM coverage for this accident which caused petitioner's ignorance about this issue until just before trial, *not* petitioner's "oversight or lack of proper preparation."

The Panel, as a federal court sitting in diversity, failed to apply to this controversy the recent decision of the Louisiana Supreme Court in *Guidry*, *supra*, issued on November 10, 2021, almost three months *before* its decision in this case. *Guidry* ruled that La. Rev. Stat. § 13:1432A(1)'s "exceptional circumstances" exception encompasses cases precisely like this where the new claim arose *after* the opportunity to amend the complaint had expired in the prior action. 326 So.3d 1224. In fact, petitioner under the trial judge's strict timelines would have been denied the opportunity to amend his complaint by the time he discovered that ASIC had misrepresented the extent of the UM coverage available under the policy.

The Panel also ignored or refused to apply the decision in *Brouillard*, *supra*. There the intermediate appellate court held that where the insurance company delayed giving the plaintiff a copy of the insurance policy (upon which she sued) until the eve of trial in the first suit, despite her many requests for same, and where the plaintiff was therefore unaware that the policy contained a medical payments provision, the source of the obligation she sought to enforce in the second suit, the plaintiff had stated sufficient "exceptional circumstances" under La. Rev. Stat. § 13:1432A(1) to prevent the application of *res judicata* as a defense to her second suit. 657 So.2d at 233.

This substantive law of Louisiana creates a bright-line rule for assessing when *res judicata* bars petitioner's present suit against ASIC for misrepresentation: when a cause of action arises *after* the time for amending a complaint has expired in the first suit, a plaintiff like petitioner may sue upon that cause of action in a subsequent action without being barred by *res judicata*. Such a rule provides clarity for litigants, comports with the interests of justice that insurers who conceal and then misrepresent coverage be subject to penalties and disciplinary action by the State's Department of Insurance, and it aligns with Louisiana law which recognizes that *res judicata* remains *stricti juris* so that the presumption is *against* its application in order that cases be heard on their merits.

The Panel's ruling otherwise violates the federalism principle of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) because a civil action removed to federal court based on diversity of citizenship should not lead to a substantially different result than in State court a block away; it is against the public policy of Louisiana which gives its citizens remedies against insurers who conceal and then misrepresent available coverage; and it undercuts the notion expressed repeatedly by Louisiana courts that *res judicata* is *stricti juris* and should not be employed to deny an insured his day in court when the unfair and deceptive conduct *by the insurer itself* in the prior lawsuit prevented the insured from raising his misrepresentation claim at that time.

The Panel failed to apply the substantive law of Louisiana to decide the controversy before it, to the detriment of its citizens, engendering "substantial

variations [in outcomes] between state and federal litigation" which would "[l]ikely...influence the choice of forum." *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001) quoting *Hanna v. Plumer*, 380 U.S. 460, 467-468 (1965). This inequitable administration of the laws which *Erie* seeks to avoid is good reason for the Court to grant certiorari as a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by th[e] Court, or has decided an important federal question in a way that conflicts with relevant decisions of th[e] Court." Supreme Court Rule 10(c).

The Court should therefore grant a writ of certiorari to review and vacate the judgment of the court of appeals, determine that the Panel failed to apply the substantive law of Louisiana regarding the exceptional circumstances which warrant a refusal to recognize the defense of *res judicata* and that had it faithfully applied substantive State law, it would conclude that petitioner was entitled to bring this suit against ASIC for misrepresentation, remanding the matter to the district court for further proceedings.

The Law of Res Judicata In Louisiana Provides Petitioner With "His Day In Court" Against ASIC.

As a matter of federal common law, federal courts sitting in diversity apply the preclusion law of the forum state unless it is incompatible with federal interests. *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. at 508. The doctrine of *res judicata* in Louisiana is set forth in La. Rev. Stat § 13:4231, a statute which was revised in 1990 to make a

substantive change in the law, i.e., a judgment bar to all causes of action arising out of "the same transaction or occurrence." *Jackson v. North Bank Towing Corp.*, 213 F.3d 885, 888 (5th Cir. 2000) citing *Fine v. Regional Transit Auth.*, 676 So.2d 1134, 1136 (La. App. 1996). See *Lefreniere Park Found. v. Broussard*, 221 F.3d 804, 810-811 (5th Cir. 2000) ("same transaction" concerns a group of facts "so connected as to constitute a single wrong and so logically related that judicial economy and fairness mandate that all issues be tried in one suit.").

Pursuant to this statute, a second action is precluded when all the following five criteria are satisfied: (1) the judgment is valid; (2) the judgment is final; (3) the parties are the same; (4) the causes of action asserted in the second suit existed at the time of final judgment in the first litigation; and (5) the cause(s) of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation. *Wooley v. State Farm Fire & Cas. Ins. Co.*, 893 So.2d 746, 771 (La. 2005) citing *Burguieres v. Pollingue*, 843 So.2d 1049, 1053 (La. 2003).

The Louisiana Supreme Court has emphasized that "[t]he doctrine of *res judicata* cannot be invoked unless *all* its essential elements are present...and each necessary element *must* be established beyond all question." *Kelty v. Brumfield*, 633 So.2d 1210, 1215 (La. 1994) (emphasis supplied). Moreover, the doctrine is interpreted *stricti juris*, and any doubt concerning the application of the principle of *res judicata* must be resolved *against* its application. *Siemens Water Tech. Corp. v. Revo Water Systems, LLC*, 130 So. 3d 473, 475 (La. App. 2014). *Domingue ex rel. Domingue v. Allied*

Disc. Tire & Brake, Inc., 849 So.2d 690, 695 (La. App. 2002), *writ denied*, 855 So.2d 320 (La. 2003) ("The doctrine...should be rejected when doubt exists as to whether a party's substantive rights have actually been previously addressed and finally resolved."). Accord, *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 437 (5th Cir. 2000) (interpreting Louisiana law).

While denying *res judicata* defenses may sometimes diminish judicial resources and increase litigation, Louisiana courts have noted that "[t]hose harms are sometimes preferable to the loss of plaintiff's substantive rights without the merits being heard." *Fine v. Regional Transit Auth.*, 676 So.2d at 1137, citing *Mavromatis v. Lou-Mar, Inc.*, 632 So.2d 828 (La. App. 1994). For this reason, Louisiana by statute (La. Rev. Stat.§ 13:4232A(1)) permits relief from the doctrine of *res judicata* when "exceptional circumstances" justify such a result.

In deciding whether "exceptional circumstances" exist, a court is empowered to exercise its discretion to balance the doctrine with the interests of justice. See *Oleszkowicz v. Exxon Mobil Corp.*, 156 So.3d 645, 647-648 (La. 2014) (explaining this power in the context of the Comment to La. Rev. Stat.§ 13:4232A(1) (1990)). "Exceptional circumstances" contemplate "complex procedural situations in which the litigants are deprived of the opportunity to present their claims due to unanticipated quirks in the system, to factual situations that could not be anticipated by the parties, or to decisions that are totally beyond the control of the parties." *Id.* at 648 quoting *Kevin Associates, LLC v. Crawford*, 917 So. 311 (La. App. 2005).

One such "exceptional circumstance" is where the party asserting a claim was, through no fault of his own, unable to adjudicate it in the first suit. *Terrebonne Fuel & Lube, Inc. v. Placid Refining Co.*, 666 So.2d 624, 635-636 (La. 1996). There the party unsuccessfully sought to raise his state breach of contract claim in bankruptcy court and then brought the claim in state court after the Bankruptcy Court approved the Plan of Confirmation. *Id.* In rejecting a *res judicata* defense, the Louisiana Supreme Court wrote that "[w]hile *res judicata* is a useful tool, it should not be used as a scythe applied mechanically to mow down claims where the party asserting the claim is not at fault for the lack of adjudication of that claim in the first suit...[and] [a]pplying *res judicata* blindly or mechanically...does not foster judicial economy or fundamental fairness to the parties." *Id.* at 635.
Accord, *Follette v. Wal-Mart Stores, Inc.*, 41 F.3d 1234, 1238 (8th Cir. 1994 (interpreting Louisiana law); *Centanni v. Ford Motor Co.*, 636 So.2d 1153, 1156 (La. App. 1994) (Thibodeaux, J., dissenting).

With regard to the circumstances here, the courts of Louisiana in both *Guidry*, 326 So.3d 1224 (Mem) (La. 2021), and *Brouillard*, 657 So.2d at 233, have held that where the circumstances which prevented the plaintiff from bringing his claim in the first suit were created by the insurer itself through its delay in giving the plaintiff a copy of the insurance policy sued upon until the eve of trial in the first suit (*Brouillard*) or when the insurer's delay in producing its policy prevents the plaintiff from timely amending his complaint to include the new cause of action in the first suit (*Guidry*), it would be inequitable to sustain a claim of *res judicata* as a bar to the plaintiff's second

suit. As the *Brouillard* Court concluded, it is unfair to allow an insurer to delay in providing the policy so that the plaintiff was unaware of the existence of the medical payments provision and then plead *res judicata* as a bar to a subsequent suit based on this very provision, justifying its recognition of the "exceptional circumstances" exception to *res judicata*. *Id.*

Such is the case here. By the time petitioner became aware of the increased UM coverage under ASIC's policy—all due to ASIC's tactical delays— the time for amending his complaint under the court's timelines had long passed; and the delay *created by the insurer itself* constituted under substantive Louisiana law precisely the kind of factual circumstances which justified the imposition of the "exceptional circumstances" exception under La. Rev. Stat.§ 13:4232A(1) to prevent ASIC's resort to *res judicata* as a bar to petitioner's second suit. All of this is consistent with notions of equity and fairness embedded in § 13:4232, the aspiration that parties be given their day in court on their cognizable claims and the recognition that the doctrine remains *stricti juris* so that any doubt about its application be resolved *against* it.

The Violation of Erie's Federalism Principle

The Panel's refusal to follow the substantive law of Louisiana in assessing ASIC's affirmative defense of *res judicata* violates the federalism principle of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). There is no excuse to avoid *Erie's* requirements and ignore substantive State law which holds that this factual scenario justifiably invokes the "exceptional circumstances" exception of La. Rev. Stat.§ 13:4232A(1) to prevent

ASIC's resort to *res judicata* as a bar to petitioner's second suit.

Under *Erie*, when a federal court exercises diversity, pendent or supplemental jurisdiction over State law claims, "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." *Felder v. Casey*, 487 U.S. 131, 151 (1988) quoting *Guaranty Trust Co. York*, 326 U.S. 99, 109 (1945). Avoiding judge-made rules in federal court which undercut a litigant's rights which he otherwise would enjoy under State law promotes comity and federalism, discourages forum-shopping and acknowledges that the pronouncements of the State courts on the substantive rights of its citizens are in most cases expressions of their own sovereignty. *Bush v. Gore*, 542 U.S. 692, 740-742 (2000) (Rehnquist, C.J., concurring). All these concerns of *Erie* are undermined by the result here.

Subsequent decisions of the Court have reinforced *Erie's* notion of federalism. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). *Salve Regina College v. Russell*, 499 U.S. 225, 234 (1991). Thus "a federal court is not free to apply a different rule however desirable it may believe it to be, and even though it may think that the state Supreme Court may establish a different rule in some future litigation." *Hicks v. Feiock*, 485 U.S. 624, 630 n.3 (1988). Where the state's highest court has spoken, as it has here in *Guidry*, its ruling must be "accepted by federal courts as defining state law." *West v. AT&T Co.*, 311 U.S. 223, 236 (1940). When it has not done so, the proper function of a federal court "is to ascertain what the state law is, not

what it ought to be." *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 497 (1941).

The Panel's refusal to apply the substantive law of Louisiana effectively repeals an important qualification to the use of *res judicata* by insurers in the State as a defense to suits brought against them for bad faith conduct, depriving petitioner and other citizens of Louisiana of a remedy they otherwise would enjoy in State court. It also undermines Louisiana's public policy which fosters jurisprudence based on notions of fairness and the reasonable expectations of the parties, especially insureds, that they will have their day in court to prove the bad faith conduct of their insurers. The Panel's decision creates unprincipled federal common law in Louisiana, dramatically limiting the rights of insureds in the federal forum, rights they would otherwise enjoy in State court, thereby violating *Erie's* core federalism principle.

Finally, the court of appeals could have certified the question to the Louisiana Supreme Court *sua sponte* if it had any doubts about the application of *Guidry*, *Brouillard*, and La. Rev. Stat.§ 13:4232A(1) to the facts here. See, e.g., *Lehman Brothers v. Schein*, 416 U.S. 386, 390-391 (1974); *Clay v. Sun Insurance Office*, 363 U.S. 207, 210-212 (1960). After *Guidry*, it is assuredly the case that petitioner's right to bring this second suit against ASIC for its bad faith conduct would have been vindicated in State court. Instead, the Panel created federal common law denying petitioner his day in court in this removed case and making certain further removals by insurers to the federal forum where they can avoid Louisiana jurisprudence

intended to level the playing field between insurers and consumers.

Petitioner Deserved His "Day in Court" Against ASIC.

Petitioner's right to have his claims fairly heard and decided by the federal courts in this removed diversity action—to have his day in court to prove ASIC's misrepresentation—is a valuable property right entitled to due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972). *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933). The actions by the federal courts in disposing of petitioner's claims are encompassed within the fifth amendment's Due Process Clause. *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984). The dismissal of petitioner's cause of action with prejudice by a federal court—refusing to apply State law which justifies the reinstatement of his civil action against ASIC —not only is in conflict with the law of the forum State, Louisiana, but also is a denial of petitioner's right to a fair hearing on the issues and a denial of due process. See *Lewis v. Casey*, 518 U.S. 343, 346 (1996); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (a decision is arbitrary and capricious if the decision maker relies on factors it is *not* permitted to consider under the applicable law).

CONCLUSION

For all of the reasons identified herein, this Court should grant a writ of certiorari to review and vacate the judgment of the court of appeals; determine that the Panel failed to apply the substantive law of Louisiana regarding the exceptional circumstances

which warrant a refusal to recognize the defense of *res judicata* and that had it faithfully applied substantive State law, it would conclude that petitioner was entitled to bring this suit against ASIC for misrepresentation, remanding the matter to the district court for further proceedings; or provide petitioner with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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24 F.4th 999
United States Court of Appeals, Fifth Circuit.

David DOTSON, Plaintiff—Appellant,

v.

ATLANTIC SPECIALTY INSURANCE COMPANY, Defendant—Appellee.

No. 21-30314
FILED January 31, 2022

Appeal from the United States District Court for the Eastern District of Louisiana, USDC No. 2:20-CV-2274, Donna Sue Morgan, U.S. District Judge

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Before King, Graves, and Ho, Circuit Judges.

Opinion

James C. Ho, Circuit Judge:

David Dotson appeals the district court's grant of summary judgment to Atlantic Specialty Insurance Company ("Atlantic"). The district court concluded that this action is precluded on res judicata grounds. We affirm. In doing so, we clarify some doctrinal confusion

in our law about Louisiana principles of res judicata that one of our sister circuits has observed.

I.

In 2015, a pickup truck driven by John Price collided with a tow truck operated by David Dotson. Dotson's employer owned the tow truck and insured it with Atlantic. State Farm Mutual Automobile Insurance Company ("State Farm") insured Price's truck.

Dotson filed suit in Louisiana state court against Price and State Farm, seeking damages for his injuries from the accident. He later added Atlantic and Progressive Direct Insurance Company ("Progressive")—Dotson's uninsured and underinsured ("UM") motorist insurer—to the action, asserting claims for UM coverage against both. After Dotson settled with Price and State Farm, Progressive removed the action to federal court on diversity grounds.

Throughout the litigation, Atlantic maintained that its insurance policy in effect at the time of the accident limited UM coverage to $100,000 per accident. Dotson moved for partial summary judgment on the issue, arguing that the limit was actually $1,000,000 per accident because the UM coverage waiver that Dotson's employer had executed in connection with this policy "d[id] not comply with Louisiana law." See Dotson v. Price, 399 F. Supp. 3d 617, 619 (E.D. La. 2019). The district court granted Dotson's motion after concluding that "the waiver [wa]s ineffective under Louisiana law" and thus the UM coverage limit had not

been reduced to $100,000, as Atlantic maintained. Id. at 623–24.

Shortly after the district court's ruling, Dotson and Atlantic filed a notice of settlement. As part of the settlement agreement, Dotson agreed to release "all claims" against Atlantic that Dotson "ha[d] asserted or was required to assert" in the action. A stipulation of dismissal with prejudice was filed on September 24, 2019.

Nine months later, Dotson filed a new action against Atlantic in state court. This time, Dotson asserted claims under Louisiana's bad faith statutes. See La. Rev. Stat. § 22:1892; La. Rev. Stat. § 22:1973. More specifically, Dotson alleged that Atlantic had breached the "duty of good faith and fair dealing" imposed by those statutes by misrepresenting the UM coverage limits of its policy throughout the initial litigation. Dotson further asserted that Atlantic's misrepresentation led him to believe "that his claim was limited to a coverage limit of $100,000 until very late into the litigation," which precluded him from fully developing all of his claims.

Atlantic removed this second suit to federal court, and then moved for summary judgment, arguing Dotson's claims were barred by res judicata. The district court granted Atlantic's motion, and Dotson timely appealed.

II.

"This court reviews a grant of summary judgment de novo, applying the same standard as the district court." Renfroe v. Parker, 974 F.3d 594, 599 (5th Cir. 2020).

"Summary judgment is appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " Id. (quoting Fed. R. Civ. P. 56(a)). "The res judicata effect of a prior judgment is a question of law that we review de novo." Oreck Direct, LLC v. Dyson, Inc., 560 F.3d 398, 401 (5th Cir. 2009) (quotations omitted).

III.

"The rule of res judicata encompasses two separate but linked preclusive doctrines: (1) true res judicata or claim preclusion and (2) collateral estoppel or issue preclusion." Stevens v. St. Tammany Par. Gov't, 17 F.4th 563, 570 (5th Cir. 2021) (quotations omitted). This appeal concerns the former. "Claim preclusion, or res judicata, bars the litigation of claims that either have been litigated or should have been raised in an earlier suit." Id. (quotations omitted).

A.

Preclusion law varies from jurisdiction to jurisdiction—in some, res judicata applies only to the claims actually brought in the previous suit, whereas in others, res judicata might apply more broadly to other claims. To determine which law applies, we look to the court where the prior judgment was entered. Compare Black v. N. Panola Sch. Dist., 461 F.3d 584, 588 (5th Cir. 2006) ("To determine the preclusive effect of a state court judgment in a federal action, federal courts must apply the law of the state from which the judgment emerged.") (quotations omitted), with Semtek Int'l Inc.

v. Lockheed Martin Corp., 531 U.S. 497, 508, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001) ("[F]ederal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity.").

Here, the judgment in Dotson's initial action was entered by the same court that this action was removed to—the Eastern District of Louisiana, sitting in diversity. We therefore apply federal common law. See id. However, "[a]s a matter of federal common law, federal courts sitting in diversity apply the preclusion law of the forum state unless it is incompatible with federal interests." Anderson v. Wells Fargo Bank, N.A., 953 F.3d 311, 314 (5th Cir. 2020) (citing Semtek, 531 U.S. at 508, 121 S.Ct. 1021). Thus, as a matter of federal common law, Louisiana law determines what preclusive effect (if any) the judgment in Dotson's earlier action has on his claims in this action.[1]

B.

Louisiana "provides a broad application of res judicata to foster judicial efficiency and protect litigants from duplicative litigation." Lafreniere Park Found. v. Broussard, 221 F.3d 804, 810 (5th Cir. 2000). That said, "any doubt concerning application of the principle of res judicata must be resolved against its application." Kelty v. Brumfield, 633 So. 2d 1210, 1215 (La. 1994).

Louisiana's res judicata statute provides that "a valid and final judgment is conclusive between the same parties, except on appeal or other direct review" and that "all causes of action existing at the time of final judgment arising out of the transaction or occurrence

that is the subject matter of the litigation are extinguished." La. Rev. Stat. § 13:4231(1)– (2). The Louisiana Supreme Court has explained that, under § 13:4231, a second action is precluded when five elements are satisfied: "(1) the judgment is valid; (2) the judgment is final; (3) the parties are the same; (4) the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation; and (5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation." Chevron U.S.A., Inc. v. State, 993 So. 2d 187, 194 (La. 2008) (quotations omitted). See also Shearman v. Asher, 851 So. 2d 1226, 1229 (La. Ct. App. 2003) (noting "consent judgments are given res judicata effect").

It is undisputed that the first four elements are satisfied here. Thus, the critical issue is whether this action arises out of the same "transaction or occurrence that was the subject matter of" the earlier action. See Chevron, 993 So. 2d at 194. To resolve that question, we must "examin[e] ... the facts underlying the event[s] in dispute." Holly & Smith Architects, Inc. v. St. Helena Congregate Facility, 872 So. 2d 1147, 1152 (La. Ct. App. 2004).

We agree with the district court that the two actions brought by Dotson are "intertwined and center around the same set of operative facts," namely, Dotson's damages from the accident, the coverage he was entitled to under Atlantic's policy, and Atlantic's response to Dotson's claim for coverage. Indeed,

Louisiana courts have found that similar types of bad faith claims are factually intertwined with the underlying contract claim. See Kosak v. La. Farm Bureau Cas. Ins. Co., 316 So. 3d 522, 530 (La. Ct. App. 2020); Spear v. Prudential Prop. & Cas. Ins. Co., 727 So. 2d 640, 643 (La. Ct. App. 1999). We therefore conclude that this action "arises out of the same nucleus of facts" as Dotson's initial suit, the issue of Atlantic's alleged bad faith in misrepresenting its UM coverage "could have been raised" in that initial suit, and Dotson "did not specifically reserve" the right to bring this second suit as part of his settlement agreement with Atlantic. Shearman, 851 So. 2d at 1229–30. Thus, Dotson's "second suit ... is barred by res judicata." Id. See Lafreniere Park Found., 221 F.3d at 811 (an action is barred by res judicata under Louisiana law when "[b]oth of the actions concern a group of facts so connected as to constitute a single wrong and so logically related that judicial economy and fairness mandate that all issues be tried in one suit").

Dotson resists this conclusion, stressing that this "bad faith action constitutes a separate cause of action from his prior claim" because it is based upon a distinct set of legal obligations on the part of Atlantic. This, in his view, means that res judicata cannot apply.

To be sure, prior to 1990, "a second action would be barred by the defense of res judicata only when the plaintiff seeks the same relief based on the same cause or grounds." La. Rev. Stat. § 13:4231, cmt. a. But in 1990, Louisiana "broadened its res judicata law to correspond with federal law." Lafreniere Park Found.,

221 F.3d at 810. Under the current iteration of Louisiana's res judicata statute, "[t]he central inquiry is not whether the second action is based on the same cause or cause of action (a concept which is difficult to define) but whether the second action asserts a cause of action which arises out of the transaction or occurrence which was the subject matter of the first action." Terrebonne Fuel & Lube, Inc. v. Placid Ref. Co., 666 So. 2d 624, 632 (La. 1996) (quoting La. Rev. Stat. § 13:4231, cmt. a). So while Dotson is correct that Louisiana's bad faith statutes impose duties on Atlantic that are "separate and distinct from its duties under the insurance contract," Wegener v. Lafayette Ins. Co., 60 So. 3d 1220, 1229 (La. 2011), this action remains barred by res judicata.

C.

Finally, Dotson contends that an exception to res judicata applies because this case presents "exceptional circumstances." La. Rev. Stat. § 13:4232(A)(1). "The 'exceptional circumstances' exception generally applies to complex procedural situations in which litigants are deprived of the opportunity to present their claims due to unanticipated quirks in the system, to factual situations that could not be anticipated by the parties, or to decisions that are totally beyond the control of the parties." Oleszkowicz v. Exxon Mobil Corp., 156 So. 3d 645, 648 (La. 2014) (quotations omitted). "It is not intended to apply ... where the plaintiff has simply failed to assert a right or claim for damages through oversight or lack of proper preparation." Spear, 727 So. 2d at 643.

As the district court observed, Dotson was "on notice of all the facts he alleges give rise to his present bad faith claim during the pendency of the 2017 Action," yet he did not attempt to amend his pleadings to include such a claim. Dotson laments that it would have been "impractical" to do so because that would have "delayed the resolution" of his case. That, however, is simply not the type of "complex procedural situation or ... unanticipated quirk in the system" that would render this a "truly exceptional" case. Oleszkowicz, 156 So. 3d at 647–48 (quotations omitted).

Accordingly, we affirm.

Footnotes

1We acknowledge, however, that at least one of our unpublished decisions has created confusion on this point, as one of our sister circuits has noted. See Chavez v. Dole Food Co., 836 F.3d 205, 231 & n.153 (3d Cir. 2016) (discussing conflict among our unpublished opinions). Notwithstanding Semtek, one of our unpublished opinions concluded that Louisiana law requires the application of federal res judicata principles when assessing the preclusive effect of judgments entered by federal courts in Louisiana sitting in diversity. Compare Frank C. Minvielle LLC v. Atl. Ref. Co., 337 F. App'x. 429, 434 (5th Cir. 2009) (applying federal law principles notwithstanding Semtek), with Tigert v. Am. Airlines Inc., 390 F. App'x. 357, 362 (5th Cir. 2010) (following Semtek).

Our holding today makes clear that, under Semtek, Louisiana law applies in this setting. In doing so, we

acknowledge, as did the Third Circuit, that "before Semtek, Louisiana courts stated that the claim-preclusive effect of all federal judgments was controlled by federal principles of claim preclusion." Chavez, 836 F.3d at 231. But we are skeptical of the notion that "Louisiana court[s] ha[ve] chosen to ignore Semtek outright by looking to federal law, rather than state law, to assess the claim-preclusive effects of a judgment issued by a federal district court sitting in diversity." Id. But see In re Marshall Legacy Found., 279 So. 3d 977, 980 (La. Ct. App. 2019) (citing Minvielle for the proposition that, notwithstanding Semtek, Louisiana courts apply federal law in determining the preclusive effect of federal diversity judgments). We therefore apply principles of Louisiana law to determine the preclusive effect of the prior judgment at issue here.

That said, we agree with the district court that we would "reach the same outcome regardless of whether Louisiana or federal law applies." Am. Home Assurance Co. v. Chevron, USA, Inc., 400 F.3d 265, 271 n.20 (5th Cir. 2005). See also Lafreniere Park Found. v. Broussard, 221 F.3d 804, 808 (5th Cir. 2000) (noting Louisiana's res judicata statute "is modeled on the federal doctrine"); Armbruster v. Anderson, 250 So. 3d 310, 316 (La. Ct. App. 2018) (describing "res judicata under Louisiana law" as "akin to federal law").

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United States District Court, E.D. Louisiana.

David DOTSON, Plaintiff
v.
ATLANTIC SPECIALTY INSURANCE COMPANY, Defendant

CIVIL ACTION NO. 20-2274
Signed 05/07/2021

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SECTION: "E" (1)

ORDER AND REASONS

SUSIE MORGAN, UNITED STATES DISTRICT JUDGE

Before the Court is a Motion for Summary Judgment by Atlantic Specialty Insurance Company ("ASIC") on Plaintiff David Dotson's Bad Faith Claim.[1] For the reasons that follow, the motion is **GRANTED.**

BACKGROUND

This action arises from a vehicle accident that occurred on the morning of January 19, 2015 in Orleans Parish, Louisiana.[2] Plaintiff was operating a tow truck owned by his employer when a pickup truck driven by John Price and insured by State Farm Mutual Automobile Insurance Company ("State Farm") struck Plaintiff.[3] Plaintiff filed suit in the Civil District Court for Orleans Parish against Price, State Farm, Progressive Direct Insurance Company ("Progressive," Plaintiff's uninsured and underinsured motorist insurer), and ASIC (Plaintiff's employer's uninsured and underinsured motorist insurer).[4] While the matter was pending in state court, Plaintiff settled but only with Price and State Farm.[5] Progressive removed the matter to this Court, Civil Action No. 17-14063 (the "2017 Action").[6] On April 19, 2019, Plaintiff moved for summary judgment that ASIC's policy provided a limit of $1,000,000 in uninsured motorist ("UM") coverage to Plaintiff for the accident giving rise to the litigation.[7] On June 19, 2019, the Court granted Plaintiff's motion for summary judgment holding there was no valid UM waiver that comported with Louisiana's statutory requirements and, as a result, the limit had not been reduced, as ASIC had argued, to $100,000.[8] On July 11, 2019, following a notice of settlement, the Court entered a dismissal "as to all parties, without costs and without prejudice to the right, upon good cause shown, within sixty days, to reopen the action if the settlement is not consummated."[9] On August 20, 2019, Plaintiff signed a "Receipt, Release, Defense, and Indemnity Agreement" in favor of ASIC.[10]

On September 24, 2019, Plaintiff filed a Stipulation of Dismissal with Prejudice "of the claims asserted by Plaintiff David H. Dotson in this action as

against Atlantic Specialty Insurance Company, each party to bear his or its own costs."[11]

On April 1, 2020, Plaintiff filed an action seeking bad faith penalties and damages against ASIC in the Civil District Court for Orleans Parish.[12] On August 17, 2020, ASIC removed the matter to this Court (the "2020 Action").[13]

On February 11, 2021, ASIC filed this Motion for Summary Judgment on Plaintiff's Bad Faith Claim, seeking summary judgment that the claim is barred by the doctrine of res judicata based on the final judgment of dismissal entered in the 2017 action.[14]

STANDARD

Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[15] "An issue is material if its resolution could affect the outcome of the action."[16] When assessing whether a material factual dispute exists, the Court considers "all of the evidence in the record but refrain[s] from making credibility determinations or weighing the evidence."[17] All reasonable inferences are drawn in favor of the non-moving party.[18] There is no genuine issue of material fact if, even viewing the evidence in the light most favorable to the non-moving party, no reasonable trier of fact could find for the non-moving party, thus entitling the moving party to judgment as a matter of law.[19]

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate

the absence of a genuine issue of material fact."[20] To satisfy Rule 56's burden of production, the moving party must do one of two things: "the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim" or "the moving party may demonstrate to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim."[21] If the moving party fails to carry this burden, the motion must be denied. If the moving party successfully carries this burden, the burden of production then shifts to the non-moving party to direct the Court's attention to something in the pleadings or other evidence in the record setting forth specific facts sufficient to establish that a genuine issue of material fact does indeed exist.[22]

If the dispositive issue is one on which the non-moving party will bear the burden of persuasion at trial, the moving party may satisfy its burden of production by either (1) submitting affirmative evidence that negates an essential element of the non-movant's claim, or (2) affirmatively demonstrating that there is no evidence in the record to establish an essential element of the non-movant's claim.[23] If the movant fails to affirmatively show the absence of evidence in the record, its motion for summary judgment must be denied.[24] Thus, the non-moving party may defeat a motion for summary judgment by "calling the Court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party."[25] "[U]nsubstantiated assertions are not competent summary judgment evidence. The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or

her claim. 'Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment.' "[26]

LAW AND ANALYSIS

ASIC argues it is entitled to summary judgment that Plaintiff's bad faith claim[27] is barred by res judicata because Plaintiff settled and released all claims against ASIC arising out of the January 2015 accident when he executed a Receipt, Release, Defense, and Indemnity Agreement with ASIC and stipulated to the dismissal of the 2017 Action.[28] ASIC points to the release signed by Plaintiff on August 20, 2019, which states:

> G. **ALL CLAIMS** shall mean any and all past, present, and future claims, demands, claims of intervention, actions, liabilities, causes of action, or suits at law, in equity, in civil law, in common law, in tort, in contract or of whatever kind or nature, asserted or required to be asserted in the **LAWSUIT** arising out of the **INCIDENT**. The definition of **ALL CLAIMS** specifically includes demands, actions, liabilities, causes of action and suits for **INJURY**, as well as any other damages of any type or description asserted or required to be asserted in the **LAWSUIT** arising out of the **INCIDENT**, which may be recoverable or exist under the laws of the State of Louisiana, the laws of the United States of America or any other state thereof.[29]

Plaintiff argues his bad faith claim is not barred because the statutory elements of res judicata are not

satisfied. Plaintiff argues the bad faith claim was not the subject matter of the 2017 Action and was not actually litigated in the 2017 Action.[30] Plaintiff alternatively argues the "exceptional circumstances" exception to res judicata applies because ASIC misled the Court on the issue of UM coverage during the 2017 Action.[31]

The parties cite only Louisiana's doctrine of res judicata under La. Rev. Stat. § 13:4231, but generally, "[f]ederal law determines the res judicata and collateral [estoppel] effect given a prior decision of a federal tribunal, regardless of the bases of the federal court's jurisdiction."[32] In this case, the 2017 Action was initiated in state court before being removed to this Court. The final judgment of dismissal on all claims in the 2017 Action was entered by this Court, a federal tribunal. The Court will determine whether the elements of res judicata have been met under both Louisiana and federal common law and, if so, need not determine which law applies.

Federal Law

Under federal common law, "res judicata encompasses two separate but linked preclusive doctrines: (1) true res judicata or claim preclusion and (2) collateral estoppel or issue preclusion."[33] "Claim preclusion, or res judicata, bars the litigation of claims that either have been litigated or should have been raised in an earlier suit."[34] The party raising the defense of res judicata bears the burden of proving all four elements,[35] which include: (1) the parties are identical or in privity; (2) the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and,

(4) the same claim or cause of action was involved in both actions.[36]

The first three elements of res judicata are easily established in this case: (1) the parties, David Dotson and ASIC, are identical; (2) Plaintiff's "Stipulation of Dismissal with Prejudice" was entered in this Court, which has jurisdiction over this matter; and (3) the 2017 Action was concluded by a final judgment on the merits. Because the parties do not dispute the first three elements are met, the question of res judicata turns on whether the fourth element is met.[37]

With regard to whether the same claim or cause of action was involved in both actions, the Fifth Circuit uses the transactional test.[38] "Under the transactional test, a prior judgment's preclusive effect extends to all rights of the plaintiff with respect to all or any part of the transaction, or series of connected transactions, out of which the original action arose."[39] "What grouping of facts constitutes a "transaction" or a "series of transactions" must be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."[40] The critical issue is whether the two actions are based on the "same nucleus of operative facts."[41] Under the transactional test "the critical issue is not the relief requested or the theory asserted but whether the plaintiff bases the two actions on the same nucleus of operative facts."[42]

The Court finds the fourth element of res judicata under federal common law has been met in this case. With respect to the claims against ASIC, the 2017 Action and the 2020 Action arose out of the same

nucleus of operative facts—Plaintiff's damages in the accident and ASIC's failure to pay under its UM policy. Under federal common law, Plaintiff was required to bring his bad faith claim in the 2017 Action and is precluded from raising it in the 2020 Action under the principle of res judicata.[43]

Louisiana Law

Under Louisiana's civil law tradition, res judicata is codified in La. Rev. Stat. § 13:4231, which states:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to

> any issue actually litigated and determined if its determination was essential to that judgment.

The Louisiana State Law Institute's Comment (e) to the statute explains:

> (e) Causes of action existing at the time of the final judgment. This clause is important in determining the scope of res judicata and accords with the basic principle underlying the doctrine of res judicata that *a plaintiff must assert all of his rights and claim all of his remedies arising out of the transaction or occurrence.* Claims that arise or which he becomes aware of before trial, may be asserted through an amended or supplemental petition, and these claims will relate back to the time of the original filing if they arise out of the transaction or occurrence set forth in the original petition. Code of Civil Procedure Articles 1153, 1155. Alternatively, he may seek a reservation in the judgment of the right to bring another action. See R.S. 13:4232.

Under Louisiana law, the Court must determine whether Plaintiff's contract claim and bad faith claim against ASIC arise out of the same transaction or occurrence and, if so, the 2020 Action is barred by the principle of res judicata. In *Kosak v. Louisiana Farm Bureau Casualty Insurance Co.*, the plaintiffs made no bad faith claim against Farm Bureau in their original petition but sought bad faith penalties in their amended petition, filed more than a year later.[44] The trial court held the bad faith claim had prescribed because the amendment did not relate back to the filing of the

original petition. The trial court certified the appeal of whether the bad faith claim had prescribed under La. C. Civ. P. art. 1915(B). The Louisiana Fourth Circuit Court of Appeal refused to certify the appeal for reasons of judicial economy because "Plaintiffs' contract claims and bad faith claims against Farm Bureau are intertwined and center around the same set of operative facts, specifically the Plaintiffs' alleged injuries in the two motor vehicle accident and Farm Bureau's alleged failure to pay under its UM policies. We find that all of these interrelated facts depend on each other for common resolution and should not be separated on appeal."[45] This leads the Court to conclude that the contract claim and the bad faith claim against ASIC are intertwined and center around the same set of operative facts and that they arose out of the same transaction or occurrence. As another section of this court has held, in Louisiana "a claim for bad faith against an insurer must be brought in the same suit as the underlying UM claim. La. Rev. Stat. § 13:4231. An attempt by a plaintiff to file suit on a bad faith claim after an adjudication of the underlying UM claim would be subject to dismissal under the doctrine of res judicata."[46] Plaintiff was required to bring his bad faith claim in the 2017 Action and is precluded from doing to in the 2020 Action under the Louisiana law of res judicata.

Alternatively, Plaintiff argues exceptional circumstances warrant a departure from applying res judicata to preclude his bad faith claim.[47] Plaintiff argues ASIC "persistently misrepresented and concealed the UM policy limits" in the 2017 Action. Plaintiff further argues "Plaintiff, to his detriment, did not learn of ASIC's bad faith until after the deadline for amending pleadings had already passed."[48] In *Spear v.*

Prudential Prop. and Cas. Ins. Co., the Louisiana Fourth Circuit Court of Appeal declined to apply the exceptional circumstances exception explaining that the exception must be applied on a case by case basis and only in truly exceptional cases.[49] After considering equitable considerations, the court explained that in the prior action there was "no impediment to [the plaintiff] amending her petition to add claims for damages, penalties, and attorney's fees [for the bad faith claim]. Indeed, she presented evidence on those issues to the trial court."[50] The exceptional circumstances exception to res judicata "is not intended to apply in the case where the plaintiff has simply failed to assert a right or claim for damages through oversight or lack of preparation."[51]

The Plaintiff in this case was on notice of all the facts he alleges give rise to his present bad faith claim during the pendency of the 2017 Action. His motion for partial summary judgment on UM coverage was based on there being no valid waiver of UM coverage. Plaintiff stated that "[o]n March 18, 2019, Atlantic Specialty supplemented its production with a second Louisiana UM coverage form."[52] It was this form that Plaintiff argued to this Court lacked an effective UM waiver, therefore setting the coverage limit at $1,000,000. ASIC responded to Plaintiff's Interrogatories on November 14, 2018 with the assertion that there was a "$100,000.00 per accident UM limit."[53] Plaintiff presented evidence on the UM coverage issue to this Court on summary judgment and this Court adjudicated the issue in Plaintiff's favor on June 19, 2019. The suit proceeded for another three months before Plaintiff executed the "Receipt, Release, Defense and Indemnity Agreement" releasing all claims. Plaintiff did not seek leave to amend his

complaint to include the bad faith claim or a continuance to investigate the viability of such a claim. Following this Court's June 19, 2019 Order and Reasons, ASIC "did not in any way prevent [Plaintiff] from amending [his] petition to state a claim for damages arising from [its] alleged bad faith claim or from offering proof as to bad faith and damages arising therefrom."[54] The Court entered its Order and Reasons on the Plaintiff's motion for summary judgment on June 19, 2019.[55] Plaintiff did not then seek leave of the Court to amend his pleadings before filing a Stipulation of Dismissal with Prejudice of all claims against ASIC. Plaintiff did not reserve his right to bring a bad faith claim against ASIC in the release or in the Stipulation of Dismissal with Prejudice.[56] Plaintiff's own inaction bars a finding that this case represents a truly exceptional case.

Res judicata under federal common law and Louisiana law precludes Plaintiff from raising the bad faith claim in the 2020 Action. As a result, the Court need not determine whether federal common law or Louisiana applies. ASIC is entitled to summary judgment that Plaintiff's bad faith claim is barred by the doctrine of res judicata.

CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that Defendant Atlantic Specialty Insurance Company's Motion for Summary Judgment on Plaintiff's Bad Faith Claim[57] is **GRANTED.**

Footnotes

1R. Doc. 12. Plaintiff opposes the motion. R. Doc. 14. ASIC filed a reply. R. Doc. 20.

2*Dotson v. Price*, Civ. No. 17-14063-SM-DMD (E.D. La. Dec. 1, 2017), ECF. No. 1-7 at ¶ V.

3*Id.*

4*Id.* at ¶¶ II-IV.

5*Dotson v. Price*, Civ. No. 17-14063-SM-DMD (E.D. La. Dec. 1, 2017), ECF. No. 1 at ¶ II.

6*Id.* at ¶ VII. ASIC was served after the action was removed to this Court.

7*Dotson v. Price*, Civ. No. 17-14063-SM-DMD (E.D. La. Dec. 1, 2017), ECF. No. 56.

8*Dotson v. Price*, Civ. No. 17-14063-SM-DMD (E.D. La. Dec. 1, 2017), ECF. No. 120 at 10.

9*Dotson v. Price*, Civ. No. 17-14063-SM-DMD (E.D. La. Dec. 1, 2017), ECF. No. 137.

10The release was filed under seal with the Court. R. Doc. 11-4. The Court hereby unseals this excerpt of the document.

11*Dotson v. Price*, Civ. No. 17-14063-SM-DMD (E.D. La. Dec. 1, 2017), ECF No. 138.

12R. Doc. 1-2.

13R. Doc. 1.

14R. Doc. 12.

15FED. R. CIV. P. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

16*DIRECTV, Inc. v. Robson*, 420 F.3d 532, 536 (5th Cir. 2005).

17*Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 398–99 (5th Cir. 2008); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000).

18*Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

19*Hibernia Nat. Bank v. Carner*, 997 F.2d 94, 98 (5th Cir. 1993) (citing *Amoco Prod. Co. v. Horwell Energy, Inc.*, 969 F.2d 146, 147–48 (5th Cir. 1992)).

20*Celotex*, 477 U.S. at 323.

21*Id.* at 331.

22*Id.* at 322–24.

23*Id.* at 331–32 (Brennan, J., dissenting).

24*See id.* at 332.

25*Id.* at 332–33. The burden would then shift back to the movant to demonstrate the inadequacy of the evidence relied upon by the non-movant. Once attacked, "the burden of production shifts to the nonmoving party, who must either (1) rehabilitate the evidence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)." *Id.* at 332–33, 333 n.3.

26*Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998) (citing *Celotex*, 477 U.S. at 324; *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994) and quoting *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915–16 & n.7 (5th Cir. 1992)).

27Penalties may be recovered under certain circumstances under Louisiana law, which provides that "[f]ailing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause" may subject the insurer to penalties. La. Rev. Stat. § 22:1973.

28R. Doc. 12-1 at 7.

29The release was filed under seal with the Court. R. Doc. 11-4. The Court unsealed this excerpt.

30R. Doc. 14 at 6-7.

31*Id.* at 8.
32*Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860, 862 (citing *Stovall v. Price Waterhouse Co.*, 652 F.2d 537 (5th Cir. 1981)).
33*Test Masters*, 428 F.3d at 570 (citing *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 436 (5th Cir. 2000)).
34*Id.* (citing *Petro–Hunt, L.L.C. v. United States*, 365 F.3d 385, 395 (5th Cir. 2004)).
35*Taylor v. Sturgell*, 553 U.S. 880, 907 (2008) (citing 18 Wright & Miller § 4405, at 83).
36*Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 (5th Cir. 2004).
37*See Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 521 (5th Cir. 2016).
38*Petro–Hunt, L.L.C. v. United States*, 365 F.3d 385, 395 (5th Cir. 2004).
39*Test Masters*, 428 F.3d at 571 (citing *Petro-Hunt*, 365 F.3d at 395-96).
40*Id.* (citing *Petro-Hunt*, 365 F.3d at 396).
41*Id.* (quoting *Gillispie*, 203 F.3d at 387; citing *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309 (5th Cir. 2004)).
42*Agrilectric Power Partners, Ltd. v. Gen. Elec. Co.*, 20 F.3d 663, 665 (5th Cir. 1994).
43Plaintiff argues res judicata is not applicable because his bad faith claim was not actually litigated in the 2017 Action. Under federal law, actual litigation of the claim in the earlier action is not required because under the transactional test the bad faith claim arose from the same nucleus of operative facts as the contract claim.
442020 WL 7258252 (La. App. 1 Cir. Dec. 10, 2020).
45*Id.*
46*Ruckman v. USAA Cas. Ins. Co.*, Civ. No. 19-cv-1288 (E.D. La. Nov. 13, 2019), ECF No. 21 at *3.

47R. Doc. 14 at 8.
48*Id.*
49*Spear v. Prudential Prop. and Cas. Ins. Co.*, 727 So.2d 640, 642-43 (La. App. 4th Cir. Jan. 13, 1999).
50*Id.* at 643.
51*Id.*
52*Dotson v. Price*, Civ. No. 17-14063-SM-DMD (E.D. La. Dec. 1, 2017), ECF. No. 56-1 at 6.
53R. Doc. 14-8 at 7.
54*Id.*
55*Dotson v. Price*, Civ. No. 17-14063-SM-DMD (E.D. La. Dec. 1, 2017), ECF. No. 120.
56The reservation of rights in a dismissal is not a foreign concept to Plaintiff. When he dismissed his claims against Progressive in the 2017 Action, he included a "reservation of Plaintiff's rights and claims against Atlantic Specialty Insurance Company." *Dotson v. Price*, Civ. Action No. 17-14063 (E.D. La. July 2, 2019), ECF 130.
57R. Doc. 12.

2/28/22

United States Court of Appeals, Fifth Circuit.

David DOTSON, Plaintiff—Appellant,

v.

ATLANTIC SPECIALTY INSURANCE COMPANY, Defendant—Appellee.

No. 21-30314

Appeal from the United States District Court for the Eastern District of Louisiana, USDC No. 2:20-CV-2274, Donna Sue Morgan, U.S. District Judge

ON PETITION FOR REHEARING AND REHEARING EN BANC

Before King, Graves, and Ho, Circuit Judges.

Per Curiam:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.